

**SUNSHINE FOR REGULATORY DECREES AND  
SETTLEMENTS ACT OF 2013**

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON  
REGULATORY REFORM,  
COMMERCIAL AND ANTITRUST LAW  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

ON

**H.R. 1493**

JUNE 5, 2013

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## SUNSHINE FOR REGULATORY DECREES AND SETTLEMENTS ACT OF 2013

WEDNESDAY, JUNE 5, 2013

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON REGULATORY REFORM,  
COMMERCIAL AND ANTITRUST LAW  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Subcommittee met, pursuant to call, at 10:04 a.m., in room 2141, Rayburn Office Building, the Honorable Spencer Bachus (Chairman of the Subcommittee) presiding.

Present: Representatives Bachus, Goodlatte, Holding, Collins, Cohen, Conyers, Johnson, DelBene, Garcia, and Jeffries.

Staff present: (Majority) Daniel Flores, Chief Counsel; Ashley Lewis, Clerk; and James Park, Minority Counsel.

Mr. BACHUS. Well, I am told by the minority staff to go ahead and proceed. So we will do that.

The Subcommittee on Regulatory Reform, Commercial and Antitrust Law hearing will come to order.

Without objection, the Chair is authorized to declare recesses of the Committee at any time.

We welcome all our witnesses today. And after an opening statement, I will do a more thorough introduction of each of our witnesses.

One of our witnesses is going to testify from a remote location, and we are having a little technical difficulty with that right now also.

And now we will go to opening statements.

Today the Subcommittee is holding a hearing on H.R. 1493, the "Sunshine for Regulatory Decrees and Settlements Act of 2013," which is designed to address a problem commonly known as "sue and settle." Some folks refer to it as "settle and sue." So I think either one would probably be descriptive.

Let me thank Subcommittee Member, Representative Doug Collins of Georgia, for introducing this bill, and I am pleased to be an original cosponsor.

We have been reminded recently it is essential that Government agencies perform their duties with full transparency and accountability. This includes allowing all members of the public a proper opportunity to provide comment and input during an open regulatory process.

In recent years particularly, we have seen an increase in the use of consent decrees and settlement agreements in Federal litigation. These settlements can circumvent the normal regulatory process and at times run contrary to legislative intent of the elected Representatives of Congress. They are often the product of litigation between a Federal or a State agency and a pro-regulatory outside group. The parties then come to an agreement or a consent decree that has binding effect and that, in essence, sets new policy without allowing outside parties any input on the final terms.

As the Chairman of the Regulatory Reform Subcommittee, I am particularly concerned that the practice of sue and settle can allow agencies to do an end run around the public participation and thorough analysis required by the Administrative Practice Act, the Regulatory Reform Flexibility Act, and other statutory requirements for rulemaking. Consent decrees should not be entered into lightly. They have the force of law and are difficult to overturn, and they offer the public no opportunity for comment. They can have long-lasting consequences and tie the hands of future Administrations, preventing them from establishing policies based on new facts or data. This is a problem that needs to be dealt with.

According to the Chamber of Commerce study, the current Administration has entered into more than 70 sue-and-settle agreements which have led to the issuance of hundreds of new regulations. One entity alone was responsible for nearly half of these new agreements.

The Sunshine for Regulatory Decrees and Settlements Act will provide much needed transparency and notice to allow input from all stakeholders and provide a better process for Federal decision-making.

With that, let me say that I look forward to the testimony of our witnesses on this legislation.

And I now recognize the Ranking Member of the full Committee, Mr. Conyers, for any opening statement that he might have.

[The bill, H.R. 1493, follows:]

113TH CONGRESS  
1ST SESSION

# H. R. 1493

To impose certain limitations on consent decrees and settlement agreements by agencies that require the agencies to take regulatory action in accordance with the terms thereof, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

APRIL 11, 2013

Mr. COLLINS of Georgia (for himself, Mr. WESTMORELAND, Mr. FRANKS of Arizona, Mr. BISHOP of Utah, Mr. CRAMER, Mr. HOLDING, Mrs. ELLMERS, Mr. YOHO, Mr. STUTZMAN, Mr. SOUTHERLAND, Mr. PERRY, Mr. BACIUS, Mr. COBLE, Mr. GARDNER, Mr. GRAVES of Georgia, Mr. MEADOWS, Mr. GOWDY, Mr. GOHMERT, Mr. BENTIVOLIO, Mr. WENSTRUP, Mr. PRICE of Georgia, Mr. GINGREY of Georgia, Mr. BROWN of Georgia, Mr. DAINES, and Mr. KINGSTON) introduced the following bill; which was referred to the Committee on the Judiciary

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## A BILL

To impose certain limitations on consent decrees and settlement agreements by agencies that require the agencies to take regulatory action in accordance with the terms thereof, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Sunshine for Regu-  
5 latory Decrees and Settlements Act of 2013”.

1 **SEC. 2. DEFINITIONS.**

2 In this Act—

3 (1) the terms “agency” and “agency action”  
4 have the meanings given those terms under section  
5 551 of title 5, United States Code;

6 (2) the term “covered civil action” means a civil  
7 action—

8 (A) seeking to compel agency action;

9 (B) alleging that the agency is unlawfully  
10 withholding or unreasonably delaying an agency  
11 action relating to a regulatory action that would  
12 affect the rights of—

13 (i) private persons other than the per-  
14 son bringing the action; or

15 (ii) a State, local, or tribal govern-  
16 ment; and

17 (C) brought under—

18 (i) chapter 7 of title 5, United States  
19 Code; or

20 (ii) any other statute authorizing such  
21 an action;

22 (3) the term “covered consent decree” means—

23 (A) a consent decree entered into in a cov-  
24 ered civil action; and

1 (B) any other consent decree that requires  
2 agency action relating to a regulatory action  
3 that affects the rights of—

4 (i) private persons other than the per-  
5 son bringing the action; or

6 (ii) a State, local, or tribal govern-  
7 ment;

8 (4) the term “covered consent decree or settle-  
9 ment agreement” means a covered consent decree  
10 and a covered settlement agreement; and

11 (5) the term “covered settlement agreement”  
12 means—

13 (A) a settlement agreement entered into in  
14 a covered civil action; and

15 (B) any other settlement agreement that  
16 requires agency action relating to a regulatory  
17 action that affects the rights of—

18 (i) private persons other than the per-  
19 son bringing the action; or

20 (ii) a State, local, or tribal govern-  
21 ment.

22 **SEC. 3. CONSENT DECREE AND SETTLEMENT REFORM.**

23 (a) PLEADINGS AND PRELIMINARY MATTERS.—

24 (1) IN GENERAL.—In any covered civil action,  
25 the agency against which the covered civil action is

1 brought shall publish the notice of intent to sue and  
2 the complaint in a readily accessible manner, includ-  
3 ing by making the notice of intent to sue and the  
4 complaint available online not later than 15 days  
5 after receiving service of the notice of intent to sue  
6 or complaint, respectively.

7 (2) ENTRY OF A COVERED CONSENT DECREE  
8 OR SETTLEMENT AGREEMENT.—A party may not  
9 make a motion for entry of a covered consent decree  
10 or to dismiss a civil action pursuant to a covered set-  
11 tlement agreement until after the end of proceedings  
12 in accordance with paragraph (1) and subpara-  
13 graphs (A) and (B) of paragraph (2) of subsection  
14 (d) or subsection (d)(3)(A), whichever is later.

15 (b) INTERVENTION.—

16 (1) REBUTTABLE PRESUMPTION.—In consid-  
17 ering a motion to intervene in a covered civil action  
18 or a civil action in which a covered consent decree  
19 or settlement agreement has been proposed that is  
20 filed by a person who alleges that the agency action  
21 in dispute would affect the person, the court shall  
22 presume, subject to rebuttal, that the interests of  
23 the person would not be represented adequately by  
24 the existing parties to the action.

1           (2) STATE, LOCAL, AND TRIBAL GOVERN-  
2           MENTS.—In considering a motion to intervene in a  
3           covered civil action or a civil action in which a cov-  
4           ered consent decree or settlement agreement has  
5           been proposed that is filed by a State, local, or tribal  
6           government, the court shall take due account of  
7           whether the movant—

8                   (A) administers jointly with an agency that  
9                   is a defendant in the action the statutory provi-  
10                  sions that give rise to the regulatory action to  
11                  which the action relates; or

12                  (B) administers an authority under State,  
13                  local, or tribal law that would be preempted by  
14                  the regulatory action to which the action re-  
15                  lates.

16           (c) SETTLEMENT NEGOTIATIONS.—Efforts to settle  
17 a covered civil action or otherwise reach an agreement on  
18 a covered consent decree or settlement agreement shall—

19                  (1) be conducted pursuant to the mediation or  
20                  alternative dispute resolution program of the court  
21                  or by a district judge other than the presiding judge,  
22                  magistrate judge, or special master, as determined  
23                  appropriate by the presiding judge; and

24                  (2) include any party that intervenes in the ac-  
25                  tion.

1 (d) PUBLICATION OF AND COMMENT ON COVERED  
2 CONSENT DECREES OR SETTLEMENT AGREEMENTS.—

3 (1) IN GENERAL.—Not later than 60 days be-  
4 fore the date on which a covered consent decree or  
5 settlement agreement is filed with a court, the agen-  
6 cy seeking to enter the covered consent decree or  
7 settlement agreement shall publish in the Federal  
8 Register and online—

9 (A) the proposed covered consent decree or  
10 settlement agreement; and

11 (B) a statement providing—

12 (i) the statutory basis for the covered  
13 consent decree or settlement agreement;

14 and

15 (ii) a description of the terms of the  
16 covered consent decree or settlement agree-  
17 ment, including whether it provides for the  
18 award of attorneys' fees or costs and, if so,  
19 the basis for including the award.

20 (2) PUBLIC COMMENT.—

21 (A) IN GENERAL.—An agency seeking to  
22 enter a covered consent decree or settlement  
23 agreement shall accept public comment during  
24 the period described in paragraph (1) on any  
25 issue relating to the matters alleged in the com-

1           plaint in the applicable civil action or addressed  
2           or affected by the proposed covered consent de-  
3           cree or settlement agreement.

4           (B) RESPONSE TO COMMENTS.—An agency  
5           shall respond to any comment received under  
6           subparagraph (A).

7           (C) SUBMISSIONS TO COURT.—When mov-  
8           ing that the court enter a proposed covered con-  
9           sent decree or settlement agreement or for dis-  
10          missal pursuant to a proposed covered consent  
11          decree or settlement agreement, an agency  
12          shall—

13                 (i) inform the court of the statutory  
14                 basis for the proposed covered consent de-  
15                 cree or settlement agreement and its  
16                 terms;

17                 (ii) submit to the court a summary of  
18                 the comments received under subparagraph  
19                 (A) and the response of the agency to the  
20                 comments;

21                 (iii) submit to the court a certified  
22                 index of the administrative record of the  
23                 notice and comment proceeding; and

1 (iv) make the administrative record  
2 described in clause (iii) fully accessible to  
3 the court.

4 (D) INCLUSION IN RECORD.—The court  
5 shall include in the court record for a civil ac-  
6 tion the certified index of the administrative  
7 record submitted by an agency under subpara-  
8 graph (C)(iii) and any documents listed in the  
9 index which any party or amicus curiae appear-  
10 ing before the court in the action submits to the  
11 court.

12 (3) PUBLIC HEARINGS PERMITTED.—

13 (A) IN GENERAL.—After providing notice  
14 in the Federal Register and online, an agency  
15 may hold a public hearing regarding whether to  
16 enter into a proposed covered consent decree or  
17 settlement agreement.

18 (B) RECORD.—If an agency holds a public  
19 hearing under subparagraph (A)—

20 (i) the agency shall—

21 (I) submit to the court a sum-  
22 mary of the proceedings;

23 (II) submit to the court a cer-  
24 tified index of the hearing record; and

1 (III) provide access to the hear-  
2 ing record to the court; and

3 (ii) the full hearing record shall be in-  
4 cluded in the court record.

5 (4) MANDATORY DEADLINES.—If a proposed  
6 covered consent decree or settlement agreement re-  
7 quires an agency action by a date certain, the agen-  
8 cy shall, when moving for entry of the covered con-  
9 sent decree or settlement agreement or dismissal  
10 based on the covered consent decree or settlement  
11 agreement, inform the court of—

12 (A) any required regulatory action the  
13 agency has not taken that the covered consent  
14 decree or settlement agreement does not ad-  
15 dress;

16 (B) how the covered consent decree or set-  
17 tlement agreement, if approved, would affect  
18 the discharge of the duties described in sub-  
19 paragraph (A); and

20 (C) why the effects of the covered consent  
21 decree or settlement agreement on the manner  
22 in which the agency discharges its duties is in  
23 the public interest.

24 (e) SUBMISSION BY THE GOVERNMENT.—

1           (1) IN GENERAL.—For any proposed covered  
2 consent decree or settlement agreement that con-  
3 tains a term described in paragraph (2), the Attor-  
4 ney General or, if the matter is being litigated inde-  
5 pendently by an agency, the head of the agency shall  
6 submit to the court a certification that the Attorney  
7 General or head of the agency approves the proposed  
8 covered consent decree or settlement agreement. The  
9 Attorney General or head of the agency shall person-  
10 ally sign any certification submitted under this para-  
11 graph.

12           (2) TERMS.—A term described in this para-  
13 graph is—

14                 (A) in the case of a covered consent decree,  
15 a term that—

16                         (i) converts into a nondiscretionary  
17 duty a discretionary authority of an agency  
18 to propose, promulgate, revise, or amend  
19 regulations;

20                         (ii) commits an agency to expend  
21 funds that have not been appropriated and  
22 that have not been budgeted for the regu-  
23 latory action in question;

1 (iii) commits an agency to seek a par-  
2 ticular appropriation or budget authoriza-  
3 tion;

4 (iv) divests an agency of discretion  
5 committed to the agency by statute or the  
6 Constitution of the United States, without  
7 regard to whether the discretion was  
8 granted to respond to changing cir-  
9 cumstances, to make policy or managerial  
10 choices, or to protect the rights of third  
11 parties; or

12 (v) otherwise affords relief that the  
13 court could not enter under its own au-  
14 thority upon a final judgment in the civil  
15 action; or

16 (B) in the case of a covered settlement  
17 agreement, a term—

18 (i) that provides a remedy for a fail-  
19 ure by the agency to comply with the  
20 terms of the covered settlement agreement  
21 other than the revival of the civil action re-  
22 solved by the covered settlement agree-  
23 ment; and

24 (ii) that—

1 (I) interferes with the authority  
2 of an agency to revise, amend, or  
3 issue rules under the procedures set  
4 forth in chapter 5 of title 5, United  
5 States Code, or any other statute or  
6 Executive order prescribing rule-  
7 making procedures for a rulemaking  
8 that is the subject of the covered set-  
9 tlement agreement;

10 (II) commits the agency to ex-  
11 pend funds that have not been appro-  
12 priated and that have not been budg-  
13 eted for the regulatory action in ques-  
14 tion; or

15 (III) for such a covered settle-  
16 ment agreement that commits the  
17 agency to exercise in a particular way  
18 discretion which was committed to the  
19 agency by statute or the Constitution  
20 of the United States to respond to  
21 changing circumstances, to make pol-  
22 icy or managerial choices, or to pro-  
23 tect the rights of third parties.

24 (f) REVIEW BY COURT.—

1           (1) AMICUS.—A court considering a proposed  
2 covered consent decree or settlement agreement shall  
3 presume, subject to rebuttal, that it is proper to  
4 allow amicus participation relating to the covered  
5 consent decree or settlement agreement by any per-  
6 son who filed public comments or participated in a  
7 public hearing on the covered consent decree or set-  
8 tlement agreement under paragraph (2) or (3) of  
9 subsection (d).

10           (2) REVIEW OF DEADLINES.—

11           (A) PROPOSED COVERED CONSENT DE-  
12 CREES.—For a proposed covered consent de-  
13 cree, a court shall not approve the covered con-  
14 sent decree unless the proposed covered consent  
15 decree allows sufficient time and incorporates  
16 adequate procedures for the agency to comply  
17 with chapter 5 of title 5, United States Code,  
18 and other applicable statutes that govern rule-  
19 making and, unless contrary to the public inter-  
20 est, the provisions of any Executive order that  
21 governs rulemaking.

22           (B) PROPOSED COVERED SETTLEMENT  
23 AGREEMENTS.—For a proposed covered settle-  
24 ment agreement, a court shall ensure that the  
25 covered settlement agreement allows sufficient

1 time and incorporates adequate procedures for  
2 the agency to comply with chapter 5 of title 5,  
3 United States Code, and other applicable stat-  
4 utes that govern rulemaking and, unless con-  
5 trary to the public interest, the provisions of  
6 any Executive order that governs rulemaking.

7 (g) ANNUAL REPORTS.—Each agency shall submit to  
8 Congress an annual report that, for the year covered by  
9 the report, includes—

10 (1) the number, identity, and content of covered  
11 civil actions brought against and covered consent de-  
12 crees or settlement agreements entered against or  
13 into by the agency; and

14 (2) a description of the statutory basis for—

15 (A) each covered consent decree or settle-  
16 ment agreement entered against or into by the  
17 agency; and

18 (B) any award of attorneys fees or costs in  
19 a civil action resolved by a covered consent de-  
20 cree or settlement agreement entered against or  
21 into by the agency.

22 **SEC. 4. MOTIONS TO MODIFY CONSENT DECREES.**

23 If an agency moves a court to modify a covered con-  
24 sent decree or settlement agreement and the basis of the  
25 motion is that the terms of the covered consent decree or

1 settlement agreement are no longer fully in the public in-  
2 terest due to the obligations of the agency to fulfill other  
3 duties or due to changed facts and circumstances, the  
4 court shall review the motion and the covered consent de-  
5 cree or settlement agreement de novo.

6 **SEC. 5. EFFECTIVE DATE.**

7 This Act shall apply to—

8 (1) any covered civil action filed on or after the  
9 date of enactment of this Act; and

10 (2) any covered consent decree or settlement  
11 agreement proposed to a court on or after the date  
12 of enactment of this Act.

○

Mr. CONYERS. Thank you, Chairman Bachus.

I too join in greeting our witnesses.

But there are some problems here. Our research on this so-called sunshine in regulatory decrees and settlements has a simple goal, and that is to discourage the use of settlement agreements and consent decrees. I think that is very, very serious.

And I am joined in this analysis, which is an attempt to delay regulatory protections, to slow it down. The result is, unfortunately, it jeopardizes not only public health, but safety, and it explains why the American Civil Liberties Union is opposed to this measure. The Natural Resources Defense Council is opposed to this measure. The National Association for the Advancement of Colored People is opposed to this measure. The Sierra Club is opposed to this measure. Earth Justice, all in strenuous opposition.

The bill's provisions, in effect, are being used to prevent Federal regulatory actions from being implemented, and it does not take a legal scholar to figure out what the purpose of the legislation is. It is pretty patent. It gives opponents of regulation additional opportunities to stifle rulemaking by allowing essentially any third party who is affected by the regulatory action at issue to intervene, to participate in settlement negotiations, to submit public comments. And so this is all going in the wrong direction for all the wrong reasons.

So H.R. 1493—this measure would needlessly slow down the process by imposing an extensive series of burdensome requirements on agencies that seek to enter into consent decrees or settlement agreements. It mandates that agencies provide for public comment on a proposed consent decree and requires agencies to respond to all such comments before a consent decree can be entered. It is a slow-down operation.

And then there would be not one but two public comment periods, one for the consent decree and one for the rulemaking that results from the consent decree, doubling the agency's effort.

Moreover, the bill would allow an unlimited number of third parties to intervene in the consent decree, furthering the delay of an entry of such decree.

Now, I mean, there are so many things wrong with this bill that I am going to submit the rest of my statement. But just let me conclude on this note.

The bill addresses a nonexistent problem. There is no evidence of collusion between agencies and private entities with respect to consent decrees and settlements, and there has been no convincing explanation as to why the current law is insufficient. The bill codifies certain Justice Department guidelines issued 30 years ago by then Attorney General Ed Meese and have since been codified in the Code of Federal Regulations. These regulations set forth in detail the criteria that the Department of Justice attorneys must follow when determining whether or not to enter into consent decrees or settlement agreements. So why do we need to codify them? Is there any evidence that these guidelines are not already being followed?

So I am disappointed at the subject matter of this hearing. I am saddened to think of all the things that we need to be doing in the Judiciary Committee that deal with far more pressing issues.

And so I will submit the rest of my statement and thank the Subcommittee Chair for permitting me to make these opening remarks.

[The prepared statement of Mr. Conyers follows:]

**Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, Ranking Member, Committee on the Judiciary, and Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law**

H.R. 1493, the “Sunshine in Regulatory Decrees and Settlements Act of 2013,” has a simple goal: to discourage the use of settlement agreements and consent decrees. Why is this problematic? Here are just a few reasons.

**To begin with**, this bill, by delaying regulatory protections, jeopardizes public health and safety, which explains why the National Resources Defense Council, the American Civil Liberties Union, the NAACP, the Sierra Club, and EarthJustice among other groups, strenuously opposed a very similar version of this bill in the last Congress.

This bill’s provisions, in effect, could be used to prevent federal regulatory actions from being implemented.

For example, the bill gives opponents of regulation multiple opportunities to stifle rulemaking by allowing essentially *any* third party who is affected by the regulatory action at issue in a covered civil action to:

- intervene in that civil action, subject to rebuttal;
- participate in settlement negotiations; and
- submit public comments about a proposed consent decree or settlement agreement that agencies would be required to respond to.

Often a federal agency defendant is sued because of its failure to take regulatory action or because it has missed statutory deadlines for taking such action, often by years.

Consent decrees and settlement agreements can help assure that the agency takes such action by a date certain.

H.R. 1493, however, would needlessly slow down this process by imposing an extensive series of burdensome requirements on agencies that seek to enter into consent decrees or settlement agreements.

For instance, it mandates that agencies provide for public comment on a proposed consent decree and requires agencies to respond to *all* such comments before the consent decree can be entered in court.

In the case of consent decrees concerning a rulemaking, an agency would be forced to go through *two* public comment periods: one for the consent decree and one for the rulemaking that results from the consent decree, doubling the agency’s effort.

Moreover, the bill would allow an unlimited number of third parties to intervene in the consent decree process, further delaying the entry of a consent decree.

Like nearly all of the anti-regulatory bills we have considered to date since the last Congress, H.R. 1493 piles on procedural requirements for agencies and courts.

Also, like these other bills, this measure encourages dilatory litigation by interests that are hostile towards regulatory protections.

**Another concern** is that this bill threatens to undermine a critical tool that Americans use to guarantee their Congressionally-mandated protections, including civil rights laws and environmental protections.

By reducing costly and time-consuming litigation, consent decrees and settlement agreements benefit both plaintiffs and defendants.

They help to ensure that federal protections are enforced while leaving flexibility for state and local governments as to how they will carry out their federal obligations.

Take, for example, a consent decree resolving a dispute under the Clean Air Act.

In light of the fact that the bill would allow *any* private party whose rights are affected by such decree a right to intervene, that could potentially include *anyone* who breathes air as well as any industry or special interest group.

So H.R. 1493 could have a chilling effect on the use of consent decrees and settlement agreements, and the inevitable result will be more litigation that will result in millions of dollars of additional transaction costs.

And, guess who is going to bear the expense of these litigation costs? Of course it will be the American taxpayer.

It is not surprising that the Congressional Budget Office in its analysis of a similar bill considered in the last Congress stated that the measure would impose millions of dollars in costs "primarily because litigation involving consent decrees and settlement agreements would probably take longer under the bill as agencies would face new requirements to report more information to the public and other additional administrative costs."

**Finally**, this bill addresses a non-existent problem. There simply is no evidence of collusion between agencies and private entities with respect to consent decrees and settlements.

Other than unsupported allegations, H.R. 1493's proponents have failed to offer a convincing explanation as to why current law is insufficient.

For instance, the bill codifies certain Justice Department guidelines, first issued by Attorney General Edwin Meese *nearly 30 years ago*, that have since been codified in the Code of Federal Regulations.

These regulations set forth detailed criteria that Justice Department attorneys must follow when determining whether or not to enter into consent decrees and settlement agreements.

So I must ask: why do we need to codify them? Is there any evidence that these guidelines are not already being followed?

There simply is no need for this legislation.

I thank the witnesses for joining us today and I look forward to your testimony.

Mr. BACHUS. I thank the full Committee Ranking Member, Mr. John Conyers, Jr. of Michigan, for that opening statement.

And I would also like to say that I enjoyed my time as a Member under your chairmanship and have the deepest respect for you as an individual and also as a legislator.

Mr. CONYERS. Thank you.

Mr. BACHUS. At this time, I would like to recognize the sponsor of this legislation, the gentleman from Georgia, Mr. Doug Collins, for an opening statement.

Mr. COLLINS. Thank you, Mr. Chairman.

I appreciate you holding this hearing today and I look forward to hearing from our witnesses. And as much respect as I have for our distinguished Ranking Member, I believe this is exactly why we need to be here. I believe in talking about jobs and the economy. I would disagree with the wrong direction. I believe this is the right direction and moving in the right way in what we are dealing with here today as we look forward to hearing from witnesses who I believe will outline the problem and will outline the issues that we are talking about.

Mr. Chairman, I ask unanimous consent to enter in the record a written statement from the Attorney General of the State of Georgia, Sam Olens. Mr. Olens was unable to be here today, but he is a tireless leader on this issue and I appreciate his—

Mr. BACHUS. Without objection.

[The information referred to follows:]

Statement of  
Samuel S. Olen  
Georgia Attorney General

House Committee on the Judiciary  
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

House Resolution 1493  
Sunshine for Regulatory Decrees and Settlements Act

*The views expressed in this testimony are those of the author alone and do not necessarily represent those of the State of Georgia.*

Chairman Bachus, Vice-Chairman Farenthold, Ranking Member Cohen, and Members of the Subcommittee, thank you for allowing me to submit written testimony today.

As Attorney General for the State of Georgia, a particular focus of mine has been fighting federal administrative and regulatory overreach. With increasing and dismaying frequency, constitutional principles of federalism and separation of powers have been set aside in favor of administrative end-routes to a preferred policy outcome. One of the most troubling manifestations of this phenomenon is the practice known as “Sue and Settle.”

Sue and Settle occurs when an agency, intentionally or otherwise, abdicates its statutory discretion – and eliminates the participation rights of States and other affected parties – by engaging in rulemaking via settlement. In these cases, the agency agrees to settlement talks with outside groups that ultimately commandeer the rulemaking process, creating legally binding, court-approved settlements through closed-door negotiations that dictate the agency’s policy priorities and funding choices. Indeed, EPA has shared publicly that complying with consent decree deadlines is the top agency priority, a position shared only with meeting statutory deadlines. These settlements or consent decrees have real-world effects on numerous parties who had no role in, and often no knowledge of, the negotiations that led to the agreements’ consummation. Congressional directives on transparency and administrative process play no role in Sue and Settle. That is plainly outside the bounds of the law set out in the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*, and the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, and interrupts important federal principles of separation of powers, federalism, and the rule of law.

As James Madison explained in Federalist No. 47,

No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

Sue and Settle accretes the legislative, executive, and judicial powers in a single regulatory agency, and – perhaps even more troublingly – can in many instances cede that conglomeration of authority to an outside interest group. Outlined below are a few of the chief concerns from a legal and constitutional perspective.

*Separation of Powers.* Congress has set out in the Administrative Procedure Act, the Clean Air Act, and elsewhere clear steps that federal agencies must follow during the rulemaking process. Sue and Settle violates the terms of these procedures even as described in the most general terms. In the Clean Air Act, for example, Congress directs the EPA to begin by publishing a notice of the proposed rulemaking in the Federal Register. 42 U.S.C. § 307(d). That notice must contain a statement of the rule’s “basis and purpose,” including a summary of the factual data on which the proposed rule is based, the methodology used in obtaining and analyzing the data, and any significant legal interpretations or policy issues behind the proposed rule. Congress also requires in that statute the opportunity for public comment and hearing. None of these congressional directives is obeyed in the context of Sue and Settle. Instead, outside advocacy groups notify agencies of their intent to sue and then conduct months of closed-door negotiations. In certain cases, the resultant consent decree is filed the same day as the complaint. *See, e.g., Defenders of Wildlife v. Jackson*, No. 10-01915 (D.D.C.) (complaint and consent decree filed Nov. 8, 2010); *Environmental Geo-Technologies, LLC v. EPA*, No. 10-12641 (E.D. Mich.) (complaint and settlement agreement filed July 2, 2010). Such processes perform an end-run around the rulemaking processes directed by Congress, and in doing so may also use a back door to achieve policy outcomes that have failed legislatively.

Moreover, although Sue and Settle agreements are rendered legally binding when courts enter them, they have not been subjected to the same adversarial testing as normally occurs in an agency challenge; the court is largely stripped of its decisional role because the parties to the case agree, while other affected parties are absent and impotent. One federal appeals court recently agreed, holding that it was an abuse of discretion for a federal court to enter “a consent decree that permanently and substantially amends an agency rule that would have otherwise been subject to statutory rulemaking procedures.” *Conservation Northwest v. Sherman*, No. 11-35729, 2013 U.S. App. LEXIS 8396 at \*14-\*15 (9<sup>th</sup> Cir. Apr. 25, 2013). In many instances those parties do not even know of the negotiations that lead to a settlement. In others, they are actually

denied the opportunity to intervene. *See Defenders of Wildlife v. Jackson*, No. 10-1915, 2012 U.S. Dist. LEXIS 35750 (D.D.C. March 18, 2012). The D.C. Circuit upheld that decision, finding that the petitioners could not demonstrate injury and therefore did not have standing to intervene. *Defenders of Wildlife v. Perciasepe*, No. 12-5122, 2013 U.S. App. LEXIS 8123 (D.C. Cir. April 23, 2013).

In short, Sue and Settle permits an agency – along with an interested advocacy group – to develop its own rulemaking processes, often in contravention of those set out by Congress, and can bar other affected parties from any role in either the negotiation or the ultimate court approval of the settlement. Such unification of authority is contrary to the separation of powers principles so fundamental to our constitutional structure.

*Federalism.* Sue and Settle also introduces significant federalism concerns. States are often heavily affected by, yet almost never privy to, Sue and Settle negotiations. Yet the structure of our government and laws provides for shared responsibility in a range of regulatory areas. Sue and Settle practices permit the federal government and interested advocacy groups to withdraw constitutional and legal authority from States in order to achieve a desired policy outcome. Regardless of my State's or my personal agreement or disagreement with a particular policy judgment, I have great concerns about expunging States from federal regulatory processes in which we have historically and statutorily played an important and authoritative role.

The Clean Air Act, for example, is predicated on a model of “cooperative federalism,” in which States and the federal government divide regulatory responsibilities. The federal government develops standards within the law for emissions limits and other regulatory goals, while States are responsible for implementing those standards through State Implementation Plans, or SIPs. Sue and Settle presents extraordinary complications for this outline of cooperative federalism, including but not limited to the fact that States are forced to develop SIPs based on settlement timelines rather than at a pace that allows them to review and analyze the appropriate information to make the right decision for how to meet environmental goals within their borders.

Not surprisingly, States have been subjected to the same limitations on intervention as private parties. In *WildEarth Guardians v. Jackson*, for example, EPA opposed intervention by

North Dakota even though the case involved how and when EPA should act on North Dakota's proposed Regional Haze SIP. See *WildEarth Guardians v. Jackson*, No. 4:09-cv-02453 (N.D. Cal.) (filed June 2, 2009; consent decree entered Feb. 23, 2010). North Dakota charged that EPA had exceeded its authority in promulgating a regional haze FIP under the auspices of an interstate transport consent decree. The district court did not permit North Dakota to intervene, deeming North Dakota's allegations that EPA relied on the consent decree in promulgating its regulation were a "sham" or "frivolity" – despite the fact that the EPA itself said that it was simultaneously exercising its authority on regional haze and interstate transport requirements. *WildEarth Guardians v. Jackson*, No. 4:09-cv-02453 (N.D. Cal. Dec. 27, 2011).

The Regional Haze issue is thus another arena in which States are losing their traditional role in the cooperative federalism structure of the Clean Air Act due to Sue and Settle consent decrees. EPA's regional haze program seeks to address impairments to visibility at national parks and other federal lands, but is an aesthetic requirement rather than a health-related mandate. The statute, 42 U.S.C. § 7491(b)(2), requires affected States to put forth SIPs that will "make reasonable progress toward meeting the national goal" on regional haze. But for the first time, and as a result of Sue and Settle consent decrees, the EPA is allowed to propose combined Regional Haze SIPs and FIPs (Federal Implementation Plans) – something EPA has not previously done in administering the Clean Air Act. These new FIPs have proved costly and improper. In five separate consent decrees negotiated without State participation, EPA agreed to commit itself to deadlines for evaluating the States' plans, and subsequently determined that each of those plans was procedurally deficient in some respect. *Nat'l Parks Cons. Ass'n v. Jackson*, No. 1:11-cv-01548 (D.D.C. Aug 18, 2011); *Sierra Club v. Jackson*, No. 1-10-cv-02112 (D.D.C. Aug. 18, 2011); *WildEarth Guardians v. Jackson*, No. 1:11-cv-00743 (D. Col. June 16, 2011); *WildEarth Guardians v. Jackson*, No. 4:09-cv-02453 (N.D. Cal. Feb. 23, 2010); *WildEarth Guardians v. Jackson*, No. 1:10-cv-01218 (D. Col. Oct. 28, 2010). Because the consent decree deadlines did not allow time for states to resubmit plans, the EPA imposed its own FIP controls. This type of action is in derogation of congressional intent, and deprives States of the appropriate level of control as stewards of their resources and environments.

The Regional Haze issue is only one example of EPA's decision to let outside interest groups control its regulatory agenda to the exclusion of its previous federalist partners. States

and their Attorneys General are increasingly concerned that we are losing our roles as federal partners in the regulatory arena, and are losing our opportunity to develop environmental plans that respect the individual circumstances of our States while also making important progress on environmental goals. Consequently, 13 States have filed a FOIA request seeking the release of documents showing EPA communications with advocacy groups relating to the scope of the EPA administrator's non-discretionary authority to take actions under environmental statutes; the course of action to be taken with respect to any SIP plan; the course of action to be taken with respect to a State's administration of federal environmental laws; and the course of action to be taken with respect to any "administrative or judicial order, decree or waiver entered or proposed to be entered . . . concerning a State." FOIA Request No. HQ-FOI-01841-12 (Sept. 12, 2012). The States also requested a fee waiver because this disclosure meets the standard criteria for a request that is within the public interest as outlined in 40 C.F.R. § 2.107(l).<sup>1</sup> As of the date of this testimony, more than eight months have passed and neither request has been granted.

\* \* \*

The above testimony does not begin to catalogue the legal and constitutional dangers of Sue and Settle practices. Congress, however, has the ability to curb these practices and restore the intended structure and process of federal rulemaking. House Resolution 1493 would take important and critical steps to ensuring transparency and equal access to the administrative process for all affected parties, including States. Thank you again for the opportunity to submit testimony on this important matter.

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<sup>1</sup> Waiver or reduction of fees. (1) Records responsive to a request will be furnished without charge or at a charge reduced below that established under paragraph (c) of this section when a FOI Office determines, based on all available information, that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

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Mr. COLLINS. In 2004, *Frew v. Hawkins*, a decision in the U.S. Supreme Court, expressed its concern that consent decrees may improperly deprive future officials of their designated legislative and executive powers. This potential for abuse and the lack of transparency in the status quo is why I believe so strongly in the need for this legislation. H.R. 1493 addresses weaknesses in the current system while preserving consent decrees as an important mecha-

nism for settling legal disputes. Any argument as to the benefits of a statutory deadline enforcement has no place in this policy discussion. As a sponsor of this legislation, I believe that the ability of citizens to hold Government accountable is an important part of administrative law, but it must be appropriately carried out with transparency and full public participation. This legislation restores the balance and the intent of the APA and ensures that those who wish to subvert the rulemaking requirements in current law are unable to do so.

I am proud to represent the thriving agricultural community in northeast Georgia and across the State. Farmers and ranchers back home are concerned by a recent settlement that has the potential to severely impact their livelihood. In 2011, WildEarth Guardians and the Center for Biological Diversity entered into an agreement binding Fish and Wildlife Services to deadlines for decisions on over 1,000 species under the Endangered Species Act. Even though the agriculture community will be significantly impacted by this agreement, they were not allowed to participate in its development.

In addition, due to the fee-shifting statutes that provide attorney's fees to special interest groups, WildEarth Guardians and the Center for Biological Diversity together received almost \$300,000 in taxpayer dollars. American families across the Nation are tightening their belt. It is absolutely unacceptable that their hard-earned taxpayer dollars go to fund back room deals that subvert the rulemaking process.

I want to thank the witnesses for being here and especially Mr. Puckett for being here today, and I look forward to hearing from them and from all our witnesses on what I believe is an important subject and I believe a right direction for this Committee to be heading. And I thank you, Mr. Chairman, for your leadership in bringing this today.

Mr. BACHUS. Thank you. Thank you.

And I now recognize our Ranking Member, Steve Cohen of Tennessee, for his opening statement.

Mr. COHEN. Thank you, Mr. Bachus. I appreciate the opportunity to speak, and it is particularly relevant here today in the Antitrust Committee where Delta Airlines struck again in my community. Even though they made testimony here that the merger would not affect hubs, they have taken the hub status away from Memphis and took our flights down to 60 from what were 243. I wish that we were concentrating on antitrust and airlines and what they are doing to the American consumer and employee in this country.

But we are here today with another Groundhog Day. H.R. 1493, the "Sunshine for Regulatory Decrees and Settlements Act of 2013," is clearly designed to impede Federal rulemaking and other regulatory action, is like legislation we have considered in the past. It does this by imposing numerous constraints and disincentives to the entry of consent decrees and settlement agreements in civil actions that seek to compel agencies to comply with their statutory rulemaking requirements. H.R. 1493 threatens to undermine rulemaking by tilting this playing field in favor of anti-regulatory forces at taxpayers' expense. It does so by taking several broad approaches.

First, it provides numerous opportunities for dilatory tactics by industry and other anti-regulatory interests. The bill makes it easier for any affected third party—any affected third party—to intervene in the underlying litigation and the settlement negotiations by requiring a court to presume—subject to rebuttal, yes—but presume that any third party affected by the agency action or dispute will not be adequately represented by the parties to the litigation. This intervention right is drafted so broadly that if the regulatory action at issue involved the Clean Water Act, theoretically any person who uses water would have a right to intervene in the negotiations on a potential consent decree or settlement agreement. Any industry interests out there would certainly not hesitate to intervene.

Second, many of the terms of 1493, its key terms, are ambiguous, opening the door to confusion, litigation, and delay in resolving disputes. For example, the threshold question of what is a covered civil action under the bill, such civil action includes, one, alleging that an agency is “unlawfully withholding or unreasonably delaying action.” As a lawyer, I know that the interpretations of words like “unreasonably” simply open the door to litigation that may go on ad infinitum, ad nauseam, particularly when, as here, they appear in the threshold question of when the bill is supposed to apply.

Third, the bill imposes numerous procedural requirements on agencies and courts that threaten to take away their already limited resources from issuing rules to protect public health and safety. For instance, the bill requires agencies to accept public comments on a proposed consent decree or settlement agreement and to respond to such comments. This provision alone would add considerable delay in resolving litigation meant to force an agency to meet its rulemaking and other statutory obligations.

Finally, the effect of the bill’s various provisions would be to dissuade agencies from ever agreeing to enter into consent decrees or settlement agreements, making it more likely they would simply proceed with potentially expensive and time consuming litigation. That is why the Congressional Budget Office found that last year’s drafting of a bill, similar to H.R. 1493, which was last year’s bill, would cost taxpayers millions of dollars.

In addition to being harmful, H.R. 1493 is simply unnecessary as its proponents offer no evidence of the problem that it purports to address. H.R. 1493’s proponents argue this bill is needed because Federal agencies collude with pro-regulatory plaintiffs to advance a mutually agreed upon regulatory agenda through the use of consent decrees and settlement agreements. Yet, when this Subcommittee considered a substantially similar bill in the last Congress, we were given no data or study indicating that such collusive consent decrees or settlement agreements were in fact a real problem. All we heard were the repeated assertions of the witnesses of the majority that such collusion was taking place.

More credible was the testimony of John C. Cruden, a senior nonpartisan career official at the Justice Department’s Environment and Natural Resources Division for over 2 decades, who testified he was, “not aware of any instance of a settlement and cer-

tainly none he personally approved that would remotely be described as collusive.”

In the absence of actual evidence of rampant collusion between Federal agencies and plaintiffs, H.R. 1493 simply addresses a non-existent problem.

H.R. 1493 would needlessly slow down an agency action and open the door widely to almost anyone who wants to impede agency action, including the promulgation of important public health and safety rules.

The bill is unnecessary. The bill is harmful. The bill is not going to go anywhere in the Senate. I urge my colleagues to oppose it.

Mr. CONYERS. Would the gentleman from Tennessee yield?

Mr. COHEN. I will yield.

Mr. CONYERS. Thank you.

I just had research on—this is the third hearing on regulatory activity in this Congress, but there were 16 other hearings during the 112th. I am writing an article on this because this is unbelievable.

And I thank the gentleman for yielding.

Mr. COHEN. You are welcome.

I yield back the balance of my time which does not exist.

Mr. BACHUS. Thank you, Mr. Cohen.

I would now like to recognize the full Committee Chairman, Mr. Bob Goodlatte of Virginia, for his opening statement.

Mr. GOODLATTE. Thank you, Mr. Chairman. I appreciate your holding this hearing. And I want to thank Mr. Collins for his introduction of the bill and Chairman Bachus and the Subcommittee for their prompt and careful consideration of it.

America’s small businesses and job creators need relief from the flood of new regulations and red tape made in Washington. Small business owners cite Government regulations as one of the most important problems they face today. And while the flow of new regulations from Washington grinds on, so does America’s dismal unemployment situation. Make no mistake. The untimely drag of new regulations, too often issued without sufficient consideration of their costs, benefits, and impacts on jobs, remains a significant part of our virtual jobs depression.

The Judiciary Committee is considering a strong set of regulatory reform bills to solve this problem while preserving important regulatory protections for the American people. The Sunshine for Regulatory Decrees and Settlements Act of 2013 is an important part of this initiative. Far too often, costly new regulations are issued directly under the authority of consent decrees and settlement agreements to force Federal agencies to issue new rules. Regulators often cooperate with pro-regulatory organizations to advance their mutual agendas in this way.

The technique used is simple: an organization that wants new regulations alleges that an agency has violated a duty to declare new rules. The agency and the plaintiff work out a deal under the cover of litigation. The deal puts the agency under judicially backed deadlines to issue the rules. These deadlines often give the public and even States that co-administer regulations little opportunity to comment on proposed rules. Deals can go so far as to require agencies to propose specific regulatory language negotiated by the agen-

cy and the regulation-seeking plaintiff. Those to be regulated frequently do not know about these deals until the plaintiff's complaints and the proposed decrees or settlements are filed in court. By then, it is too late. Regulated businesses, State regulators, and other interested entities are unlikely to be able to intervene in the litigation. The court can approve the deals before regulated parties have an opportunity to determine whether new regulatory costs will be imposed on them.

The Obama administration has entered into a high number of consent decrees and settlement agreements just like I just described. Examples include a consent decree to require new performance standards for greenhouse gas emissions under the Clean Air Act. They also include settlement agreements to require EPA to issue Chesapeake Bay TMDL's that trigger billions of dollars in costs and the Fish and Wildlife Service to take actions involving hundreds of species under the Endangered Species Act. Deadlines set in these and other decrees and settlements can even be used to bind the hands of future Administrations.

The Sunshine for Regulatory Consent Decrees and Settlements Act of 2012 puts an end to the abuse of this practice. It assures that those to be regulated have a fair opportunity to participate in the resolution of litigation that affects them. It ensures that courts have all the information they need before they approve proposed decrees and settlements, and it provides needed transparency on the ways agencies conduct their business.

The bill also respects the basic rights of plaintiffs and defendants to manage litigation between them.

As a result, the bill offers an effective and balanced remedy and it is a timely solution to a real and important problem. And I commend the gentleman from Georgia, Mr. Collins, for his efforts on this bill, and I strongly support them and yield back the balance of my time.

Mr. BACHUS. Thank you.

Without objection, other Members' opening statements will be made a part of the record.

Since the full Committee Ranking Member introduced something, I would like unanimous consent to offer a response to his submittal, which is "Sue and Settle: Regulating Behind Closed Doors," authored by the U.S. Chamber of Commerce, in rebuttal and ask that it be entered into the record.

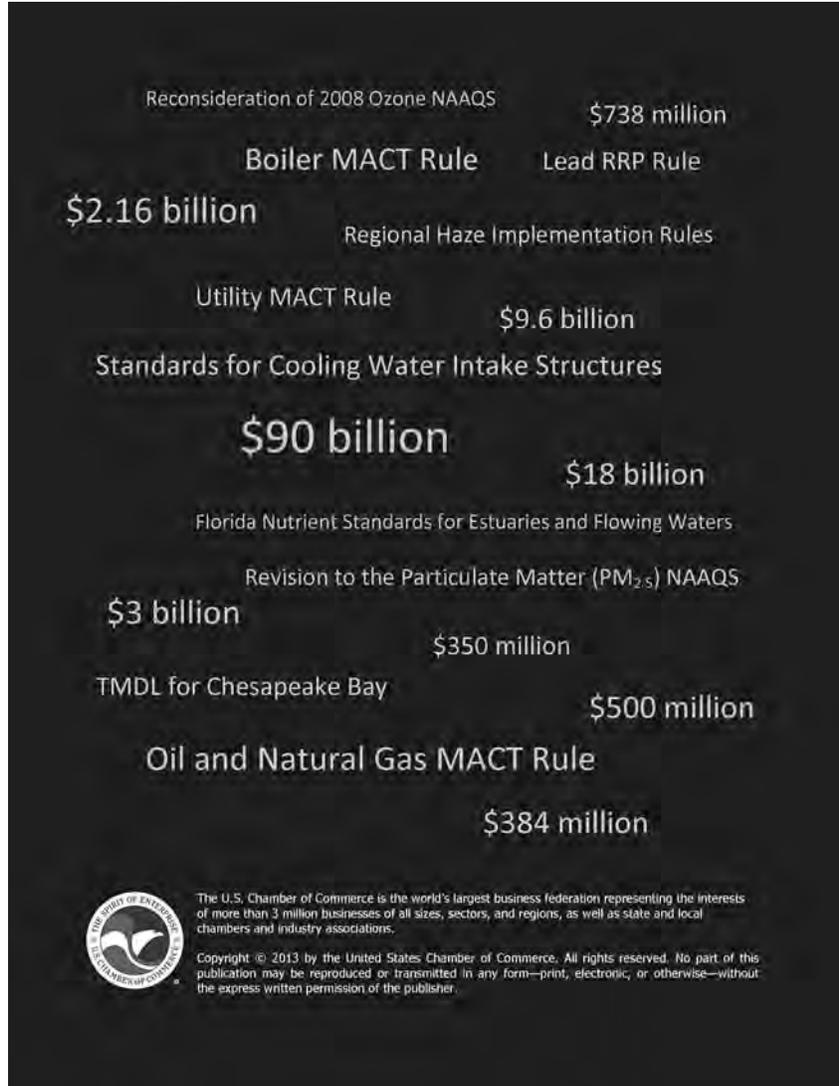
[The information referred to follows:]

# SUE AND SETTLE

Regulating Behind Closed Doors



U.S. CHAMBER OF COMMERCE



The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.

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A Report on

# SUE AND SETTLE

REGULATING BEHIND CLOSED DOORS

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U.S. Chamber of Commerce

May 2013

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### Recognition

The U.S. Chamber of Commerce thanks William Yeatman, assistant director of the Center for Energy and Environment at the Competitive Enterprise Institute, for helping us formulate an additional methodology and the development of a database of sue and settle cases. The database was used to check the validity of, and supplement, the Chamber's database of cases.

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## Introduction

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### What Is Sue and Settle?



Sue and settle occurs when an agency intentionally relinquishes its statutory discretion by accepting lawsuits from outside groups that effectively dictate the priorities and duties of the agency through legally binding, court-approved settlements negotiated behind closed doors—with no participation by other affected parties or the public.

As a result of the sue and settle process, the agency intentionally transforms itself from an independent actor that has discretion to perform its duties in a manner best serving the public interest into an actor subservient to the binding terms of settlement agreements, which includes using congressionally appropriated funds to achieve the demands of specific outside groups. This process also allows agencies to avoid the normal protections built into the rulemaking process—review by the Office of Management and Budget and the public, and compliance with executive orders—at the critical moment when the agency's new obligation is created.

### What Is the Sue and Settle Process?



## Executive Summary

William L. Kovacs

U.S. Chamber Senior Vice President for Environment, Technology & Regulatory Affairs



### BACKGROUND

The U.S. Chamber of Commerce undertook an investigation of the sue and settle process because of the growing number of complaints by the business community that it was being entirely shut out of regulatory decisions by key federal agencies. While the U.S. Environmental Protection Agency (EPA) and the Fish and Wildlife Service have been leaders in settling—rather than defending—cases brought by advocacy groups, other agencies, including the U.S. Forest Service, the Bureau of Land Management, the National Park Service, the Army Corps of Engineers, the U.S. Department of Agriculture, and the U.S. Department of Commerce, have also agreed to this tactic.

As discussed in our report *Sue and Settle: Regulating Behind Closed Doors*, we found that under this sue and settle process, EPA chose at some point not to defend itself in lawsuits brought by special interest advocacy groups at least 60 times between 2009 and 2012.<sup>1</sup> In each case, it agreed to settlements on terms favorable to those groups. These settlements directly resulted in EPA agreeing to publish more than 100 new regulations,<sup>2</sup> many of which impose compliance costs in the tens of millions and even billions of dollars.<sup>3</sup>

### LACK OF AGENCY TRANSPARENCY ON SUE AND SETTLE CASES

We also found that when EPA was asked by Congress to provide information about the notices of intent to sue received by the agency or the petitions for rulemaking served on EPA by private parties, the agency could not—or would not—provide the information. When such lawsuits were initiated, EPA does not disclose the notice of the lawsuit or its filing until a settlement agreement had been worked out with the private parties and filed with the court. As a result, court orders were entered, binding the agency to undertake a specific rulemaking within a specific and usually very short time period, notwithstanding whether the agency actually had sufficient time to perform the obligations imposed by the court order. In response to Congress, EPA made it clear that it is “unable to accommodate this [congressional] request to make all petitions, notices, and requests for agency action publicly accessible in one location on the

<sup>1</sup> A description of the methodology the Chamber used to identify sue and settle cases is discussed in Appendices A and B of this report.

<sup>2</sup> See pages 43–45 for the list of rules and agency actions resulting from sue and settle cases.

<sup>3</sup> For a description of the costs of selected rules, see discussion and notes on pages 14–22.

Internet.”<sup>4</sup> Specifically, “the EPA does not have a centralized process to individually characterize and sort all the different types of notices of intent the agency receives.”<sup>5</sup> Imagine what would happen if a state or local government, a school district, or a publicly traded company claimed to have no knowledge about lawsuits brought against it, the number of cases settled by its lawyers, or the number of agreements that obligated it to undertake extensive new action? It is unimaginable that such an entity would be able to claim ignorance of lawsuits that significantly impact it or to be unable to provide its citizens, customers, and regulatory agencies with required information. And yet, the position of EPA has been that it would not be bothered to track settlements that impose significant new rules and requirements on the country or to notify the public about them in any systematic fashion.<sup>6</sup>

#### SUE AND SETTLE SKIRTS PROCEDURAL SAFEGUARDS ON THE RULEMAKING PROCESS

The practice of agencies entering into voluntary agreements with private parties to issue specific rulemaking requirements also severely undercuts agency compliance with the Administrative Procedure Act. The Administrative Procedure Act is designed to promote transparency and public participation in the rulemaking process. Because the substance of a sue and settle agreement has been fully negotiated between the agency and the advocacy group before the public has any opportunity to see it—even in those situations where the agency allows public comment on the draft agreement—the outcome of the rulemaking is essentially set. Sue and settle allows EPA to avoid the normal protections built into the rulemaking process, such as review by OMB, reviews under several executive orders, and reviews by the public and the regulated community. Further, the principles of federalism are also flagrantly ignored when EPA uses the conditions in sue and settle agreements to set aside state-administered programs, such as the Regional Haze program. With no public input, EPA binds itself to the demands of a private entity with special interests that may be adverse to the public interest, especially in the areas of project development and job creation. Sue and settle activities deny the public its most basic of all rights in the regulatory process: the right to weigh in on a proposed regulatory decision before agency action occurs.

#### SUE AND SETTLE CREATES TENSION BETWEEN THE BRANCHES OF GOVERNMENT

At its heart, the sue and settle issue is a situation in which the executive branch expands the authority of agencies at the expense of congressional oversight. This occurs with at least the implicit cooperation of the courts, which typically rubber stamp proposed settlement agreements even though they enable private parties to dictate agency policy. Congress is harmed because its control over appropriations diminishes. Sue and settle deals (and not Congress) increasingly are what drive an agency's budget concerns. Additionally, the

<sup>4</sup> Letter from Arvin Ganesan, EPA Associate Administrator for the Office of Congressional and Intergovernmental Affairs, to Hon. Fred Upton, Chairman, House Committee on Energy and Commerce (June 12, 2012) at 2.

<sup>5</sup> *Id.*

<sup>6</sup> It is our understanding that EPA has very recently begun to disclose on its website the notices of intent to sue that it receives from outside parties. While this is a welcome development, this important disclosure needs to be required by statute and not just be a voluntary measure. Moreover, agencies such as EPA also need to provide public notice of the filing of a complaint and/or petitions for rulemaking.

implementation of congressionally directed policies is now reprioritized by court orders that the agency asks the court to issue. Once the court approves the consent decree or settlement agreement, EPA is free to tell Congress “we are acting under court order and we must publish a new regulation.”

#### SUE AND SETTLE MIGRATES TO OTHER STATUTES?

A major concern is that the sue and settle tactic, which has been so effective in removing control over the rulemaking process from Congress—and placing it instead with private parties under the supervision of federal courts—will spread to other complex statutes that have statutorily imposed dates for issuing regulations, such as Dodd-Frank or Obamacare. On April 22, 2013, the U.S. District Court for the Northern District of California, which has been very active in sue and settle cases, issued an order in a Food Safety Modernization Act case that sets in motion a new process to bring sue and settle actions under Section 706 of the Administrative Procedure Act. In *Center for Food Safety v. Hamburg*,<sup>7</sup> the court recognized a statutorily imposed deadline, but also recognized that food safety is not always served by rushing a regulation to finality. In this instance, the court ordered the parties to “arrive at a mutually acceptable schedule” because “it will behoove the parties to attempt to cooperate on this endeavor, as any decision by the court will necessarily be arbitrary. The parties are hereby ORDERED to meet and confer, and prepare a joint written statement setting forth proposed deadlines, in detail sufficient to form the basis of an injunction.” With a new structure in place that uses the Administrative Procedure Act as a basis for citizen suits, private interest groups and agencies could—without use of any other citizen suit provision—negotiate private arrangements for how an agency will proceed with a new regulation.

#### THE IMPORTANCE OF FIXING THE SUE AND SETTLE PROBLEM

Why is it so important to fix the sue and settle process? Congress’s ability to act on or undertake oversight of the executive branch is diminished and perhaps eliminated through the private agreements between agencies and private parties. Rulemaking in secret, a process that Congress abandoned 65 years ago when it passed the Administrative Procedure Act, is dangerous because it allows private parties and willing agencies to set national policy out of the light of public scrutiny and the procedural safeguards of the Administrative Procedure Act.

Perhaps the most significant impact of these sue and settle agreements is that by freely giving away its discretion in order to satisfy private parties, an agency uses congressionally appropriated funds to achieve the demands of private parties. This happens even though there are congressional appropriations specifying the use of such funds. In essence, the agency intentionally transforms itself from an independent actor that has discretion to perform duties in a manner best serving the public interest into an actor subservient to the binding terms of the settlement agreements. The magnitude and serious consequences of the sue and settle problem have recently been recognized by at least one court, when it set aside a sue and settle

<sup>7</sup> *Center for Food Safety v. Hamburg*, No. C 12-4529 PJH, slip op. at 10 (N.D. Cal. Apr. 22, 2013).

agreement that would “promulgate a substantial and permanent amendment” to an agency rule.<sup>8</sup>

#### THE MOST EFFECTIVE SOLUTION TO SUE AND SETTLE LIES WITH CONGRESS

In the final analysis, Congress is also to blame for letting the sue and settle process take on a life free of congressional review. Most of the sue and settle lawsuits were filed as citizen suits authorized under the various environmental statutes.<sup>9</sup> Because citizen suit provisions were included within the environmental titles of the U.S. Code, Congress placed jurisdiction and oversight of citizen suits with congressional authorizing committees rather than with the House and Senate Judiciary Committees. Despite the fact that the sole purpose of citizen suits is to grant access to the federal courts, which is the primary jurisdiction of the Judiciary committees, jurisdiction was instead placed in committees that had no expertise in the subject matter. Accordingly, no meaningful oversight has been conducted in more than four decades over the use and abuse of citizen suit activity, such as sue and settle.

Fortunately, however, in 2012, the House Judiciary Committee began looking at the abuses of the sue and settle process. It introduced the Sunshine for Regulatory Decrees and Settlements Act of 2012, which the House passed as part of a larger bill. Under the bill, before the agency and outside groups can file a proposed consent decree or settlement agreement with a court, the proposed consent decree or settlement has to be published in the *Federal Register* for 60 days to allow for public comment. Also, affected parties would be afforded an opportunity to intervene prior to the filing of the consent decree or settlement.

On April 11, 2013, the Sunshine for Regulatory Decrees and Settlements Act of 2013 was introduced in the Senate as S. 714, and in the House as H.R. 1493. It is a strong bill that would implement these and other important common-sense changes. Passage of this legislation will close the massive sue and settle loophole in our regulatory process.

<sup>8</sup> *Conservation Northwest v. Sherman*, No. 11-35729, slip op. at 15 (9th Cir. Apr. 25, 2013) (“Because the consent decree in this case allowed the Agencies effectively to promulgate a substantial and permanent amendment to [a regulation] without having followed statutorily required procedures, it was improper.”).

<sup>9</sup> See, e.g., Clean Air Act, 42 U.S.C. § 7604; Clean Water Act, 33 U.S.C. § 1365; Resource Conservation and Recovery Act, 42 U.S.C. § 6972.



## SUE AND SETTLE

### REGULATING BEHIND CLOSED DOORS

May 2013

#### INTRODUCTION

Over the past several years, the business community has expressed growing concern about interest groups using lawsuits against federal agencies and subsequent settlements as a technique to shape agencies' regulatory agendas. The overwhelming majority of instances of sue and settle actions from 2009 to 2012 have occurred in the environmental regulatory context. These actions were primarily brought under the citizen suit provisions of the Clean Air Act, the Clean Water Act, and the Endangered Species Act.<sup>10</sup> The citizen suit provisions in environmental statutes such as the Clean Air Act provide advocacy groups with the most direct and straightforward path to obtain judicial review of an agency's failure to meet a statutory deadline or perform such other duty a plaintiff group believes is necessary and desirable.<sup>11</sup> From a new wave of endangered species listings to the EPA's federalization of the Chesapeake Bay cleanup program, to the federal takeover of regional haze programs, recent sue and settle arrangements have fueled fears that the rulemaking process itself is being subverted to serve the ends of a few favored interest groups.

Beginning in 2011, the U.S. Chamber of Commerce began working to better understand the full scope and consequences of the sue and settle issue. We set out to determine how often sue and settle actually happens, to identify major sue and settle cases, and to track the types of agency actions involved. Compiling information on sue and settle agreements turned out to be labor intensive and time consuming. Many such agreements are not clearly disclosed to the

<sup>10</sup> Clean Air Act, 42 U.S.C. § 7604; Clean Water Act, 33 U.S.C. § 1365; Endangered Species Act, 16 U.S.C. §1540(g).

<sup>11</sup> Interest groups have traditionally also obtained judicial review of agency action (or inaction) through section 706 of the Administrative Procedure Act (APA), even where the underlying statute does not contain an explicit citizen suit provision. See, e.g., *Calvert Cliffs Coordinating Comm. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971)(Court of Appeals for the D.C. Circuit holds that an agency's compliance with NEPA is reviewable, and that the agency is not entitled to assert that it has wide discretion in performing the procedural duties required by NEPA). APA-based citizen suits to enforce or expand the requirements of regulatory programs developed under recent laws such as Dodd-Frank and the Affordable Care Act, and the potential for advocacy group-driven sue and settle agreements in areas like financial regulation, healthcare, transportation, and immigration are a growing likelihood. See *Center for Food Safety v. Hamburg*, No. C 12-4529 (PJH)(N.D. Cal. Apr. 22, 2013)(nonprofit group sued the Food and Drug Administration under section 706 of the APA to compel a rulemaking on a specific deadline. Despite agency's assertion that the "issuance of the required regulations on a rushed or hurried basis would not help protect human health and safety," the court ordered the parties to "meet and confer, and prepare a joint written statement setting forth proposed deadlines, in detail sufficient to form the basis of an injunction.")

public or other parties until after they have been signed by a judge and the agency has legally bound itself to follow the settlement terms. Even then, agencies do not maintain lists of their sue and settle cases that are publicly available.

Using a combination of approaches, the Chamber was able to compile a database of sue and settle cases and their subsequent rulemaking outcomes. This combined database, which is summarized at the end of this report, indicates the sue and settle cases for the current administration. The Chamber also developed data on the use of the tactic during earlier administrations.

#### WHAT IS SUE AND SETTLE?

Sue and settle occurs when an agency intentionally relinquishes its statutory discretion by accepting lawsuits from outside groups which effectively dictate the priorities and duties of the agency through legally binding, court-approved settlements negotiated behind closed doors—with no participation by other affected parties or the public.<sup>12</sup>

As a result of the sue and settle process, the agency intentionally transforms itself from an independent actor that has discretion to perform its duties in a manner best serving the public interest into an actor subservient to the binding terms of settlement agreements, which includes using congressionally appropriated funds to achieve the demands of specific outside groups. This process also allows agencies to avoid the normal protections built into the rulemaking process—review by the Office of Management and Budget (OMB) and other agencies, reviews under executive orders, and review by other stakeholders—at the critical moment when the agency's new obligations are created.

Because sue and settle lawsuits bind an agency to meet a specified deadline for regulatory action—a deadline the agency often cannot meet—the agreement essentially reorders the agency's priorities and its allocation of resources. These sue and settle agreements often go beyond simply enforcing statutory deadlines and the agreements themselves become the legal authority for expansive regulatory action with no meaningful participation by affected parties or the public. The realignment of an agency's duties and priorities at the behest of an individual special interest group runs counter to the larger public interest and the express will of Congress.

#### WHAT DID OUR RESEARCH REVEAL?

By using the methodologies described in Appendix A and Appendix B, the Chamber was able to compile a list of sue and settle cases that occurred between early 2009 and 2012. Because agencies are not required to notify the public when they receive notices from outside groups of

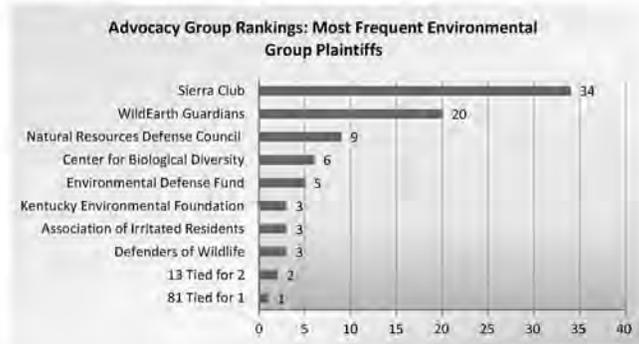
<sup>12</sup> The coordination between outside groups and agencies is aptly illustrated by a November 2010 sue and settle case where EPA and an outside advocacy group filed a consent decree and a joint motion to enter the consent decree with the court on the same day the advocacy group filed its complaint against EPA. See *Defenders of Wildlife v. Perciasepe*, No. 12-5122, slip op. at 6 (D.C. Cir. Apr. 23, 2013).

their intent to sue, or, in many cases, when they reach tentative settlement agreements with the groups, it is often extremely difficult for an interested party (e.g., a state, a regulated business, the public) to know about a settlement until it is final and has legally binding effect on the agency. For this reason, we do not know if the list of cases we have developed is a truly complete list of recent sue and settle cases. Only the agencies themselves and the Department of Justice<sup>13</sup> really know this.

**Number of Sue and Settle Cases**

Our investigation shows that from 2009 to 2012, a total of 71 lawsuits (including one notice of intent to sue) were settled under circumstances such that they can be categorized as sue and settle cases under the Chamber’s definition. These cases include EPA settlements under the Clean Air Act and the Clean Water Act, along with key Fish and Wildlife Service (FWS) settlements under the Endangered Species Act. Significantly, settlement of these cases directly resulted in more than 100 new federal rules, many of which are major rules with estimated compliance costs of more than \$100 million annually.

**Which Advocacy Groups Use the Sue and Settle Process the Most?**

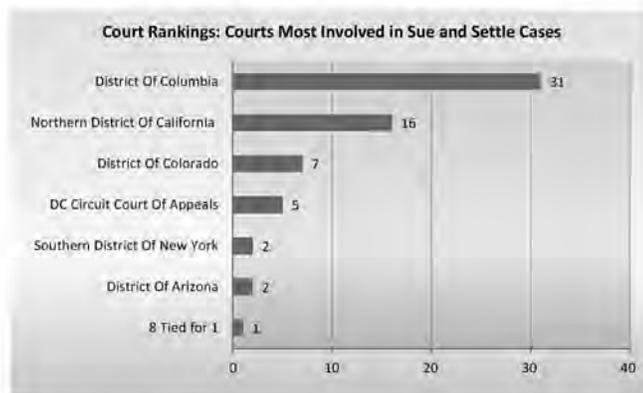


Several environmental advocacy groups have made the sue and settle process a significant part of their legal strategy. By filing lawsuits covering significant EPA rulemakings and regulatory initiatives, and then quickly settling, these groups have been able to circumvent the normal rulemaking process and effect immediate regulatory action with the consent of the agencies themselves.<sup>14</sup>

<sup>13</sup> Virtually all lawsuits against federal agencies are handled by U.S. Department of Justice attorneys. In all of the sue and settle cases the Chamber found, the Department of Justice represented the agency.

<sup>14</sup> Although the Chamber was not able to compile a complete database on the extent to which advocacy groups receive attorney’s fees from the federal government, a review of a portion of the Chamber’s database revealed that attorney’s fees

### Which Courts Handle the Most Sue and Settle Cases?

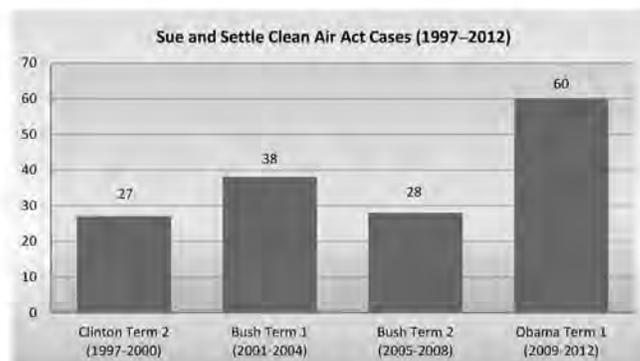


### Comparing the Use of Sue and Settle Over the Past 15 Years

Unlike other environmental laws, the Clean Air Act specifically requires EPA to publish notices of draft consent decrees in the *Federal Register*.<sup>15</sup> These public notices gave the Chamber the opportunity to identify Clean Air Act settlement agreements/consent decrees going back to 1997. By excluding agreements resulting from enforcement actions, permitting cases, and other non-sue and settle cases (e.g., cases not involving the issuance of rules of general applicability), we have been able to compare the Clean Air Act sue and settle cases that occurred between 1997 and 2012. The following chart compares Clean Air Act sue and settle settlement agreements and consent decrees finalized during that period.

were awarded in at least 65% (49 of 71) of the cases. These fees are not paid by the agency itself, but are paid from the federal Judgment Fund. In effect, advocacy groups are incentivized by federal funding to bring sue and settle lawsuits and exert direct influence over agency agendas.

<sup>15</sup> Section 113(g) of the Clean Air Act, 42 U.S.C. § 7413(g), provides that "[a]t least 30 days before a consent decree or settlement agreement of any kind under [the Clean Air Act] to which the United States is a party (other than enforcement actions) . . . the Administrator shall provide a reasonable opportunity by notice in the *Federal Register* to persons who are not named as parties or intervenors to the action or matter to comment in writing." Of all the other major environmental statutes, only section 122(i) of the Superfund law, (42 U.S.C. § 9622(i)) requires an equivalent public notice of a settlement agreement.



The results show that sue and settle is by no means a recent phenomenon<sup>16</sup> and that the tactic has been used during both Democratic and Republican administrations. To the extent that the sue and settle tactic skirts the normal notice and comment rulemaking process, with its procedural checks and balances, agencies have been willing for decades to allow sue and settle to vitiate the rulemaking requirements of the Administrative Procedure Act.<sup>17</sup> Moreover, our research found that business groups have also taken advantage of the sue and settle approach to influence the outcome of EPA action. While advocacy groups have used sue and settle much more often in recent years, both interest groups and industry have taken advantage of the tactic.

#### WHAT ARE THE ECONOMIC IMPLICATIONS OF OUR FINDINGS?

Since 2009, regulatory requirements representing as much as \$488 billion in new costs have been imposed by the federal government.<sup>18</sup> By itself, EPA is responsible for adding tens of billions of dollars in new regulatory costs.<sup>19</sup> Significantly, more than 100 of EPA's costly new rules were the product of sue and settle agreements. The chart below highlights just ten of the most significant rules that arose from sue and settle cases:

<sup>16</sup> The sue and settle problem dates back at least to the 1980s. In 1986, Attorney General Edward Meese III issued a Department of Justice policy memorandum, referred to as the "Meese Memo," addressing the problematic use of consent decrees and settlement agreements by the government, including the agency practice of turning discretionary rulemaking authority into mandatory duties. See Meese, Memorandum on Department Policy Regarding Consent Decrees and Settlement Agreements (March 13, 1986).

<sup>17</sup> 5 U.S.C. Subchapter II.

<sup>18</sup> Sam Batkins, American Action Forum, "President Obama's \$488 Billion Regulatory Burden" (September 19, 2012).

<sup>19</sup> *Id.* Mr. Batkins estimates the regulatory burden added by EPA in 2012 alone to be \$12.1 billion.

Ten Costly Regulations Resulting From Sue and Settle Agreements		
1.	Utility MACT Rule	Up to \$9.6 billion annually
2.	Lead Renovation, Repair and Painting (LRRP) Rule	Up to \$500 million in first-year
3.	Oil and Natural Gas MACT Rule	Up to \$738 million annually
4.	Florida Nutrient Standards for Estuaries and Flowing Waters	Up to \$632 million annually
5.	Regional Haze Implementation Rules	\$2.16 billion cost to comply
6.	Chesapeake Bay Clean Water Act Rules	Up to \$18 billion cost to comply
7.	Boiler MACT Rule	Up to \$3 billion cost to comply
8.	Standards for Cooling Water Intake Structures	Up to \$384 million annually
9.	Revision to the Particulate Matter (PM <sub>2.5</sub> ) National Ambient Air Quality Standards (NAAQS)	Up to \$350 million annually
10.	Reconsideration of 2008 Ozone NAAQS	Up to \$90 billion annually

### 1. Utility MACT Rule

In December 2008, environmental advocacy groups sued EPA, seeking to compel the agency to issue maximum achievable control technology (MACT) air quality standards for hazardous air pollutants from power plants.<sup>20</sup> In October 2009, EPA lodged a proposed consent decree.<sup>21</sup> The intervenor in the case, representing the utility industry, argued that MACT standards such as those proposed by EPA were not required by the Clean Air Act.<sup>22</sup>

Utility MACT (also known as the Mercury Air Toxics Standard, or MATS) is a prime example of EPA taking actions, in the wake of a sue and settle agreement, that were not mandated by the Clean Air Act. Ironically, even in this situation, where an affected party was able to intervene, EPA and the advocacy groups did not notify or consult with them about the proposed consent decree. Moreover, even though the District Court for the District of Columbia expressed some concern about the intervenor being excluded from the settlement negotiations, the court still approved the decree in the lawsuit.<sup>23</sup> The extremely costly Utility MACT Rule, which EPA was not previously required to issue, is estimated by EPA to cost \$9.6 billion annually by 2015.<sup>24</sup>

### 2. Lead Renovation, Repair and Painting Rule for Residential Buildings

In 2008, numerous environmental groups sued EPA to challenge EPA's April 22, 2008, Lead Renovation, Repair and Painting Program (LRRP) Rule, and these suits were consolidated in the

<sup>20</sup> *American Nurses Ass'n v. Jackson*, No. 1:08-cv-02198 (RMC) (D.D.C.), filed December 18, 2008.

<sup>21</sup> *American Nurses Ass'n*, Defendant's Notice of Lodging of Proposed Consent Decree (Oct. 22, 2009).

<sup>22</sup> *American Nurses Ass'n*, Motion of Defendant-Intervenor Utility Air Regulatory Group for Summary Judgment (June 24, 2009). (Defendant-intervenors argued that the proposed consent decree improperly limited the government's discretion because it required EPA to find that MACT standards under section 112(d) of the Clean Air Act were required, rather than issuing less burdensome standards or no standards at all).

<sup>23</sup> *American Nurses Ass'n v. Jackson*, No. 1:08-cv-02198 (RMC), 2010 WL 1506913 (D.D.C. Apr. 15, 2010).

<sup>24</sup> 77 Fed. Reg. 9,304, 9306 (Feb. 16, 2012); see also Letter from President Barack Obama to Speaker John Boehner (August 30, 2011), Appendix "Proposed Regulations from Executive Agencies with Cost Estimates of \$1 Billion or More."

D.C. Circuit Court of Appeals. EPA chose not to defend the suits and settled with the environmental groups on August 24, 2009. As part of the settlement agreement, EPA agreed to propose significant and specific changes to the rule, including the elimination of an “opt-out” provision that had been included in the 2008 rule. The opt-out authorized homeowners without children under six or pregnant women residing in the home to allow their contractor to forgo the use of lead-safe work practices during the renovation, repair, and/or painting activity. Removing the opt-out provision more than doubled the amount of homes subject to the LRRP rule—to an estimated 78 million—and increased the cost of the rule by \$500 million per year.<sup>25</sup> To make matters worse, EPA underestimated the number of contractors who would have to be trained to comply with the new rule and failed to anticipate that there were too few trainers to prepare contractors by the rule’s deadline.

### 3. Oil and Natural Gas MACT Rule

In January 2009, environmental groups sued EPA to update federal regulations limiting air emissions from oil- and gas-drilling operations. EPA settled the dispute with environmentalists on December 7, 2009. The settlement required EPA to review and update three sets of regulations: (1) new source performance standards (NSPS) for oil and gas drilling, (2) the Oil and Gas MACT standard, and (3) the air toxics “residual risk” standards. On August 23, 2011, EPA proposed a comprehensive set of updates to these rules, including new NSPS and MACT standards. Despite concerns by the business community that EPA had rushed its analysis of the oil and gas industry’s emissions and relied on faulty data, EPA issued final rules on August 16, 2012. These rules are estimated by the agency to impose up to \$738 million in additional regulatory costs each year.<sup>26</sup>

### 4. Florida Nutrient Standards for Estuaries and Flowing Waters

Environmental groups sued EPA in July 2008 to set water quality standards in Florida that would cut down on nitrogen and phosphorous in order to reduce contamination from sewage, animal waste, and fertilizer runoff. EPA entered into a consent decree with the plaintiffs in August 2009—a consent decree that was opposed by nine industry intervenors. As part of the settlement, EPA agreed to issue numeric nutrient limits in phases. Limits for Florida’s estuaries and flowing waters were proposed on December 18, 2012. Final rules are required by September 30, 2013. EPA recently approved Florida’s proposed nutrient standards as substantially complying with the federal proposal. The estimated cost of the federal standards is up to \$632 million per year.<sup>27</sup>

<sup>25</sup> 75 Fed. Reg. 24,802, 24,812 (May 6, 2010).

<sup>26</sup> See Fall 2011 Regulatory Plan and Regulatory Agenda, “Oil and Natural Gas Sector – New Source Performance Standards and NESHAPS,” RIN: 2060-AP76, at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201108&RIN=2060-AP76>.

<sup>27</sup> EPA, Proposed Nutrient Standards for Florida’s Coastal, Estuarine & South Florida Flowing Waters, November 2012, at <http://water.epa.gov/hwstregs/rulesregs/upload/floridafag.pdf>.

### 5. Regional Haze Implementation Rules

EPA's regional haze program, established decades ago by the Clean Air Act, seeks to remedy visibility impairment at federal national parks and wilderness areas. Because regional haze is an aesthetic requirement, and not a health standard, Congress emphasized that states—and not EPA—should decide which measures are most appropriate to address haze within their borders.<sup>28</sup> Instead, EPA has relied on settlements in cases brought by environmental advocacy groups to usurp state authority and federally impose a strict new set of emissions controls costing 10 to 20 times more than the technology chosen by the states. Beginning in 2009, advocacy groups filed lawsuits against EPA alleging that the agency had failed to perform its nondiscretionary duty to act on state regional haze plans. In five separate consent decrees negotiated with the groups and, importantly, without notice to the states that would be affected, EPA agreed to commit itself to specific deadlines to act on the states' plans.<sup>29</sup> Next, on the eve of the deadlines it had agreed to, EPA determined that each of the state haze plans was in some way procedurally deficient. Because the deadlines did not give the states time to resubmit revised plans, EPA argued that it had no choice but to impose its preferred controls federally. EPA used sue and settle to reach into the state haze decision-making process and supplant the states as decision makers—despite the protections of state primacy built into the regional haze program by Congress.

As of 2012, the federal takeover of the states' regional haze programs is projected to cost eight states an estimated \$2.16 billion over and above what they had been prepared to spend on visibility improvements.<sup>30</sup>

### 6. Chesapeake Bay Clean Water Act Rules

On January 5, 2009, individuals and environmental advocacy groups filed a lawsuit against EPA alleging that the agency was not taking necessary measures to protect the Chesapeake Bay.<sup>31</sup> On May 10, 2010, EPA and the groups entered into a settlement agreement that would require EPA to establish stringent total maximum daily load (TMDL) standards for the Bay. EPA also agreed to establish a new stormwater regime for the watershed. The U.S. District Court for the District of Columbia signed the settlement agreement on May 19, 2010.<sup>32</sup> The agency later cited the binding agreement as the legal basis for its expansive action on TMDLs and stormwater.<sup>33</sup>

<sup>28</sup> See 42 U.S.C. § 7491 (b)(2)(A).

<sup>29</sup> The five consent decrees are: *Natl' Parks Cons. Ass'n, et al. v. Jackson*, No. 1:11-cv-01548 (D.D.C. Aug. 18, 2011); *Sierra Club v. Jackson*, No. 1:10-cv-02112-JEB (D.D.C. Aug. 18, 2011); *WildEarth Guardians v. Jackson*, No. 1:11-cv-00743-CMA-MEH (D.Col. June 16, 2011); *WildEarth Guardians v. Jackson*, No. 4:09-CV02453 (N.D.Cal. Feb. 23, 2010); *WildEarth Guardians v. Jackson*, No. 1:10-cv-01218-REB-BNB (D.Col. Oct. 28, 2010).

<sup>30</sup> See William Yeatman, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs* (July 2012)(Oklahoma was ultimately forced to comply with federally mandated SO<sub>2</sub> controls rather than implementing fuel switching; costs for the SO<sub>2</sub> controls were estimated to be at \$1.8 billion). The report is available at [http://www.uschamber.com/sites/default/files/reports/1207\\_ETRA\\_HazeReport\\_lr.pdf](http://www.uschamber.com/sites/default/files/reports/1207_ETRA_HazeReport_lr.pdf).

<sup>31</sup> *Fowler v. EPA*, case 1:09-00005-CKK, Complaint (Jan. 5, 2009).

<sup>32</sup> *Fowler v. EPA*, Settlement Agreement (May 19, 2010).

<sup>33</sup> See *Clouded Waters: A Senate Report Exposing the High Cost of EPA's Water Regulations and Their Impacts on State and Local Budgets*, U.S. Senate Committee on Environment and Public Works, Minority Staff, at pp. 2-3 (June 30, 2011), available at [http://www.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentID=Record\\_id=1bc66911-802a-23ad-8767-8b1337aba46f](http://www.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentID=Record_id=1bc66911-802a-23ad-8767-8b1337aba46f).

Several lawmakers, in a 2012 letter, argued that EPA was taking this substantive action even though it was not authorized to do so under law.<sup>34</sup> Further, they also argued that EPA was improperly using settlements as the regulatory authority for other Clean Water Act actions:

We are concerned that EPA has demonstrated a disturbing trend recently, whereby EPA has been entering into settlement agreements that purport to expand federal regulatory authority far beyond the reach of the Clean Water Act and has then been citing these settlement agreements as a source of regulatory authority in other matters of a similar nature.

One example of this practice is EPA's out-of-court settlement agreement with the Chesapeake Bay Foundation in May 2010. EPA has referred to that settlement as a basis for its establishment of a federal total maximum daily load (TMDL) for the entire 64,000 square-mile Chesapeake Bay watershed and EPA's usurpation of state authority to implement TMDLs in that watershed. EPA also has referred to that settlement as a basis for its plan to regulate stormwater from developed and redeveloped sites, which exceeds the EPA's statutory authority.<sup>35</sup>

The sweeping new federal program for the Chesapeake Bay is major in its scope and economic impact. The program sets land use-type limits on businesses, farms, and communities on the Bay based upon their calculated daily pollutant discharges. EPA's displacement of state authority is estimated to cost Maryland and Virginia up to \$18 billion<sup>36</sup> to implement.

The federal takeover of the Chesapeake Bay program is unprecedented in its scope; however, by relying on the settlement agreement as the source of its regulatory authority for the TMDLs and stormwater program, EPA did not have to seek public input, explain the statutory basis for its actions in the Clean Water Act, or give stakeholders an opportunity to evaluate the science upon which the agency relies. Because the rulemakings resulted from a settlement agreement that set tight timelines for action, the public never had access to the information, which would have been necessary in order to comment effectively on the modeling and the assumptions EPA used.

<sup>34</sup> Letter to EPA Administrator Lisa Jackson from House Transportation and Infrastructure Committee Chairman John L. Mica, House Water Resources and Environment Subcommittee Chairman Bob Gibbs, Senate Environment and Public Works Committee Ranking Member James Inhofe, and Senate Water and Wildlife Subcommittee Ranking Member Jeff Sessions, January 20, 2012. The date of the letter is based on the press release date, [http://www.epw.senate.gov/public/index.cfm?fuseAction=Minority.PressReleases&ContentRecord\\_id=1bcb69a1-802a-23ad-4767-8b1337aba451](http://www.epw.senate.gov/public/index.cfm?fuseAction=Minority.PressReleases&ContentRecord_id=1bcb69a1-802a-23ad-4767-8b1337aba451) and this project Vote Smart page, <http://votesmart.org/public-statement/663407/letter-to-lisa-jackson-administrator-of-environmental-protection-agency-epa>.

<sup>35</sup> "House, Senate Lawmakers Highlight Concerns with EPA Sue & Settle Tactic for Backdoor Regulation," United States Senate Committee on Environment & Public Works, Minority Office, January 20, 2012 at [http://www.epw.senate.gov/public/index.cfm?fuseAction=Minority.PressReleases&ContentRecord\\_id=fbc669a1-802a-23ad-4767-8b1337aba451](http://www.epw.senate.gov/public/index.cfm?fuseAction=Minority.PressReleases&ContentRecord_id=fbc669a1-802a-23ad-4767-8b1337aba451).

<sup>36</sup> See Sage Policy Group, Inc., *The Impact of Phase I Watershed Implementation Plans on Key Maryland Industries* (Apr. 2011); *CHESAPEAKE BAY JOURNAL*, January 2011, available at [www.bayjournal.com/article.cfm?article=4007](http://www.bayjournal.com/article.cfm?article=4007).

### 7. Boiler MACT Rule

In 2003, EPA and Sierra Club entered into a consent agreement that required EPA to set a MACT standard for major- and area-source boilers. In 2006, the U.S. District Court for the District of Columbia issued an order detailing a schedule for the rulemaking. On September 10, 2009, April 3, 2010, and September 20, 2010, EPA and Sierra Club agreed to extend the deadline for the rule. Sierra Club subsequently opposed EPA's request to further extend the deadline from January 16, 2011, to April 13, 2012, despite declarations by EPA officials that the agency could not meet the January 2011 deadline because of the time necessary to consider and respond to all of the public comments on the proposed rule. The D.C. District Court ruled that EPA had had enough time and gave the agency only an additional month to finalize the rule. EPA knew the final rule it had been ordered to issue would not survive court challenge. Accordingly, EPA published a notice of reconsideration the same day it finalized the rule: March 21, 2011. Based on comments it received from the public as well as additional data, EPA issued final reconsidered rules on January 31, 2013, and February 1, 2013. The cost of the 2012 Boiler MACT Rule that EPA had to issue prematurely was estimated by the agency to be \$3 billion.<sup>37</sup>

### 8. Standards for Cooling Water Intake Structures

On November 17, 2006, environmental advocacy groups sued EPA, claiming that the agency had failed to use "Best Technology Available" when it issued a final rule setting standards for small, existing cooling water intake structures under section 316(b) of the Clean Water Act.<sup>38</sup> EPA defended against this lawsuit. On July 23, 2010, EPA and the groups agreed to a voluntary remand of the 2006 cooling water intake rule. On November 22, 2010, EPA entered into a settlement agreement with the environmental groups to initiate a new rulemaking and to take public comment on the appropriateness of subjecting small, existing facilities to the national standards developed for larger facilities. EPA published the proposed rule on April 20, 2011. The proposal would increase dramatically the cost to smaller facilities—such as small utilities, pulp and paper plants, chemical plants, and metal plants—by more than \$350 million each year.<sup>39</sup>

### 9. Revision to the Particulate Matter (PM<sub>2.5</sub>) NAAQS

EPA entered into a consent decree with advocacy groups and agreed to issue a final rule by December 14, 2012, revising the NAAQS for fine particulate matter (PM<sub>2.5</sub>). Even by EPA's own admission, this deadline was unrealistic. In a May 4, 2012, declaration filed with the U.S. District Court of the District of Columbia, Assistant Administrator for Air Regina McCarthy stated that EPA would need until August 14, 2013, to finalize the PM<sub>2.5</sub> NAAQS due to the many technical and complex issues included in the proposed rulemaking.<sup>40</sup> Despite this recognition of the time

<sup>37</sup> Letter from President Barack Obama to Speaker John Boehner (Aug. 30, 2011), Appendix "Proposed Regulations from Executive Agencies with Cost Estimates of \$1 Billion or More."

<sup>38</sup> 71 Fed. Reg. 35,046 (Jun. 16, 2006).

<sup>39</sup> "2012 Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," rule web page for "Criteria and Standards for Cooling Water Intake Structures," RIN: 2040-AE95, available at

<http://www.reginfo.gov/public/do/AgendaViewRule?pubId=201210&RIN=2040-AE95>

<sup>40</sup> *American Lung Ass'n v. EPA*, Nos. 1:12-cv-00243, 1:12-cv-00531, Declaration of Regina McCarthy (D.D.C. May 4, 2012) at ¶ 20.

constraints, EPA agreed in the original consent decree to a truncated deadline, promising to finish the rule in only half the time it believed it actually needed to do the rulemaking properly. The final rule is estimated to cost as much as \$382 million each year.<sup>41</sup>

#### 10. Reconsideration of the 2008 Ozone NAAQS

On May 23, 2008, environmental groups sued EPA to challenge the final revised ozone NAAQS, which the agency had published on March 27, 2008. The 2008 rule had lowered the eight-hour primary ground-level ozone standard from 84 parts per billion (ppb) to 75 ppb. On March 10, 2009, EPA filed a motion requesting that the court hold the cases in abeyance to allow time for officials from the new administration to review the 2008 standards and determine whether they should be reconsidered. On January 19, 2010, EPA announced that it had decided to reconsider the 2008 ozone NAAQS.<sup>42</sup> Although EPA did not enter into a settlement agreement or consent decree with the environmental group, it readily accepted the legal arguments put forth by the group despite available legal defenses.<sup>43</sup> The agency announced its intention to propose a reconsidered standard ranging between 70 ppb and 65 ppb.<sup>44</sup> Although the reconsidered ozone NAAQS was not published—and was withdrawn by the administration on September 2, 2011—EPA had estimated that the reconsidered standard would impose up to \$90 billion of new costs per year on the U.S. economy.<sup>45</sup>

#### OTHER SUE AND SETTLE-BASED RULEMAKINGS OF PARTICULAR NOTE

##### Revisions to EPA's Rule on Protections for Subjects in Human Research Involving Pesticides

In 2006, EPA issued a final rule on protecting human subjects in research involving pesticides.<sup>46</sup> Various advocacy groups sued EPA, alleging that the rule did not go far enough.<sup>47</sup> In November 2010, EPA and the advocacy groups finalized a settlement agreement that required EPA to include specific language for a new proposed rule.

<sup>41</sup> "Overview of EPA's Revisions to the Air Quality Standards for Particle Pollution (Particulate Matter)," Environmental Protection Agency (2012), see <http://www.epa.gov/pm/2012/decsoverview.pdf>.

<sup>42</sup> 75 Fed. Reg. 2,938, 2,944 (Jan. 19, 2010).

<sup>43</sup> Most of the sue and settle cases identified in this report involve a consent decree or settlement agreement. However, there is a variation of this standard type of sue and settle case that contains many of the same problems that these cases contain, but do not involve a consent decree or settlement agreement. In these cases, advocacy groups sue agencies and then the agencies take the desired action sought by the advocacy groups without any consent decrees or settlement agreements.

<sup>44</sup> 75 Fed. Reg. 2,938, 2,944 (Jan. 19, 2010).

<sup>45</sup> Letter from President Barack Obama to Speaker John Boehner (Aug. 30, 2011), Appendix "Proposed Regulations from Executive Agencies with Cost Estimates of \$1 Billion or More." EPA's intention to revise the 2008 Ozone NAAQS Rule less than two years after it had been finalized—which was unprecedented—and the standard's staggering projected compliance costs, caused tremendous public outcry, which led to the planned rule being withdrawn at the order of the White House on September 2, 2011. EPA is expected to propose the revised ozone NAAQS in late 2013 or early 2014.

<sup>46</sup> 71 Fed. Reg. 6,138 (Feb. 6, 2006).

<sup>47</sup> *Natural Resources Defense Council v. EPA*, No. 06-0820-ag (2d Cir.). NRDC filed a petition for review on February 23, 2006. Other plaintiffs filed petitions shortly thereafter. The case was consolidated into this case before the Second Circuit.

The advocacy group's influence on the substance of the rules is reflected in the fact that their desired regulatory changes were directly incorporated into the proposed rule. In the preamble of the 2011 proposed rule,<sup>48</sup> EPA wrote:

EPA also agreed to propose, at a minimum, amendments to the 2006 rule that are substantially consistent with language negotiated between the parties and attached to the settlement agreement.... Although the wording of the amendments proposed in this document [2011 proposed rule] differs in a few details of construction and wording, they are substantially consistent with the regulatory language negotiated with Petitioners, and EPA considers these amendments to address the Petitioners' major arguments.<sup>49</sup>

In fact, there are entire passages from the settlement agreement that are identical to the language included in the 2011 proposed rule.<sup>50</sup> EPA was not mandated by statute to take any action on the human-testing rule and certainly was not required to "cut and paste" the language sought by the advocacy groups. If EPA was concerned that the rule needed to be changed, it should have gone through a normal notice and comment rulemaking rather than writing the substance of the proposed rule behind closed doors.

#### **U.S. Fish and Wildlife Service (FWS) Endangered Species Act Listings and Critical Habitat Designation**

*FWS agreed in May and July 2011, to two consent decrees with an environmental advocacy group requiring the agency to propose adding more than 720 new candidates to the list of endangered species under the Endangered Species Act.*

FWS used a settlement in 2009 to designate a large critical habitat area under the Endangered Species Act.<sup>51</sup> In 2008, environmental advocacy groups sued FWS to protest the exclusion of 13,000 acres of national forest land in Michigan and Missouri from the final "critical habitat" designation for the endangered Hine's emerald dragonfly under the Endangered Species Act.<sup>52</sup> Initially, FWS disputed the case; however, while the case was pending, the new administration took office, changed its mind, and settled with the plaintiffs on February 12, 2009.<sup>53</sup> FWS doubled the size of the critical habitat area from 13,000 acres to more than

<sup>48</sup> 76 Fed. Reg. 5,735, 5,740 (February 2, 2011).

<sup>49</sup> Settlement Agreement between EPA and plaintiffs connected to *Natural Resources Defense Council v. EPA*, 06-0820, (2<sup>nd</sup> Cir.), November 3, 2010. See also 76 Fed. Reg. 5,735, 5,740-5,741 (February 2, 2011).

<sup>50</sup> See Settlement Agreement between EPA and plaintiffs connected to *Natural Resources Defense Council v. EPA*, 06-0820 (2<sup>nd</sup> Cir.), November 3, 2010, and the proposed rule at 76 Fed. Reg. 5735, 5740. Much of the language in 26.1603(b) and (c) of the proposed rule is identical to the language set forth in the settlement agreement.

<sup>51</sup> *Northwoods Wilderness Recovery v. Kempthorne*, Civil Action No. 08-01407, (N.D. Ill.), Stipulated Settlement Agreement and Order of Dismissal (February 12, 2009).

<sup>52</sup> *Northwoods Wilderness Recovery v. Kempthorne*, Civil Action No. 08-01407, Complaint for Declaratory and Injunctive Relief, March 10, 2008 (N.D. Ill.).

<sup>53</sup> *Supra*, note 37.

26,000 acres, as sought by the advocacy groups.<sup>54</sup> Thus, FWS effectively removed a large amount of land from development without affected parties having any voice in the process. Even the federal government did not think FWS was clearly mandated to double the size of the critical habitat area, as evidenced by the previous administration's willingness to fight the lawsuit.

Moreover, FWS agreed in May and July 2011 to two consent decrees with an environmental advocacy group, requiring the agency to propose adding more than 720 new candidates to the list of endangered species under the Endangered Species Act.<sup>55</sup> Agreeing to list this many species all at once imposes a huge new burden on the agency. According to the director of FWS, in FY 2011, FWS was allocated \$20.9 million for endangered species listing and critical habitat designation; the agency spent more than 75% of this allocation (\$15.8 million) taking the substantive actions required by court orders or settlement agreements resulting from litigation.<sup>56</sup> In other words, sue and settle cases and other lawsuits are effectively driving the regulatory agenda of the Endangered Species Act program at FWS.

#### THE PUBLIC POLICY IMPLICATIONS OF SUE AND SETTLE

By being able to sue and influence agencies to take actions on specific regulatory programs, advocacy groups use sue and settle to dictate the policy and budgetary agendas of an agency. Instead of agencies being able to use their discretion on how best to utilize their limited resources, they are forced to shift these resources away from critical duties in order to satisfy the narrow demands of outside groups.

Through sue and settle, advocacy groups also significantly affect the regulatory environment by getting agencies to issue substantive requirements that are not required by law. Even when a regulation is required, agencies can use the terms of a sue and settle agreement as a legal basis for allowing special interests

to dictate the discretionary terms of the regulations. Third parties have a very difficult time challenging the agency's surrender of its discretionary power because they typically cannot intervene, and the courts often simply want the case to be settled quickly.

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<sup>54</sup> See, e.g., 75 Fed. Reg. 21,394 (August 30, 2010).

<sup>55</sup> Stipulated Settlement Agreements, *WildEarth Guardians v. Salazar* (D.D.C. May 10, 2011) and *Center for Biological Diversity v. Salazar* (D.D.C. July 12, 2011). The requirement to add more than 720 candidates for listing as endangered species would significantly add to the existing endangered species list that contains 1,118 plant and animal species, which could significantly expand the amount of critical habitat in the U.S. This would be a nearly two-thirds expansion in the number of listed species. Fish and Wildlife Species Reports, at [http://ecos.fws.gov/fess\\_public/pub/Basscore.do](http://ecos.fws.gov/fess_public/pub/Basscore.do).

<sup>56</sup> Testimony of Hon. Dan Ashe, Director, U.S. Fish and Wildlife Service before the House Natural Resources Committee (December 6, 2011).

Likewise, when advocacy groups and agencies negotiate deadlines and schedules for new rules through the sue and settle process, the rulemaking process can suffer greatly. Dates for regulatory action are often specified in statutes, and agencies like EPA are typically unable to meet the majority of those deadlines. To a great extent, these agencies must use their discretion to set resource priorities in order to meet their many competing obligations. By agreeing to deadlines that are unrealistic and often unachievable, the agency lays the foundation for rushed, sloppy rulemaking that often delays or defeats the objective the agency is seeking to achieve. These hurried rulemakings typically require correction through technical corrections, subsequent reconsiderations, or court-ordered remands to the agency. Ironically, the process of issuing rushed, poorly developed rules and then having to spend months or years

*Instead of agencies being able to use their discretion on how best to utilize their limited resources, they are forced to shift these resources away from critical duties in order to satisfy the narrow demands of outside groups.*

to correct them defeats the advocacy group's objective of forcing a rulemaking on a tight schedule. The time it takes to make these fixes, however, does not change a regulated entity's immediate obligation to comply with the poorly constructed and infeasible rule.

Moreover, if regulated parties are not at the table when deadlines are set, an agency will not have a realistic sense of the issues involved in the rulemaking (e.g., will there be enough time for the agency to understand the constraints facing an industry, to perform emissions monitoring, and to develop achievable standards?). Especially when it comes to implementation timetables, agencies are ill-suited to make such decisions without significant feedback from those who actually will have to comply with a regulation.

By setting accelerated deadlines, agencies very often give themselves insufficient time to comply with the important analytic requirements that Congress enacted to ensure sound policymaking. These requirements include the Regulatory Flexibility Act (RFA)<sup>57</sup> and the Unfunded Mandates Reform Act.<sup>58</sup> In addition to undermining the protections of these statutory requirements, rushed deadlines can limit the review of regulations under the OMB's regulatory review under executive orders,<sup>59</sup> among other laws. This short-circuited process deprives the public (and the agency itself) of critical information about the true impact of the rule.

Unreasonably accelerated deadlines, such as with PM<sub>2.5</sub> NAAQS, have adverse impacts that go well beyond the specific rule at issue. As Assistant Administrator McCarthy noted in her declaration before the court in the PM<sub>2.5</sub> NAAQS case discussed above, an unreasonable deadline for one rule will draw resources from other regulations that may also be under

<sup>57</sup> Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. §§ 601-612.

<sup>58</sup> Unfunded Mandates Reform Act of 1995, 2 U.S.C. § 1501 et seq.

<sup>59</sup> See, e.g., Executive Order 12,856, "Regulatory Planning and Review" (September 30, 1993); Executive Order 13132, "Federalism" (August 4, 1999); Executive Order 13,211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (May 18, 2001); Executive Order 13,563 "Improving Regulation and Regulatory Review" (January 18, 2011).

deadlines.<sup>50</sup> When there are unrealistic deadlines, there will be collateral damage on these other rules, which will invite advocacy groups to reset EPA's priorities further when they sue to enforce those deadlines.

In fact, one of the primary reasons advocacy groups favor sue and settle agreements approved by a court is that the court retains jurisdiction over the settlement and the plaintiff group can readily enforce perceived noncompliance with the agreement by the agency. For its part, the agency cannot change any of the terms of the settlement (e.g., an agreed deadline for a rulemaking) without the consent of the advocacy group. Thus, even when an agency subsequently discovers problems in complying with a settlement agreement, the advocacy group typically can force the agency to fulfill its promise, regardless of the consequences for the agency or regulated parties.

*Because a settlement agreement directs the structure (and sometimes even the actual substance) of the agency rulemaking that follows, interested parties have a very limited ability to alter the subsequent rulemaking through comments.*

For all of these reasons, sue and settle violates the principle that if an agency is going to write a rule, then the goal should be to develop the most effective, well-tailored regulation. Instead, rulemakings that are the product of sue and settle agreements are most often rushed, sloppy, and poorly conceived. They usually take a great deal of time and effort to correct, when the rule could have been done right in the first place if the rulemaking process had been conducted properly.

#### NOTICE AND COMMENT ALLOWED AFTER A SUE AND SETTLE AGREEMENT DOES NOT GIVE THE PUBLIC REAL INPUT

The opportunity to comment on the product of sue and settle agreements, either when the agency takes comment on a draft settlement agreement or takes notice and comment on the subsequent rulemaking, is not sufficient to compensate for the lack of transparency and participation in the settlement process itself. In cases where EPA allows public comment on draft consent decrees, EPA only rarely alters the consent agreement—even after it receives adverse comments.<sup>51</sup>

<sup>50</sup> "This amount of time [requested as an extension by EPA] also takes into account the fact that during the same time period for this rulemaking, the Office of Air and Radiation will be working on many other major rulemakings involving air pollution requirements for a variety of stationary and mobile sources, many with court-ordered or settlement agreement deadlines." *American Lung Ass'n v. EPA*, Nos. 1:12-cv-00243, 1:12-cv-00531, Declaration of Regina McCarthy (D.D.C. May 4, 2012) at ¶ 15 (emphasis added).

<sup>51</sup> In the PM<sub>2.5</sub> NAAQS deadline settlement agreement discussed above, for example, the timetable for final rulemaking action remained unchanged despite industry comments insisting that the agency needed more time to properly complete the rulemaking. Even though EPA itself agreed that more time was needed, the rulemaking deadline in the settlement agreement was not modified.

Moreover, because the settlement agreement directs the timetable and the structure (and sometimes even the actual substance<sup>62</sup>) of the agency rulemaking that follows, interested parties usually have a very limited ability to alter the design of the subsequent rulemaking

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through their comments.<sup>63</sup> In effect, the "cement" of the agency action is set and has already hardened by the time the rule is proposed, and it is very difficult to change it. Once an agency proposes a regulation, the agency is restricted in how much it can change the rule before it becomes final.<sup>64</sup> Proposed regulations are not like proposed legislation, which can be very fluid and go through several revisions before being enacted. When an agency proposes a regulation, they are not saying, "let's have a conversation about this issue," they are saying, "this is what we intend to put into effect unless there is some very good reason we have overlooked why we cannot." By giving an agency feedback during the early development stage about how a regulation will affect those covered by it, the agency learns from all stakeholders about problems before they get locked into the regulation.

Sue and settle agreements cut this critical step entirely out of the process. Rather than hearing from a range of interested parties and designing the rule with a panoply of their concerns in mind, the agency essentially writes its rule to accommodate the specific demands of a single interest. Through sue and settle, advocacy groups achieve their narrow goals at the expense of sound and thoughtful public policy.

#### SUE AND SETTLE IS AN ABUSE OF THE ENVIRONMENTAL CITIZEN SUIT PROVISIONS

Congress expressed concern long ago that allowing unlimited citizen suits under environmental statutes to compel agency action has the potential to severely disrupt agencies' ability to meet their most pressing statutory responsibilities.<sup>65</sup> Matters are only made worse when an agency

<sup>62</sup> See discussion of the Human Testing Rule, *supra* on page 21.

<sup>63</sup> EPA overwhelmingly rejected the comments and recommendations submitted by the business community on the major rules that resulted from sue and settle agreements. These rules were ultimately promulgated largely as they had been proposed. As EPA Assistant Administrator for Air McCarthy recently noted, "[m]y staff has made me aware of some instances in which EPA changed the substance of Clean Air Act settlement agreements in response to public comments. For example, after receiving adverse comments on a proposed settlement agreement [concerning hazardous air standards for 25 individual industries] EPA modified deadlines for taking proposed or final actions and clarified the scope of such actions for a number of source categories before finalizing the agreement. However, I am not aware of every instance in which EPA has made such a change." McCarthy Response to Questions for the Record submitted by Senator David Vitter to Assistant Administrator Gina McCarthy, Senate Environment and Public Works Committee April 8, 2013, Confirmation Hearing at 24. The Chamber is not aware of any other instances where EPA has made such a change in response to public comments.

<sup>64</sup> See *South Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1<sup>st</sup> Cir. 1974) ("logical outgrowth doctrine" requires additional notice and comment if final rule differs too greatly from proposal).

<sup>65</sup> The Court of Appeals for the District of Columbia noted in 1974 that "While Congress sought to encourage citizen suits, citizen suits were specifically intended to provide only 'supplemental... assurance that the Act would be implemented and

does not defend itself against sue and settle lawsuits, and when it willingly allows outside groups to reprioritize its agenda and deadlines for action.

Most of the legislative history that gives an understanding of the environmental citizen suit provision comes from the congressional debate on the 1970 Clean Air Act. There is little legislative history beyond the Clean Air Act.<sup>66</sup> The addition of the citizen suit provision in later statutes was perfunctory, and the statutory language used was generally identical to the Clean Air Act language.<sup>67</sup>

The inclusion of a citizen suit provision was far from a given when it was being considered in the Clean Air Act. The House version of the bill did not include a citizen suit provision.<sup>68</sup> The Senate bill did include such a provision,<sup>69</sup> but serious concern was expressed during the Senate floor debate. Senator Roman Hruska (R-NE), who was ranking member of the Senate Judiciary Committee, expressed two major concerns about the citizen suit provision: the limited opportunity for Senators to review the provision and the failure to involve the Senate Judiciary Committee:

Frankly, inasmuch as this matter [the citizen suit provision] came to my attention for the first time not more than 6 hours ago, it is a little difficult to order one's thoughts and decide the best course of action to follow.

Had there been timely notice that this section was in the bill, perhaps some Senators would have asked that the bill be referred to the Committee of the Judiciary for consideration of the implications for our judicial system.<sup>70</sup>

Senator Hruska entered into the record a memo written by one of his staff members. It reiterated the problem of ignoring the Judiciary Committee:

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enforced.' *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1974). Congress made 'particular efforts to draft a provision that would not reduce the effectiveness of administrative enforcement, ... nor cause abuse of the courts ... while at the same time still preserving the right of citizens to such enforcement of the act.' Senate Debate on S. 3375, March 10, 1970, reprinted in Environmental Policy Division of the Congressional Research Service, *A Legislative History of the Clean Air Act Amendments of 1970*, Vol. 1, at 387 (1974) [remarks of Senator Cooper]. " *Friends of the Earth, et al. v. Potomac Electric Power Co.*, 546 F. Supp. 1357 (D.D.C. 1982); "[T]he agency might not be at fault if it does not act promptly or does not enforce the act as comprehensively and as thoroughly as it would like to do. Some of its capabilities depend on the wisdom of the appropriation process of this Congress. It would not be the first time that a regulatory act would not have been provided with sufficient funds and manpower to get the job done.... Notwithstanding the lack of capability to enforce this act, suit after suit after suit could be brought. The functioning of the department could be interfered with, and its time and resources frittered away by responding to these lawsuits. The limited resources we can afford will be needed for the actual implementation of the act." (Sen. Hruska arguing against the citizen suit provision of the Clean Air Act during Senate debate on S.4358 on Sept. 21, 1970).

<sup>66</sup> See, e.g., Robert D. Snook, *Environmental Citizen Suits and Judicial Interpretation: First Time Tragedy, Second Time Farce*, 20 W. New Eng. L. Rev. 311 (1998) at 318.

<sup>67</sup> *Id.* at 313-314, 318.

<sup>68</sup> See, e.g., "A Legislative History of the Clean Air Amendments, Together with a Section-by-Section Index," Library of Congress, U.S. Govt. Print. Off., 1974-1980, Conference Report, at 205-206.

<sup>69</sup> *Id.*

<sup>70</sup> Senate debate on S. 4358 at 277.

The Senate Committee on the Judiciary has jurisdiction over, among other things, "(1) Judicial proceedings, civil and criminal, generally... (3) Federal court and judges..." The Senate should suspend consideration of Section 304 [the citizen suit provision] pending a study by the Judiciary Committee of the section's probable impact on the integrity of the judicial system and the advisability of now opening the doors of the courts to innumerable Citizens Suits against officials charged with the duty of carrying out the Clean Air Act.<sup>71</sup>

Senator Griffin (R-MI), also a member of the Senate Judiciary Committee, noted the lack of critical feedback that was received regarding the provision:

[I]t is disturbing to me that this far-reaching provision was included in the bill without any testimony from the Judicial Conference, the Department of Justice, or the Office of Budget and Management concerning the possible impact this might have on the Federal judiciary.<sup>72</sup>

*The citizen suit provision in the Clean Air Act was never considered by either the House or Senate Judiciary Committees. The same is true for the citizen suit provision in the Clean Water Act, which was enacted just two years later. There was no House or Senate Judiciary Committee hearing focused specifically on citizen suits for 41 years, dating back to the creation of the first citizen suit provision in 1970.*

The citizen suit provision in the Clean Air Act was never considered by either the House or Senate Judiciary Committees.<sup>73</sup> The same is true for the citizen suit provision in the Clean Water Act, which was enacted just two years later.<sup>74</sup> There was no House or Senate Judiciary Committee hearing focused specifically on citizen suits for 41 years, dating back to the creation of the first citizen suit provision in 1970.<sup>75</sup>

Fortunately however, in 2012, during the 112<sup>th</sup> Congress, the House Judiciary Committee began looking at the abuses of the sue and settle process. Representative Ben Quayle (R-AZ) introduced H.R. 3862, the Sunshine for Regulatory Decrees and Settlements Act of 2012. This bill became Title III of H.R. 4078, the Red Tape Reduction and Small Business Job Creation Act, which passed the House of Representatives on July 24, 2012, by a vote of 245 to 172. As part of the development of the Sunshine for Regulatory Decrees

<sup>71</sup> *Id.* at 279.

<sup>72</sup> *Id.* at 350.

<sup>73</sup> "A Legislative History of the Clean Air Amendments, Together with a Section-by-Section Index," Library of Congress, U.S. Govt. Print. Off., 1974-1980; The legislative history was also searched using Lexis.

<sup>74</sup> "A Legislative History of the Water Pollution Control Act Amendments of 1972, Together with a Section-By-Section Index," Library of Congress, U.S. Govt. Print. Off., 1973-1978; The legislative history was also searched using Lexis.

<sup>75</sup> In 1985, the Senate Judiciary Committee held a hearing on the Superfund Improvement Act of 1985 that among other things discussed citizen suits (S. Hrg. 99-415). The hearing covered a wide range of issues, such as financing of waste site clean-up, liability standards, and joint and several liability. To find hearing information, a comprehensive search was conducted using ProQuest Congressional at the Library of Congress. The search focused on hearings from 1970-present that addressed citizen suits.

and Settlements Act, the House Judiciary Committee held extensive hearings on sue and settle and issued a committee report on July 11, 2012. Under the bill, which passed the House as Title III of H.R. 4078, before a court could sign a proposed consent decree between a federal agency and an outside group, the proposed consent decree or settlement must be published in the *Federal Register* for 60 days for public comment. Also, affected parties would be afforded an opportunity to intervene prior to the filing of the consent decree or settlement. The agency would also have to inform the court of its other mandatory duties and explain how the consent decree would benefit the public interest. Unfortunately, the Senate never took action on its version of the sue and settle bill, also called the Sunshine for Regulatory Decrees and Settlements Act of 2012, which was introduced by Senator Chuck Grassley on July 12, 2012.

On April 11, 2013, the Sunshine for Regulatory Decrees and Settlements Act of 2013 was introduced in the Senate as S. 714, and in the House as H.R. 1493. The 2013 Act is a strong bill that would implement these and other important common-sense changes. Passage of this legislation will close the massive sue and settle loophole in our regulatory process.

#### RECOMMENDATIONS

The regulatory process should not be radically altered simply because of a consent decree or settlement agreement. There should not be a two-track system that allows the public to meaningfully participate in rulemakings, but excludes the public from sue and settle negotiations which result in rulemakings designed to benefit a specific interest group. There should not be one system where agencies can use their discretion to develop rules and another system where advocacy groups use lawsuits to legally bind agencies and improperly hand over their discretion.

##### ➤ Notice

Federal agencies should inform the public immediately upon receiving notice of an advocacy group's intent to file a lawsuit.<sup>76</sup> This public notice should be provided in a prominent location, such as the agency's website or through a notice in the *Federal Register*.<sup>77</sup> By having this advanced notice, affected parties will have a better opportunity to intervene in cases and also prepare more thoughtful comments.

##### ➤ Comments and Intervening

Federal agencies should be required to submit a notice of a proposed consent decree or settlement agreement before it is filed with the court. This notice should be published in the *Federal Register* and allow a reasonable period for public comment (e.g., 45 days).

<sup>76</sup> The Department of Justice also should provide public notice of the filing of lawsuits against agencies, as well as settlements the agencies agree to.

<sup>77</sup> It is our understanding that EPA recently began to disclose on this website the notices of intent to sue that it receives from outside parties. While this is a welcome development, this important disclosure needs to be statutorily required, not just a voluntary measure.

Currently, because it is so difficult for third parties to intervene in sue and settle cases, courts should presume that it is appropriate to include a third party as an intervenor. The intervenors should only be excluded if this strong presumption could be rebutted by showing that the party's interests are adequately represented by the existing parties in the action. Given that intervenors presently can be excluded from settlement negotiations, *sometimes without even being notified of the negotiations*, there should be clarification that all parties in the action, including the intervenors, should have a seat at the negotiation table.

➤ **Substance of Rules**

Agencies should not be able to cede their discretionary powers to private interests, especially the power to issue regulations and to develop the content of rules. This problem does not exist in the normal rulemaking process. Yet, since courts readily approve consent decrees that legally bind agencies in the sue and settle context, the decree itself becomes a vehicle for agencies to give up their discretionary rulemaking power—and even to develop rules with questionable statutory authority.

Courts should review the statutory basis for agency actions in consent decrees and settlement agreements in the same manner as if they were adjudicating a case. For example, they should ensure that an agency is required to perform a mandatory act or duty, and, if so, that the agency is implementing the act or duty in a way that is authorized by statute.

➤ **Deadlines**

Federal agencies should ensure that they (and their partners, including states and other agencies) have enough time to comply with regulatory timelines. The public also should be given enough time to meaningfully comment on proposed regulations, and agencies should themselves take enough time to adequately conduct proper analysis. This would include agency compliance with the RFA, executive orders, and other requirements designed to promote better regulations. This is particularly important because recent rulemakings are often more challenging to evaluate in terms of scope, complexity, and cost than earlier rules were.

➤ **The Sunshine for Regulatory Decrees and Settlements Act of 2013**

Fortunately, there is a simple, noncontroversial way to address the sue and settle problem that currently undermines the fundamental protections that exist within our regulatory system. Passage of the Sunshine for Regulatory Decrees and Settlements Act of 2013 would solve the sue and settle problem and restore the protections of the Administrative Procedure Act to all citizens and stakeholders.

## Catalog of Sue and Settle Cases

### Sue and Settle Cases Resulting in New Rules and Agency Actions<sup>78</sup> (2009–2012)

Case	Agency	Issue and Result
<b><i>American Petroleum Institute v. EPA</i> (petroleum refineries NSPS)</b> 08-1277 (D.C. Cir.) Settled: 12/23/2010 (date is from EPA website)	EPA	<b>Issue:</b> Greenhouse gas (GHG) New Source Performance Standards (NSPS) for petroleum refineries  <b>Result:</b> EPA agreed to issue the first-ever NSPS for GHG emissions from petroleum refineries.
<b><i>American Lung Association v. EPA</i> (consolidated with <i>New York v. Jackson</i>)</b> 12-00243 (consolidated with 12-00531) (D.D.C.) Settled: 6/15/2012	EPA	<b>Issue:</b> National ambient air quality standards (NAAQS) for particulate matter  <b>Result:</b> EPA agreed to sign a final rule addressing the NAAQS for particulate matter. In January 2013, EPA published a final rule making the standard more stringent.
<b><i>American Nurses Association v. Jackson</i></b> 08-02198 (D.D.C.) Settled: 10/22/2009	EPA	<b>Issue:</b> Maximum achievable control technology (MACT) emissions standards for hazardous air pollutants (HAP) from coal- and oil-fired electric utility steam generating units (EGUs)  <b>Result:</b> EPA entered into a consent decree requiring the agency to issue MACT standards under Section 112 of the Clean Air Act for coal- and oil-fired electric utility steam generating units (known as the "Utility MACT" rule). The rule was finalized in February 2012.
<b><i>Association of Irrigated Residents v. EPA et al.</i> (2008 PM<sub>2.5</sub> SIP)</b> 10-03051 (N.D. Cal.) Settled: 11/12/2010	EPA	<b>Issue:</b> CA state implementation plan (SIP) submission regarding 1997 PM <sub>2.5</sub> NAAQS  <b>Result:</b> EPA agreed to take final action on the 2008 PM <sub>2.5</sub> San Joaquin Valley Unified Air Control District Plan for compliance with 1997 PM <sub>2.5</sub> NAAQS. The final action was taken in November 2011.
<b><i>Association of Irrigated Residents v. EPA et al.</i> (SIP revisions)</b> 09-01890 (N.D. Cal.) Settled: 10/21/2009	EPA	<b>Issue:</b> CA SIP revision regarding two rules amended by the San Joaquin Valley Unified Air Pollution Control District  <b>Result:</b> EPA agreed to take final action on the SIP revision and specifically the two rules amended by the San Joaquin Valley Unified Air Pollution Control District (Rule 2020 "Exemptions" and Rule 2020 "New and Modified Stationary Source Review Rule"). The final action was taken in May 2010.
<b><i>Center for Biological Diversity et al. v. EPA</i> (kraft pulp NSPS)</b>	EPA	<b>Issue:</b> Kraft pulp NSPS

<sup>78</sup> For a description of the methodology the Chamber used to identify sue and settle cases is discussed in Appendices A and B of this report.

Case	Agency	Issue and Result
11-06059 (N.D. Cal.) Settled: 8/27/2012		<b>Result:</b> EPA agreed to review and, if applicable, revise the kraft pulp NSPS air quality standards.
<i>Center for Biological Diversity v. EPA</i> 09-00670 (W.D. Wash.) Settled: Settlement agreement (parties entered into it on 3/10/10). Notice of voluntary dismissal, 3/11/10. Notice discusses settlement agreement.	EPA	<b>Issue:</b> GHGs and ocean acidification under the Clean Water Act  <b>Result:</b> In a settlement agreement, EPA agreed to take public comment and begin drafting guidance on how to approach ocean acidification under the Clean Water Act. On November 15, 2010, in guidance, EPA urged states to identify waters impaired by ocean acidification under the Clean Water Act and urged states to gather data on ocean acidification, develop methods for identifying waters affected by ocean acidification, and create criteria for measuring the impact of acidification on marine ecosystems.
<i>Center for Biological Diversity v. U.S. Department of Agriculture</i> 08-03884 (N.D. Cal.) Settled: 12/15/2010	Dept. of Agriculture, U.S. Forest Service	<b>Issue:</b> Southern California Forest Service Management Plans  <b>Result:</b> Conservation groups sued U.S. Forest Service over a forest management plan for four California national forests. The challenged plans designated more than 900,000 roadless acres for possible road building or other development. In 2009, a federal district court agreed with the groups, ruling that the plans violated the National Environmental Policy Act (NEPA). The parties entered into a settlement agreement that withholds more than 1 million acres of roadless areas from development. Further, the agency allowed the advocacy groups to participate in a collaborative process to, among other things, identify a list of priority roads and trails for decommissioning and/or restoration projects.
<i>Center for Biological Diversity v. U.S. Dept. of the Interior (DOI)</i> 10-00952 (D.D.C.) Settled: 1/14/2011	DOI, Dept. of Agriculture, BLM, U.S. Forest Service	<b>Issue:</b> Grazing fees on federal lands; environmental groups wanted the fees raised  <b>Result:</b> In a settlement agreement, agencies agreed to respond to the plaintiffs' petition by January 18, 2011, and determine whether a NEPA environmental impact statement was required to issue new rules for the fee grazing program. The agencies ultimately declined to revise the rules for the fee grazing program, citing other high-priority efforts that took precedence.
<i>Coal River Mountain Watch, et al. v. Salazar et al.</i> 08-02212; A related case is National Parks Conservation Association v. Kempthorne: 09-00115; Settlement agreement: 09-00115 (D.D.C.) (D.D.C.) Settled: 3/19/2010	EPA and DOI	<b>Issue:</b> Stream Buffer Zone Rule  <b>Result:</b> The 1983 stream buffer rule restricted mining activities from impacting resources within 100 feet of waterways. The Bush administration revised the rule to allow activity inside the buffer if it was deemed impractical for mine operators to comply. Environmental groups want the Obama administration to undo that change and declare that the stream buffer zone rule prohibits "valley fills." Environmental groups sued DOI in 2008 over the changes. Secretary Salazar tried to revoke the rule in April 2009, but a court held that OSM must go through a full rulemaking process. OSM agreed to amend or replace the stream buffer rule.
<i>Colorado Citizens Against Toxic Waste, Inc. et al. v. Johnson</i> 08-01787 (D. Colo.) Settled: 9/3/2009	EPA	<b>Issue:</b> National emission standards for radon emissions from operating mill tailings  <b>Result:</b> EPA agreed to review and, if appropriate, revise national emission standards for radon emissions from operating mill tailings. EPA also agreed to certain public participation stipulations.

Case	Agency	Issue and Result
<b>Colorado Environmental Coalition v. Salazar</b> 09-00085 (D. Colo.) Settled: 2/15/2011	DOI	<p><b>Issue:</b> Bureau of Land Management (BLM) decision to amend resource management plans (RMPs), which opened 2 million acres of federal lands for potential oil shale leasing; plaintiffs alleged failure to comply with NEPA and other statutes</p> <p><b>Result:</b> BLM agreed to consider amending each of the 2008 RMP decisions. As part of the amendment process, BLM agreed to consider several proposed alternatives, including alternatives that would exclude lands with wilderness characteristics and core or priority habitat for the imperiled sage grouse from commercial oil shale leasing. BLM also agreed to delay any calls for commercial leasing, but retained the right to continue nominating parcels for Research, Development, and Demonstration (RD&amp;D) leases and to convert existing RD&amp;D leases to commercial leases.</p>
<b>Comite Civico del Valle, Inc. v. Jackson et al. (CA SIP)</b> 10-00946 (N.D. Cal.) Settled: 6/11/2010	EPA	<p><b>Issue:</b> CA SIP regarding measures to control particulate matter emissions from beef feedlot operations within the Imperial Valley</p> <p><b>Result:</b> EPA agreed to take final action on the SIP revision regarding particulate matter emissions from beef feedlot operations within the Imperial Valley. The final rule was published on November 10, 2010.</p>
<b>Comite Civico del Valle, Inc. v. Jackson et al. (Imperial County 1)</b> 09-04095 (N.D. Cal.) Settled: 11/10/2009	EPA	<p><b>Issue:</b> CA SIP revision regarding Imperial County Air Pollution Control District Rules 800-806 (addressing PM<sub>10</sub>)</p> <p><b>Result:</b> EPA agreed to take final action on the Imperial County Air Pollution Control District's Rules 800-806 (addressing PM<sub>10</sub>) that revise the CA SIP. A proposed rule was published on January 7, 2013.</p>
<b>Comite Civico del Valle, Inc. v. Jackson et al. (Imperial County 2)</b> 10-02859 (N.D. Cal.) Settled: 10/12/2010	EPA	<p><b>Issue:</b> CA SIP revision regarding Imperial County Air Pollution Control District Rules 201, 202, and 217</p> <p><b>Result:</b> EPA agreed to take final action on Imperial County Air Pollution Control District Rules 201, 202, and 217 that revise the CA SIP.</p>
<b>Defenders of Wildlife v. Jackson</b> 10-01915 (D.D.C.) Settled: 11/5/2010, 11/8/10 moved for entry same day the complaint was filed (see page 3 of the 3/18/12 memorandum opinion), 3/18/12 (ordered)	EPA	<p><b>Issue:</b> Effluent Limitation Guidelines for Steam Electric Power Generating Point Source</p> <p><b>Result:</b> EPA agreed to sign a notice of proposed rulemaking regarding revisions to the effluent guidelines for steam electric power plants, followed by a final rule. In this case, the advocacy group's complaint was filed on the same day that the parties moved to enter the consent decree.</p>
<b>El Comite Para El Bienestar De Earlimart et al. v. EPA et al.</b> 11-03779 (N.D. Cal.) Settled: 11/14/2011	EPA	<p><b>Issue:</b> CA SIP submission regarding fumigant rules in San Joaquin Valley</p> <p><b>Result:</b> EPA agreed to take final actions on the Pesticide Element SIP Submittal and the Fumigant Rules Submittal. A final rule was published on October 26, 2012.</p>
<b>Environmental Defense Fund v. Jackson</b> 11-04492 (S.D.N.Y.) Settled: 7/6/2012	EPA	<p><b>Issue:</b> NSPS for municipal solid waste landfills</p> <p><b>Result:</b> EPA agreed to review and, if applicable, revise the NSPS for municipal solid waste landfills.</p>

Case	Agency	Issue and Result
<b>Florida Wildlife Federation v. Jackson</b> 08-00324 (N.D. Fla.) Settled: 8/25/2009	EPA	<b>Issue:</b> Numeric nutrient criteria for waters in FL  <b>Result:</b> Environmental groups sued EPA in July 2008 to develop numeric nutrient criteria for FL. EPA entered into a consent decree with the plaintiffs in 2009. As part of the consent decree, EPA agreed to issue limits in phases. Limits for FL's inland water bodies outside South FL were finalized on December 6, 2010; the limits for estuaries and coastal waters, and South FL's inland flowing waters were proposed on December 18, 2012. Final rules, by consent decree, are required by September 30, 2013.
<b>Fowler v. EPA</b> 09-00005 (D.D.C.) Settled: 5/10/2010	EPA	<b>Issue:</b> Clean Water Act regulatory regime for Chesapeake Bay  <b>Result:</b> EPA agreed to establish a Total Maximum Daily Load for the Chesapeake Bay. The settlement requires EPA to develop changes to its storm water program affecting the Bay.
<b>Friends of Animals v. Salazar</b> 10-00357 (D.D.C.) Settled: 7/21/2010	DOI	<b>Issue:</b> DOI non-action on plaintiff's petitions to list 12 species of parrots, macaws, and cockatoos as endangered or threatened under the Endangered Species Act  <b>Result:</b> DOI agreed to issue 12-month findings on the 12 species contained in the petition.
<b>In re Endangered Species Act Section 4 Deadline Litigation (This case relates to Center for Biological Diversity v. Salazar, 10-0230, and 12 different WildEarth Guardians complaints)</b> 10-00377 (D.D.C.) Settled: Wildlife Guardians: 5/10/2011 CBD: July 12, 2011	DOI	<b>Issue:</b> WildEarth Guardians cases: 12 lawsuits seeking to designate 251 species as threatened or endangered under the Endangered Species Act. CBD case: Seeking 90-day findings for 32 species of Pacific Northwest mollusks, 42 species of Great Basin springsnails, and 403 southeast aquatic species.  <b>Result:</b> WildEarth: U.S. Forest Service agreed to make a final determination on Endangered Species Act status for 251 candidate species on or before September 2016. CBD: FWS agreed to make requested findings no later than the end of 2011 (this covers 32 species of Pacific Northwest mollusks, 42 species of Great Basin springsnails, and the 403 southeast aquatic species). Note: There are additional actions required for both settlements.
<b>Kentucky Environmental Foundation v. Jackson (Huntington-Ashland SIP)</b> 10-01814 (D.D.C.) Settled: 8/4/2011	EPA	<b>Issue:</b> KY SIP revision addressing 1997 PM <sub>2.5</sub> NAAQS  <b>Result:</b> EPA agreed to take final action on the Kentucky SIP addressing 1997 PM <sub>2.5</sub> NAAQS for the Huntington-Ashland area. The final rule was published in April 2012.
<b>Kentucky Environmental Foundation v. Jackson (Louisville SIP)</b> 11-01253 (D.D.C.) Settled: 2/27/2012	EPA	<b>Issue:</b> KY SIP regarding 1997 PM <sub>2.5</sub> NAAQS  <b>Result:</b> EPA had already taken actions by the time the agreement was made. EPA did agree to take final action on the PM <sub>2.5</sub> emissions inventory for the Louisville SIP.
<b>Louisiana Environmental Action Network v. Jackson</b> 09-01333 (D.D.C.) Settled: 11/23/2010	EPA	<b>Issue:</b> LA SIP for 1997 ozone NAAQS  <b>Result:</b> LEAN brought the case to compel EPA to take action on ozone standards in the Baton Rouge area. As part of the settlement, LEAN agreed to ask the court to hold the litigation in abeyance and EPA agreed to take action if the Baton Rouge area does not come into attainment.
<b>Missville Environmental</b>	EPA	<b>Issue:</b> New MACT standards for polyvinyl chloride (PVC) manufacturers

Case	Agency	Issue and Result
<b>Action NOW v. Jackson</b> 08-01803 (D.D.C.) Settled: 10/30/2009		<b>Result:</b> Environmental groups previously litigated and won a decision overturning EPA's 2002 decision not to make the MACT standards for PVC makers more stringent. Environmental groups brought this case in 2008 to compel EPA to set new MACT standards. In 2009, there was a settlement agreement between EPA and the plaintiffs. The agreement called upon EPA to finalize the new MACT standards. EPA issued a final rule in April 2012.
<b>National Parks Conservation Association v. Jackson (Regional haze FIPs and SIPs)</b> 11-01548 (D.D.C.) Settled: 11/9/2011	EPA	<b>Issue:</b> Regional haze FIPs and SIPs <b>Result:</b> EPA agreed to deadlines to promulgate proposed and final regional haze FIPs and/or SIPs (or partial FIPs and SIPs).
<b>Natural Resources Defense Council et al. v EPA</b> 09-60510 (5th Cir.) Settled: 5/25/2010	EPA	<b>Issue:</b> Reporting requirements for concentrated animal feeding operations (CAFOs) <b>Result:</b> EPA agreed to create publicly available guidance to assist in the implementation of NPDES permit regulations and Effluent Limitation Guidelines and Standards for CAFOs. The agency also agreed to publish a proposed rule regarding reporting requirements for CAFOs. A proposed rule was published in October 2011 and later withdrawn in July 2012.
<b>Natural Resources Defense Council v. EPA</b> 06-0820 (2d Cir.) Settled: 6/17/2010 (see EarthJustice press release). Finalized on 11/3/10 (see proposed rule)	EPA	<b>Issue:</b> Pesticide human testing consent rule <b>Result:</b> A 2006 human-testing rule required subjects of paid pesticide experiments to provide "legally effective informed consent." Environmental groups challenged the rule. A June 2010 settlement required EPA to propose amendments to the rule to make it stricter. The settlement required EPA to incorporate specific language in the rule. The new rules were proposed on February 2, 2011. The final rule was published on February 14, 2013 and includes the negotiated language.
<b>Natural Resources Defense Council v. EPA (California SIP)</b> 10-06029 (C.D. Cal.) Settled: 12/13/2010	EPA	<b>Issue:</b> CA SIP submission for 1997 ozone and PM <sub>2.5</sub> NAAQS <b>Result:</b> EPA agreed to take action on SIPs as they apply to PM <sub>2.5</sub> and ozone for California's South Coast Air Basin.
<b>Natural Resources Defense Council v. Salazar</b> 10-00299 (D.D.C.) Settled: 6/18/2010	Fish and Wildlife Service (FWS); DOI	<b>Issue:</b> Listing of whitebark pine tree as an endangered species under the Endangered Species Act as a result of climate change <b>Result:</b> On July 19, 2011, FWS found that the whitebark pine tree should be listed as threatened or endangered under the Endangered Species Act as a result of climate change. It was the first time the federal government has declared a widespread tree species in danger of extinction because of climate change.
<b>New York v. EPA</b> 06-1322 (D.C. Cir.) Settled: 12/23/2010 (see EPA settlement page)	EPA	<b>Issue:</b> GHG NSPS for power plants <b>Result:</b> On April 13, 2012, EPA proposed the first-ever NSPS for GHG emissions from new coal- and oil-fired power plants. This came about as a result of a settlement of a 2006 lawsuit challenging power plant NSPS.
<b>Northwoods Wilderness Recovery v. Kempthorne</b> 08-01407 (N.D. Ill.)	FWS; DOI	<b>Issue:</b> FWS's exclusion of 13,000 acres of national forest land in Michigan and Missouri from the final "critical habitat" designation for the Hine's emerald dragonfly under the Endangered Species Act

Case	Agency	Issue and Result
Settled: 1/13/2009		<b>Result:</b> FWS agreed to a remand without vacatur of the critical habitat designation in order to reconsider the federal exclusions from the designation of critical habitat for the Hine's emerald dragonfly. FWS doubled the size of the critical habitat from 13,000 acres to more than 26,000. The final rule was published in April 2010.
<b>Portland Cement Assn. v. EPA</b> 07-1046 (D.C. Cir.) Settled: 1/6/2009 (This date is based on when DOJ signed the settlement agreement)	EPA	<b>Issue:</b> MACT standards for cement kilns <b>Result:</b> EPA settled a lawsuit seeking to force the agency to control mercury emissions from cement kilns. The settlement was between EPA and numerous petitioners that challenged the 2006 cement MACT rule. The petitioners included environmental groups, states, and the cement industry. The final cement MACT rule was published in the Federal Register on September 9, 2010; environmental groups and cement industry petitioned for reconsideration of the 2010 rule. EPA denied in part and amended in part the petitions to reconsider. EPA published a new final rule on February 12, 2013. The reconsidered rule relaxed some aspects of the 2010 rule, and allowed cement companies more time to comply.
<b>Riverkeeper v. EPA</b> 06-12987 (S.D.N.Y.) Settled: 11/22/2010	EPA	<b>Issue:</b> Clean Water Act 316(b) standards on cooling water intake structures <b>Result:</b> The EPA agreed to propose and finalize a rule regulating cooling water intake structures under 316(b), and to consider the feasibility of more stringent technical controls.
<b>Sierra Club et al. v. Jackson</b> (ozone NC, NV, ND, HI, OK, AK, ID, OR, WA, MD, VA, TN, AR, AZ, FL, and GA) 10-04060 (N.D. Cal.) Settled: 8/12/2011 (Date that court ordered Joint Motion to Stay All Deadlines. This motion was filed with the Notice of Proposed Settlement)	EPA	<b>Issue:</b> Action on 1997 ozone NAAQS revisions for NC, NV, ND, HI, OK, AK, ID, OR, WA, MD, VA, TN, AR, AZ, FL, and GA <b>Result:</b> EPA agreed to take final action on 1997 Ozone NAAQS revision for NC, NV, ND, HI, OK, AK, ID, OR, WA, MD, VA, TN, AR, AZ, FL, and GA.
<b>Sierra Club et al. v. Jackson et al. (CA RACT SIP)</b> 11-03106 (N.D. Cal.) Settled: 1/6/2012	EPA	<b>Issue:</b> CA SIP submissions regarding reasonably available control technology demonstration <b>Result:</b> EPA agreed to take final action on the CA RACT SIP.
<b>Sierra Club et al. v. Jackson et al. (San Joaquin Valley)</b> 10-01954 (N.D. Cal.) Settled: 11/8/2010	EPA	<b>Issue:</b> CA SIP submission for 1997 ozone NAAQS <b>Result:</b> EPA agreed to take final action on the 8-hour ozone plan submitted by the San Joaquin Valley Air Pollution Control District, the purpose of which is to achieve progress toward attainment of 1997 ozone NAAQS. A final rule was published on March 1, 2012.
<b>Sierra Club et al. v EPA (lead case)</b> 08-1258 (D.C. Cir.) Settled: 8/24/2009 (see also the amended settlement)	EPA	<b>Issue:</b> Lead Renovation, Repair and Painting Program <b>Result:</b> In 2008, numerous environmental groups commenced lawsuits against EPA to challenge the Lead Renovation, Repair, and Painting Program Rule, and these suits were consolidated in the DC Circuit Court of Appeals.

Case	Agency	Issue and Result
agreement referring to this date)		As part of this settlement agreement, EPA agreed to propose significant and specific changes to the rule that were outlined in the settlement agreement. Significantly, EPA agreed to drop an "opt-out" provision that would allow millions of homes without children or pregnant women to waive the lead restrictions.
<b>Sierra Club filed a notice of intent to file a lawsuit</b>	EPA	<b>Issue:</b> Attainment determinations for 1997 ozone NAAQS for areas in NY, NJ, CT, MA, IL, MO and other areas
NOTICE OF INTENT		<b>Result:</b> EPA agreed to make attainment determinations for 1997 ozone NAAQS for areas in NY, NJ, CT, MA, IL, and MO. The "other areas" were not included because EPA and plaintiffs agreed that EPA had already addressed the issues for those areas.
Settled: 12/19/2011		
<b>Sierra Club v. EPA (Nitric Acid)</b>	EPA	<b>Issue:</b> Nitric acid plants NSPS
09-00218 (D.D.C.)		<b>Result:</b> EPA agreed to review NSPS for nitric acid plants: As a result of this review, EPA proposed NSPS for nitric acid plants in October 2011. The final rule was published in August 2012.
Settled: 11/3/2009		
<b>Sierra Club v. EPA et al. (clay ceramics)</b>	EPA	<b>Issue:</b> Brick MACT
08-00424 (D.D.C.)		<b>Result:</b> EPA agreed to issue final rules setting MACT standards for brick and structural clay products manufacturing facilities located at major sources and clay ceramics manufacturing facilities located at major sources.
Settled: 11/20/2012		
<b>Sierra Club v. EPA et al. (TX ozone PM SIP)</b>	EPA	<b>Issue:</b> TX SIP submission regarding 1997 ozone and PM <sub>2.5</sub> NAAQS
10-01541 (D.D.C.)		<b>Result:</b> EPA agreed to take final action on certain infrastructure components of TX SIP submissions for 1997 ozone and PM <sub>10</sub> NAAQS.
Settled: 9/13/2011		
<b>Sierra Club v. Jackson (21 states)</b>	EPA	<b>Issue:</b> 21 states' SIPs submissions for 1997 ozone NAAQS
10-00133 (D.D.C.)		<b>Result:</b> EPA agreed to approve or disapprove the 1997 8-hour ozone NAAQS Infrastructure SIPs for ME, RI, CT, NH, AL, KY, MS, SC, WI, IN, MI, OH, LA, KS, NE, MO, CO, MT, SD, UT, and WY.
Settled: 4/29/2010 (EPA lodged consent decree with court on this date)		
<b>Sierra Club v. Jackson (28 different MACT)</b>	EPA	<b>Issue:</b> MACT standards for 28 industry source categories
09-00152 (N.D. Cal.)		<b>Result:</b> Sierra Club sued EPA on January 13, 2009—seven days prior to the change in administration—to review and revise Clean Air Act MACT standards for 28 different categories of industrial facilities, including wood furniture manufacturing, Portland Cement, pesticides, lead smelting, secondary aluminum, pharmaceuticals, shipbuilding, and aerospace manufacturing. On July 6, 2010, EPA lodged a consent decree that required EPA to revise MACT standards for all 28 categories.
Settled: 7/6/2010		
<b>Sierra Club v. Jackson (AL and GA SIPs)</b>	EPA	<b>Issue:</b> AL SIP submission for 1997 PM <sub>2.5</sub> NAAQS and GA SP submission for 1997 ozone NAAQS
11-02000 (D.D.C.)		<b>Result:</b> EPA agreed to take final action on "numerous SIP submittals" by AL for the 1997 PM <sub>2.5</sub> NAAQS and GA for the 1997 8-hour ozone NAAQS.
Settled: 7/20/2012		
<b>Sierra Club v. Jackson (AR Regional Haze)</b>	EPA	<b>Issue:</b> AR Regional Haze SIP

Case	Agency	Issue and Result
10-02112 (D.D.C.) Settled: 8/3/2011		<b>Result:</b> EPA agreed to sign a notice of final rulemaking to approve or disapprove the AR Regional Haze SIP.
<b>Sierra Club v. Jackson (Boiler MACT and RICE rule)</b> 01-01537 (D.D.C.) Settled: RICE and Boiler MACT: 5/22/03 (consent decree), For RICE: 11/15/07 amendment to change deadlines; 11/9/09 amendment to change deadlines; 2/10/10 was a third modification to the deadline.	EPA	<b>Issue:</b> MACT standards for boilers and stationary reciprocating internal combustion engines (RICE)  <b>Result:</b> In 2003, EPA and Sierra Club entered into a consent decree that required MACT standards for boilers and RICE. There were other MACT standards requirements as well. For Boiler MACT: The rule history is extremely complicated. In 2006, the DC District court issued an order detailing a schedule. EPA and Sierra Club both agreed multiple times to extend the deadline to finalize rules. However, Sierra Club opposed EPA's motion to extend a January 16, 2011 deadline that was established in a September 20, 2010, order, from January 16, 2011 to April 13, 2012. EPA realized that it needed much more time for the final rules. Judge Paul Friedman of the DC District Court decided that enough was enough and gave EPA only one month to issue the rules. EPA did in fact issue the rule on March 21, 2011, and that same day published a notice of reconsideration. The final rules based on the reconsideration were published on January 31, 2013, and February 1, 2013. For the RICE rule: In 2007, 2009, and 2010, EPA and Sierra Club modified the deadline dates for final action as required in the decree. EPA agreed to take additional comment on the RICE rule in June and October 2012, and published the final RICE rule in January 2013.
<b>Sierra Club v. Jackson (DSW Rule)</b> 09-1041 Consol. with 09-1038 (D.C. Cir.) Settled: 9/7/2010 (see also proposed rule that says this date, pp. 44, 102)	EPA	<b>Issue:</b> Revisions to the Definition of Solid Waste under RCRA  <b>Result:</b> Sierra Club challenged the 2008 "Definition of Solid Waste" rule, which established requirements for recycling hazardous secondary materials. To settle the lawsuit, EPA agreed it would review and reconsider the rule. In July 2011, EPA published a proposed rule, significantly tightening the types of materials that can be recycled under RCRA.
<b>Sierra Club v. Jackson (Houston-Galveston-Brazoria)</b> 12-00012 (D.D.C.) Settled: 6/21/2012	EPA	<b>Issue:</b> TX SIP submission for 1997 ozone NAAQS  <b>Result:</b> EPA agreed to take final action on the SIP for the Houston-Galveston-Brazoria 1997 8-hour ozone nonattainment areas.
<b>Sierra Club v. Jackson (Kentucky Regional Haze)</b> 10-00889 (D.D.C.) Settled: 10/29/2010	EPA	<b>Issue:</b> KY SIP submissions for 1997 ozone NAAQS and Regional Haze  <b>Result:</b> EPA agreed to the following: By April 15, 2011, EPA would take final action on ozone SIP submittals for various Kentucky ozone maintenance areas; by March 15, 2012, EPA would take final action on KY's Regional Haze SIP.
<b>Sierra Club v. Jackson (MA, CT, NJ, NY, PA, MD, and DE SIPs)</b> 11-02180 (D.D.C.) Settled: 7/23/2012	EPA	<b>Issue:</b> SIP submissions for certain NAAQS by MA, CT, NJ, NY, PA, MD, and DE  <b>Result:</b> EPA agreed to take final actions on SIPs for certain NAAQS for MA, CT, NJ, NY, PA, MD, and DE.
<b>Sierra Club v. Jackson (ME, MO, IL, and WI SIPs)</b> 11-00035 (D.D.C.) Settled: 11/30/2011	EPA	<b>Issue:</b> SIP submissions for 1997 ozone NAAQS by ME, MO, IL, and WI  <b>Result:</b> EPA agreed to take final action on the SIPs for certain areas of IL, ME, and MO. Wisconsin was not included because the issue was already

Case	Agency	Issue and Result
		resolved.
<b>Sierra Club v. Jackson (NC and SC SIPs)</b>	EPA	<b>Issue:</b> NC and SC SIP submissions regarding 1997 ozone NAAQS
12-00013 (D.D.C.)		<b>Result:</b> EPA agreed to take final actions on North Carolina and South Carolina SIPs for Charlotte-Gastonia-Rock Hill.
Settled: 6/28/2012		
<b>Sierra Club v. Jackson (OK SIP)</b>	EPA	<b>Issue:</b> OK SIP revision regarding excess emissions
12-00705 (D.D.C.)		<b>Result:</b> EPA agreed to take final action on a revision to the OK SIP regarding excess emissions.
Settled: 10/15/2012		
<b>Sierra Club v. Jackson (ozone TX, CT, MD, NY, NJ, MA, and NH)</b>	EPA	<b>Issue:</b> Attainment determinations for 1-hour ozone for areas in TX, CT, MD, NY, NJ, MA, and NH
11-00100 (D.D.C.)		<b>Result:</b> EPA agreed to make attainment determinations for 1 hour ozone for areas in TX, CT, MD, NY, NJ, MA, and NH.
Settled: 9/12/2011		
<b>WildEarth Guardians et al. v. Jackson (ozone AZ, NV, PA, and TN)</b>	EPA	<b>Issue:</b> Nonattainment of 1997 ozone NAAQS for areas in AZ, NV, PA, and TN
10-04603 (N.D. Cal.)		<b>Result:</b> EPA agreed to set a deadline for issuing findings of failure to submit SIPs for the 1997 ozone NAAQS for areas in NV and PA. Other actions addressed concerns in two other states.
Settled: 3/23/2011 (Date found in the notice of proposed settlement)		
<b>WildEarth Guardians v. Jackson (2008 ozone NAAQS)</b>	EPA	<b>Issue:</b> Area designations for 2008 ground level ozone NAAQS
11-01661 (D. Ariz.)		<b>Result:</b> EPA agreed to sign for publication in the Federal Register a notice of the Agency's promulgation of area designations for the 2008 ground-level ozone NAAQS.
Settled: 12/12/2011		
<b>WildEarth Guardians v. Jackson (2nd suit for Phoenix)</b>	EPA	<b>Issue:</b> AZ SIP submission for 1997 ozone NAAQS
11-02205 (N.D. Cal.)		<b>Result:</b> EPA agreed to take action on AZ SIP submission pertaining to Phoenix-Mesa's plan to achieve progress toward attainment of 1997 ozone NAAQS. EPA issued a final rule on June 13, 2012.
Settled: 6/7/2011		
<b>WildEarth Guardians v. Jackson (CO, UT, MT, and NM SIPs)</b>	EPA	<b>Issue:</b> Final action on 22 SIP submissions from CO, UT, and MT
09-02148 (D. Colo.)		<b>Result:</b> EPA agreed to take final action on 22 SIP submissions from CO, UT, and MT, and then added 19 SIP submissions from NM, for a total of 41 SIP submissions.
Settled: 2/1/2010		
<b>WildEarth Guardians v. Jackson (oil and gas)</b>	EPA	<b>Issue:</b> Clean Air Act Regulations on Oil and Gas Drilling Operations
09-00089 (D.D.C.)		<b>Result:</b> In January 2009, environmental groups sued EPA to update federal regulations limiting air pollution from oil and gas drilling operations. EPA settled with environmentalists on December 3, 2009. The settlement required EPA to review and update three sets of regulations: (1) NSPS for oil and gas drilling; (2) MACT standards for hazardous air pollutant emissions; (3) and "residual risk" standards. On August 23, 2011, EPA proposed a comprehensive set of updates to these rules, including new NSPS and MACT standards. On August 16, 2012, EPA issued final rules covering NSPS, MACT, and residual risk for the oil and gas sector.
Settled: 12/3/2009		

Case	Agency	Issue and Result
<b>WildEarth Guardians v. Jackson (ozone)</b> 09-02453 (N.D. Cal.) Settled: 2/18/2010	EPA	<b>Issue:</b> SIP submissions for 1997 8-hour ozone and PM <sub>2.5</sub> NAAQS by CA, CO, ID, NM, ND, OK, and OR  <b>Result:</b> EPA agreed to decide, for each state, whether to approve or deny SIPs for the 1997 8-hour ozone and PM <sub>2.5</sub> NAAQS, or whether to instead force the states to comply with a federal implementation plan.
<b>WildEarth Guardians v. Jackson (PM<sub>2.5</sub>)</b> 11-00190 (N.D. Cal.) Settled: 8/25/2011	EPA	<b>Issue:</b> SIP submissions for 2006 PM <sub>2.5</sub> NAAQS infrastructure by 20 states  <b>Result:</b> EPA agreed to sign a final action to approve or disapprove the 2006 PM <sub>2.5</sub> NAAQS infrastructure SIPs for AL, CT, FL, MS, NC, TN, IN, ME, OH, NM, DE, KY, NV, AR, NH, SC, MA, AZ, GA, and WV.
<b>WildEarth Guardians v. Jackson (CO, WY, MT, and ND SIPs)</b> 11-00001 (Consolidated with 11-00743) (D. Colo.) Settled: 6/6/2011	EPA	<b>Issue:</b> CO, WY, MT, and ND SIP submissions for Regional Haze and excess emissions standards  <b>Result:</b> EPA agreed to decide for each state whether to approve or deny the SIP submissions.
<b>WildEarth Guardians v. Jackson (Utah breakdown provision)</b> 09-02109 (D. Colo.) Settled: 11/23/2009	EPA	<b>Issue:</b> Utah SIP revision regarding breakdown provision  <b>Result:</b> EPA agreed to take a final action regarding the "Utah breakdown provision," which allows sources to exceed their permitted air pollution limits during periods of "unavoidable breakdown." In April 2011, EPA found the breakdown provision inadequate and called on the state to revise its SIP.
<b>WildEarth Guardians v. Jackson (Utah SIP)</b> 10-01218 (D. Colo.) Settled: 10/28/2010	EPA	<b>Issue:</b> Utah SIP submissions for Regional Haze and PM <sub>10</sub> NAAQS  <b>Result:</b> EPA agreed to sign a final action approving or disapproving, in whole or in part, Utah's request to redesignate Salt Lake City's attainment status for PM <sub>10</sub> NAAQS. EPA also agreed to take final action on Utah's Regional Haze submission.
<b>WildEarth Guardians v. Jackson, et al. (Utah Salt Lake and Davis Counties SIP)</b> 12-00754 (D. Colo.) Settled: 7/11/2012	EPA	<b>Issue:</b> Deadline for action on Utah SIP for 1997 NAAQS for ozone regarding Salt Lake and Davis Counties  <b>Result:</b> EPA agreed to sign a notice of final action regarding Utah's proposed SIP revision for maintenance of the 1997 8-hour NAAQS for ozone in Salt Lake and Davis Counties.
<b>WildEarth Guardians v. Kempthorne</b> 08-00689 (D. Ariz.) Settled: 4/29/2009	DOI	<b>Issue:</b> Critical habitat designation for the Chiricahua leopard frog  <b>Result:</b> DOI under the Bush administration listed the leopard frog as threatened under the Endangered Species Act but declined to designate a critical habitat because doing so would not be "prudent," as is permitted by the Endangered Species Act. WildEarth Guardians sued to challenge this decision, and the Obama administration's DOI settled the case. The terms of the settlement provided that DOI would reconsider its prudency determination. On March 20, 2012, DOI finalized a rule that reversed its prudency decision and designated approximately 10,346 acres as critical habitat for the Chiricahua leopard frog.
<b>WildEarth Guardians v. Locke</b> 10-00283 (D.D.C.)	Dept. of Commerce	<b>Issue:</b> Alleged failure by National Marine Fisheries Service (NMFS) to set Endangered Species Act protections for sperm whales, fin whales, and sei

Case	Agency	Issue and Result
Settled: 6/25/2010		whales <b>Result:</b> NMFS agreed to issue recovery plans for sperm whales, fin whales, and sei whales by the end of 2011.
<i>WildEarth Guardians v. Salazar (674 species)</i> 08-00472 (D.D.C.) Settled: 3/13/2009	DOI	<b>Issue:</b> DOI non-action on plaintiff's petitions to list 674 plant and animal species as threatened under the Endangered Species Act <b>Result:</b> DOI agreed to issue decisions on hundreds of species for which no finding had already been made.
<i>WildEarth Guardians v. Salazar (Wright's marsh thistle)</i> 10-01051 (D.N.M.) Settled: 6/2/2010	DOI	<b>Issue:</b> DOI non-action on petition to list the Wright's marsh thistle as endangered or threatened under the Endangered Species Act <b>Result:</b> DOI agreed to issue a decision on whether to list the the Wright's marsh thistle. FWS listed the Wright's marsh thistle as endangered or threatened on November 4, 2010 (it was a 12-month petition finding).

Most sue and settle cases are resolved through a consent decree or settlement agreement. However, there is a comparable type of case in which the case is resolved by agency action in response to the legal challenge, as opposed to resolving the case with a consent decree or settlement agreement. Like with the "standard" sue and settle cases, special interests bring legal actions to compel agencies to take their desired actions. A common thread between the cases is the special interests are able to change policy affecting the general public without the public having sufficient notice or opportunity to change agency actions.

Case	Agency	Issue and Result
<i>California v. EPA</i> 08-1178 (D.C. Cir.) Settled: 6/30/2009 (EPA granted the waiver; see also EPA waiver web page)	EPA	<b>Issue:</b> Grant of California GHG Waiver <b>Result:</b> EPA, California, environmental groups and the automobile industry negotiated a settlement of a multi-party lawsuit requesting that EPA set Clean Air Act Title II emissions limitations on GHG emissions from automobiles, and granting California a waiver to set its own automobile GHG standards. EPA had previously denied the waiver in 2008; a lawsuit followed. In January, 2009, California asked for reconsideration of the waiver request. EPA granted the waiver in June 2009 (the notice was published in the Federal Register on July 8, 2009).
<i>Center for Biological Diversity v. Kempthorne</i> 08-05546 (lead case—a consolidated case is NRDC v. DOI, 08-05605) (N.D. Cal.) Settled: 5/14/2009	DOI, NMFS, Dept. of Commerce	<b>Issue:</b> December 2008 amendments to the Section 7 consultation rules under the Endangered Species Act and the decision to exempt greenhouse gas emitters from regulation under the Endangered Species Act <b>Result:</b> While the lawsuit was pending, the Department of Interior unilaterally revoked the Section 7 rule at issue, reverting to the Section 7 consultation process as it existed prior to the December 2008 amendments. The parties to this lawsuit then jointly agreed to dismiss the case. A formal settlement agreement was not issued.
<i>Greater Yellowstone Coalition v. Kempthorne</i> 08-02138 (D.D.C.) Settled: 11/2/2009	National Park Service, DOI	<b>Issue:</b> December 2008 rule allowing limited recreational snowmobile use (720 snowmobiles per day) inside Yellowstone National Park <b>Result:</b> While the lawsuit was pending, the National Park Service

Case	Agency	Issue and Result
		announced, on October 15, 2009, a new winter rule superseding the December 2008 rule of which the plaintiffs complained. The plan reduced snowmobile usage to 318 snowmobiles per day, which is less than half the allowed number under the prior rule.
<i>League of Wilderness Defenders-Blue Mountains Biodiversity Project v. Kevin Martin</i>	U.S. Forest Service	<b>Issue:</b> Whether authorization of the Wildcat Fuels Reduction and Vegetation Management Project in the Umatilla National Forest violates NEPA and Administrative Procedure Act <b>Result:</b> U.S. Forest Service agreed to withdraw its decision notice for the project, which would have allowed timber to be harvested from the National Forest. The parties then agreed to dismiss the case.
09-01023 (D. Or.) Settled: Stipulation of Dismissal, 12/30/2009		
<i>Mississippi v. EPA (ozone case)</i>	EPA	<b>Issue:</b> Ozone NAAQS Reconsideration <b>Result:</b> Earthjustice sued EPA in 2008 challenging the NAAQS for ground-level ozone, which were lowered at the time from 84 parts per billion (ppb) to 75 ppb. In 2009, EPA announced it would reconsider the rule, and Earthjustice agreed to place its lawsuit on hold as long as EPA imposed stricter ozone NAAQS. EPA proposed new NAAQS somewhere in the range of 60 and 70 ppb. The Obama Administration put the planned rule on hold. However, the rule is expected to be proposed in late 2013.
08-1200 (D.C. Cir.) Settled: 1/19/2010 (This is the publication date of the proposed ozone standards)		
<i>Natural Resources Defense Council v. Federal Maritime Commission</i>	Federal Maritime Comm'n	<b>Issue:</b> Federal Maritime Commission (FMC) decision to terminate portions of the Port of Los Angeles' and Long Beach's Clean Trucks Programs <b>Result:</b> While the lawsuit was pending, FMC ended its administrative investigation against the Ports of Los Angeles and Long Beach related to their clean trucks programs, and in a related case, FMC's attempt to block implementation of the ports' clean trucks program was dismissed.
08-07436 (C.D. Cal.) Settled: 9/11/2009		
<i>Natural Resources Defense Council v. DOI</i>	DOI, NMFS, Dept. of Commerce	<b>Issue:</b> December 2008 amendments to the Section 7 consultation rules under the Endangered Species Act and the decision to exempt greenhouse gas emitters from regulation under the Endangered Species Act <b>Result:</b> While the lawsuit was pending, the Department of Interior unilaterally revoked the Section 7 rule at issue, reverting to the Section 7 consultation process as it existed prior to the December 2008 amendments. The parties to this lawsuit then jointly agreed to dismiss the case. A formal settlement agreement was not issued.
08-05605 (N.D. Cal.) Settled: 5/15/2009		
<i>Ohio Valley Environmental Coalition v. Army Corps of Engineers</i>	EPA	<b>Issue:</b> Clean Water Act Guidance for Mountaintop Removal Mining Permits <b>Result:</b> Environmental groups challenged Clean Water Act permitting for mountaintop removal mining, saying EPA did not account for the impact on stream function. EPA issued this "guidance" while suit was pending in the U.S. Supreme Court, which effectively settled the case.
09-247 (R46-024) (U.S.) Settled: 7/30/2010 (Memo that effectively settled the case)		
<i>Sierra Club v. EPA (emission case)</i>	EPA	<b>Issue:</b> Emission-Comparable Fuels (ECF) conditional exclusion reconsideration <b>Result:</b> EPA issued a December 2008 rule creating a category of Emission-Comparable Fuels (ECF) wastes that could be burned in industrial boilers without triggering RCRA combustion requirements, as long as the resulting
09-1063 (D.C. Cir.) Settled: 6/15/2010 EPA revoked the rule		

Case	Agency	Issue and Result
		emissions were comparable to those produced by burning fuel oil. Environmental groups sued, and EPA proposed a rule that would withdraw this conditional exclusion for ECF. In June, 2010, EPA published a final rule that revoked this conditional exclusion.
<p><b><i>Southern Appalachian Mountain Stewards v. Anninos</i></b></p> <p>09-00200 (Complaint, Army Corps Joint Status Report (stating decision to suspend NWP 21 permit), Stipulation of Dismissal)</p> <p>Settled: 6/18/2010 (This date is based on a 6/30/10 status report explaining the suspension of permits as of 6/18/10)</p>	Army Corps	<p><b>Issue:</b> Decision to Issue a streamlined nationwide Clean Water Act permit for surface coal mining</p> <p><b>Result:</b> Army Corps suspended the use of Nationwide Permit 21, which authorized discharges of dredged or fill material into waters of the United States for surface coal mining activities. As a result, coal mining companies must obtain costly, time-consuming individual dredge and fill permits from the Corps.</p>
<p><b><i>Taylor v. Locke</i></b></p> <p>09-02289 (D.D.C.)</p> <p>Settled: 7/19/2010</p>	National Marine Fisheries Service (NMFS)	<p><b>Issue:</b> Atlantic Herring Fishery Revocation of Exemption</p> <p><b>Result:</b> Settlement removes exemption that allowed herring industrial trawlers to release small amounts of fish that remain after pumping without federal inspection. The new final rule by NMFS, published in 2010, requires federal accounting and inspection for all fish brought on board.</p>

## List of Rules and Agency Actions

### Rules and Agency Actions Resulting From Sue and Settle Cases (Pending or Final) 2009–2012

Air	
<ul style="list-style-type: none"> <li>▪ The Environmental Protection Agency (EPA) agreed to propose the first-ever greenhouse gas (GHG) regulations for power plants.</li> <li>▪ EPA agreed to propose the first-ever GHG regulations for petroleum refineries.</li> <li>▪ EPA issued Maximum Achievable Control Technology (MACT) standards for cement kilns.</li> <li>▪ EPA revoked rule that made it easier to burn Emission Comparable Fuel wastes.</li> <li>▪ EPA proposed stricter ozone standards (withdrawn, but could be published at any time).</li> <li>▪ EPA issued a rule that made the National Ambient Air Quality Standards (NAAQS) for particulate matter more stringent.</li> <li>▪ EPA issued MACT standards for hazard air pollutants for coal- and oil-fired electric utility steam generating units (Utility MACT).</li> <li>▪ EPA granted waiver to CA to set its own limitations on GHG emissions from automobiles.</li> <li>▪ EPA to increase regulations on oil- and gas-drilling operations regulations, including:               <ul style="list-style-type: none"> <li>○ New Source Performance Standards (NSPS) for oil and gas drilling</li> <li>○ MACT standards for hazardous air pollutant emissions</li> <li>○ Residual Risk Standards</li> </ul> </li> <li>▪ EPA finalized new MACT standards for polyvinyl chloride manufacturers.</li> <li>▪ EPA agreed to set MACT standards for brick and structural clay products manufacturing facilities located at major sources and clay ceramics manufacturing facilities located at major sources.</li> <li>▪ EPA imposed a Federal Implementation Plan (FIP) on OK impacting three coal-fired power plants.</li> <li>▪ EPA imposed an FIP on ND impacting seven coal-fired power plants.</li> <li>▪ EPA imposed an FIP on NM impacting one coal-fired power plant.</li> <li>▪ EPA imposed an FIP on NE impacting one coal-fired power plant.</li> <li>▪ EPA agreed to review kraft pulp NSPS.</li> <li>▪ EPA revised NSPS for nitric acid plants.</li> <li>▪ EPA agreed to review national emissions standards for radon emissions from operating mill tailings.</li> <li>▪ EPA agreed to review NSPS for municipal solid waste landfills.</li> <li>▪ EPA issued MACT standards for boilers (Boiler MACT).</li> <li>▪ EPA issued MACT standards for stationary reciprocating internal combustion engines (RICE rule).</li> </ul>	
EPA issuing MACT standards for:	
<ul style="list-style-type: none"> <li>○ Marine tank vessel loading operations</li> <li>○ Pharmaceuticals production</li> <li>○ Printing and publishing industry</li> <li>○ Hard and decorative chromium electroplating and chromium anodizing tanks</li> <li>○ Steel pickling—HCl process facilities and hydrochloric acid regeneration plants</li> <li>○ Group I polymers and resins</li> <li>○ Shipbuilding and ship repair</li> </ul>	<ul style="list-style-type: none"> <li>○ Ferroalloys production—ferromanganese and silicomanganese</li> <li>○ Wool fiberglass manufacturing</li> <li>○ Secondary aluminum production</li> <li>○ Pesticide active ingredient production</li> <li>○ Polyether polyols production</li> <li>○ Group IV polymers and resins</li> <li>○ Flexible polyurethane foam production</li> <li>○ Generic MACT—acrylic and modacrylic fibers</li> </ul>

<ul style="list-style-type: none"> <li>o Wood furniture manufacturing operations</li> <li>o Primary lead smelting</li> <li>o Secondary lead smelting</li> <li>o Pulp and paper production industry</li> <li>o Aerospace manufacturing and rework facilities</li> <li>o Mineral wool production</li> <li>o Primary aluminum reduction plants</li> <li>o Portland cement manufacturing industry</li> </ul>	<ul style="list-style-type: none"> <li>o production</li> <li>o Generic MACT—polycarbonate production</li> <li>o Off-site waste and recovery operations</li> <li>o Phosphoric acid manufacturing</li> <li>o Phosphate fertilizers production plants</li> <li>o Group III polymers and resins—manufacture of amino/phenolic resins.</li> </ul>
<p>EPA agreed to take action on the following proposals related to State Implementation Plans (SIPs):</p>	
<ul style="list-style-type: none"> <li>o CA SIP revision regarding San Joaquin Valley (SJV) 1997 PM<sub>2.5</sub> attainment plan</li> <li>o CA SIP revision regarding rule changes for SJV Unified Air Pollution Control District</li> <li>o CA SIP revision regarding particulate matter from beef feedlot operations</li> <li>o CA SIP revision regarding PM<sub>10</sub> emissions in Imperial County</li> <li>o CA SIP revision regarding air quality rules in Imperial County</li> <li>o Pesticide Element SIP submittal and the Fumigant Rules submittal</li> <li>o KY SIP submission regarding 1997 PM<sub>2.5</sub> NAAQS for the Huntington-Ashland area</li> <li>o KY SIP submission regarding 1997 PM<sub>2.5</sub> NAAQS emissions inventory for Louisville</li> <li>o EPA agreed to issue a Federal plan if Louisiana regulators do not attain 1997 ozone standards in Baton Rouge</li> <li>o CA SIP revisions addressing 1997 PM<sub>2.5</sub> and ozone NAAQS for South Coast Air Basin</li> <li>o 1997 ozone NAAQS revision for NC, NV, ND, HI, OK, AK, ID, OR, WA, MD, VA, TN, AR, AZ, FL, and GA</li> <li>o CA SIP submission demonstrating RACT for SJV</li> <li>o CA SIP submission for 1997 ozone NAAQS plan for SJV</li> <li>o 1997 ozone NAAQS submission by NY, NJ, CT, MA, IL, and MO</li> <li>o TX SIP submission addressing 1997 ozone and PM<sub>2.5</sub> NAAQS</li> <li>o EPA required to approve or disapprove ozone NAAQS SIPs for 21 states</li> <li>o AL SIP for 1997 PM<sub>2.5</sub> NAAQS and GA SIP for 1997 8-hour ozone NAAQS</li> </ul>	<ul style="list-style-type: none"> <li>o AR regional haze SIP</li> <li>o TX SIP submission for Houston-Galveston-Brazoria 1997 8-hour ozone nonattainment areas</li> <li>o KY SIP submission addressing 1997 ozone NAAQS in 3 counties</li> <li>o SIP submission for certain NAAQS for MA, CT, NJ, NY, PA, MD, and DE</li> <li>o SIPs for certain areas of IL, ME, and MO</li> <li>o NC and SC SIP submissions for 1997 ozone NAAQS</li> <li>o OK SIP submission regarding excess emissions</li> <li>o Determination of 1-hour ozone attainment designations for areas in TX, CT, MD, NY, NJ, MA, and NH</li> <li>o 1997 ozone NAAQS for areas in NV and PA</li> <li>o Determination of area designations for the 2008 ground-level ozone NAAQS</li> <li>o AZ SIP submission regarding plan for 1997 NAAQS attainment in Phoenix-Mesa</li> <li>o 41 SIP submissions by CO, UT, MT, and NM</li> <li>o SIP submissions for 1997 8-hour ozone and PM<sub>2.5</sub> NAAQS by CA, CO, ID, NM, ND, OK, and OR</li> <li>o 2006 PM<sub>2.5</sub> NAAQS Infrastructure SIP submissions by AL, CT, FL, MS, NC, TN, IN, ME, OH, NM, DE, KY, NV, AR, NH, SC, MA, AZ, GA, and WV</li> <li>o SIP submissions regarding regional haze and excess emissions standards in CO, WY, MT, and ND</li> <li>o UT SIP revision regarding the "breakdown provision"</li> <li>o Two UT SIP submissions, including one on regional haze</li> <li>o 1997 8-hour NAAQS for ozone in Salt Lake and Davis Counties (UT)</li> <li>o UT SIP submission addressing PM<sub>10</sub> NAAQS designations for Salt Lake County, Utah County, and Ogden City</li> </ul>
<b>Land</b>	
<ul style="list-style-type: none"> <li>▪ U.S. Forest Service (USFS) considering blocking 1 million acres in CA federal parks from development.</li> <li>▪ EPA considering revisions to "definition of solid waste."</li> <li>▪ Office of Surface Mining agreed to consider restricting mining activities near waterways (Stream Buffer Zone Rule).</li> <li>▪ The Bureau of Land Management agreed to consider amending 12 resource management plans that opened 2</li> </ul>	

million acres of federal lands for potential oil shale leasing.

- National Park Service reduced snowmobile usage inside Yellowstone National Park.
- USFS agreed to withdraw its decision notice regarding the "Wildcat" project on the Umatilla National Forest.

#### Plants and Animals

- National Marine Fisheries Service (NMFS) imposed inspection requirements for Atlantic Herring Fishery.
- Fish and Wildlife Service (FWS) doubled size of critical habitat of Hine's emerald dragonfly to more than 26,000 acres in MI and MO.
- The Department of the Interior (DOI) designated about 10,386 acres of critical habitat for Chiracahua leopard frog.
- DOI agreed to issue decisions that had not already been made on hundreds of plant and animal species from list of 674 species.
- FWS listed the whitebark pine tree as an endangered species as a result of climate change.
- NMFS agreed to issue recovery plans for sperm plans, fin whales, and sei whales.
- DOI agreed to issue 12-month findings under the Endangered Species Act on 12 species of parrots, macaws, and cockatoos.
- USFS agreed to make final determinations under the Endangered Species Act for 251 species.
- FWS agreed to make findings under the Endangered Species Act for at least 477 species.
- DOI agreed to issue a decision whether to list Wright's marsh thistle.

#### Water

- New water quality standards for FL (inland).
- New water quality standards for FL (coastal).
- Guidance for mountaintop removal mining permits.
- EPA issued guidance on how states should address ocean acidification under the Clean Water Act.
- Army Corps of Engineers suspended nationwide surface coal mining permit.
- EPA finalizing rule regulating cooling water intake structures.
- EPA agreed to issue rules that revise steam electric effluent guidelines.
- EPA agreed to establish a total maximum daily load for the Chesapeake Bay.
- EPA agreed to develop changes to its stormwater regulations nationally.

#### Other

- EPA issued stricter pesticide human-testing consent rule.
- EPA agreed to issue specific changes to the Lead Renovation, Repair and Painting Program Rule.
- Federal Maritime Commission ended its administrative investigation of the ports of Los Angeles and Long Beach related to their clean trucks program.

## Appendix A

### Methodology I for Identifying Cases in the Sue and Settle Database

To identify the cases included in the current version of the sue and settle database, the following approaches were used:

The database was *only* designed to capture examples of major sue and settle cases. To accomplish this, a multijurisdictional federal court search was conducted in 2011 using Lexis-Nexis looking at cases 2.5 years before the start of the Obama administration and 2.5 years after (through June 2011). The names of numerous environmental groups were used and dockets of cases were identified.

For those cases identified that were still open, they were not pursued any further because an open case is by its nature not a sue and settle case. If the case was closed, then the case was searched on PACER ([www.pacer.gov](http://www.pacer.gov)). If there was a settlement, relevant cases were included in a larger database that included challenges to projects. In the current version of the database, challenges to projects were excluded.

To add major cases or cross-check the existing database:

- A search was conducted in the Fall Unified Agendas for 2009–2012.<sup>79</sup> Economically significant active, completed, and long-term actions were searched. If a consent decree or settlement agreement was listed as being connected to a specific rule, a case search was conducted to verify this information.
- House Report 112-593, which is the House Report for the Sunshine for Regulatory Decrees and Settlements Act of 2012 (H.R. 3862), included information on sue and settle cases. These cases were either added or cross-checked with the database, as was information from the following House testimony: *Addressing Off Ramp Settlements: How Legislation Can Ensure Transparency, Public Participation, and Judicial Review in Rulemaking Activity*, Testimony of Roger R. Martella, Jr. before the House Committee on the Judiciary, Feb. 2, 2012; and *The Use and Abuse of Consent Decrees in Federal Rulemaking*, Testimony of Andrew M. Grossman before the House Committee on the Judiciary, Feb. 2, 2012.
- The following GAO report was used: GAO, *Environmental Litigation: Cases Against EPA and Associated Costs Over Time* GAO-11-650 (Washington, D.C.: August, 2011). The U.S. Chamber's report on regional haze and sue and settle was also used: *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs*, Chamber of Commerce of the United States, William Yeatman (August 2012). In addition,

<sup>79</sup> Since only one Unified Agenda was published in 2012, which was in December, this agenda was used for 2012.

environmental groups announce settlements and lawsuits on their websites—this information served as a resource.

The database includes environmental-related cases, regardless of federal agency or federal statute; however, actions that were not of general applicability (except for some FOIA cases) were excluded, such as enforcement actions and Title V permit cases.

## Appendix B

### Methodology II for Identifying Cases in the Sue and Settle Database

#### Clean Air Act

Clean Air Act settlement agreements and were compiled using a database search of the *Federal Register*. Pursuant to Clean Air Act section 113(g), all settlement agreements and consent decrees must be announced in the *Federal Register*. The search terms were:

- Agency: "Environmental Protection Agency"  
Title: "Settlement Agreement" or "Consent Decree"  
Dates: Between "1/20/2009" and "1/20/2013"

All settlement agreements and consent decrees pursuant to a Title V challenge or an enforcement action were removed in order to ensure that the settlement agreement or consent decree had a general applicability.

It was possible to determine whether EPA and the petitioners either litigated or went straight to negotiations by checking the case docket using [www.pacer.gov](http://www.pacer.gov).

#### Clean Water Act

Clean Water Act settlement agreements pursuant to citizen deadline suits are not announced in the *Federal Register*. Two techniques were used to find them.

The first was a database search of "Inside EPA," and used two sets of search terms:

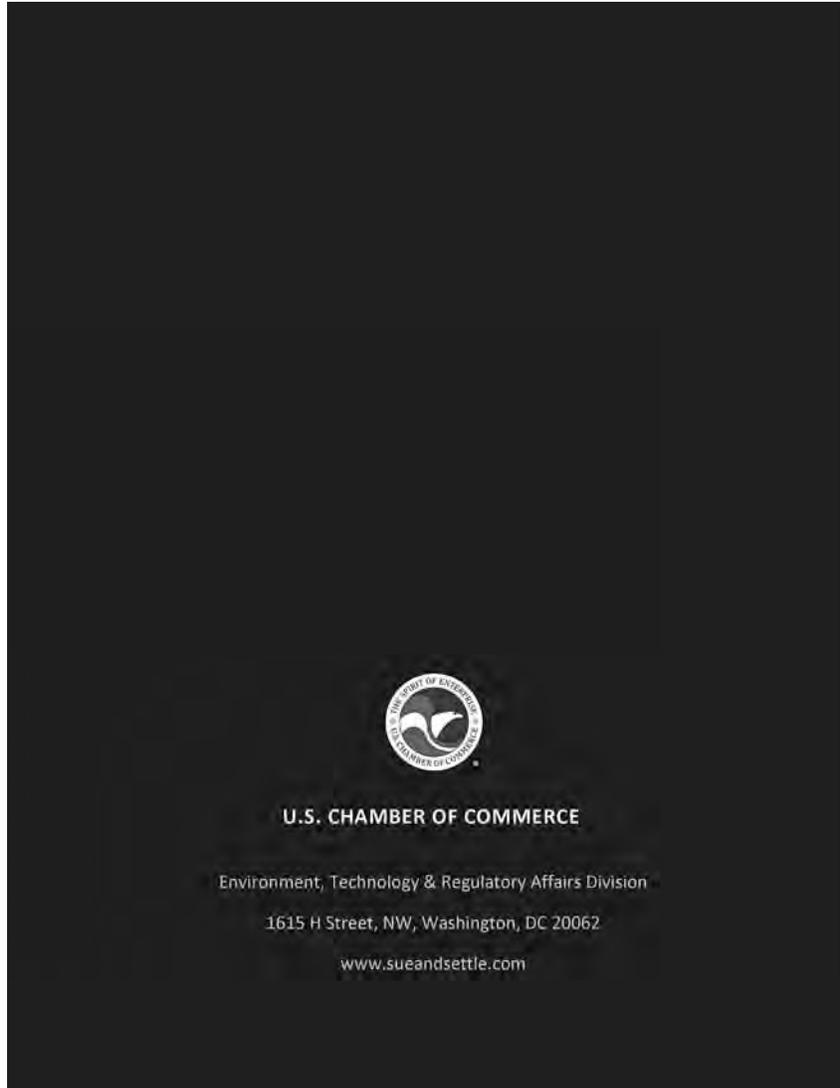
- "Clean Water Act" and "Settlement Agreement"  
"Clean Water Act" and "Consent Decree"

The second was a database search of the *Federal Register*. Instead of searching for announcements of settlement agreements (as had been done for the Clean Air Act), regulations pursuant to Clean Water Act settlement agreements or consent decrees were searched. The search terms were as follows:

- Agency: "Environmental Protection Agency"  
Title: "Clean Water Act"  
Full Text or Metadata: "Settlement Agreement" or "Consent Decree"  
Dates: Between "1/20/2009" and "1/20/2013"

As with the Clean Air Act methodology, all settlement agreements and consent decrees pursuant to an enforcement action were removed to ensure that the settlement agreement or consent decree had general applicability. It was possible to determine whether EPA and the petitioners either litigated or went straight to negotiations by checking the case docket using [www.pacer.gov](http://www.pacer.gov).





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Mr. BACHUS. Thank you.

We have a distinguished panel today, and I will first begin by introducing our witnesses.

Mr. Bill Kovacs provides the overall direction, strategy, and management for the Environment, Technology & Regulatory Affairs Division of the U.S. Chamber of Commerce. Since he joined the Chamber in March 1998, he has transformed a small division concentrating on a handful of issues and committee meetings into one of the most significant in the organization. His division initiates and leads national issue campaigns on energy legislation, complex

environmental rulemaking, telecommunications reform, emerging technologies, and applying sound science to the Federal regulatory process.

Mr. Kovacs previously served as Chief Counsel and Staff Director for the House Subcommittee on Transportation and Commerce. He earned a J.D. from Ohio State University College of Law and a bachelor of science degree from the University of Scranton, magna cum laude.

I welcome you, Mr. Kovacs.

Mr. Allen Puckett III is the owner of Columbus Brick Company. Columbus Brick was founded in 1890 by Mr. Puckett's great grandfather, W.N. Puckett, and his friend W.S. Lindamood. Mr. Puckett represents the fourth generation of Pucketts to operate Columbus Brick, which is now the only brick manufacturer in the State of Mississippi. The company is the distributor for many other brick companies based in Mississippi, Alabama, Georgia, North Carolina, South Carolina, and Virginia. Columbus Brick ships over 140 million bricks each year throughout the Midwest and southern United States. And his story I think is quite dramatic and telling, similar to other stories I have heard from his colleagues in the industry, and I am very much looking forward to hearing your firsthand account of your experience.

Mr. John D. Walke is Senior Attorney for Clean Air and Clean Air Director for the Natural Resources Defense Council in Washington, D.C. As Mr. Conyers mentioned, you all are opposing this legislation. And you are responsible, as I understand it, for the National Resources Defense Council's National Clean Air Advocacy before Congress, the courts, and the U.S. Environmental Protection Agency.

Prior to joining NRDC, Mr. Walke worked for the EPA in the Air and Radiation Law Office of the Office of General Counsel. At EPA, he worked on permitting air toxics, monitoring, and enforcement issues under the Clean Air Act.

Prior to working for the EPA, Mr. Walke was an associate at Beveridge & Diamond here in Washington, D.C.

He graduated from Duke University with a B.A. in English and earned his J.D. from Harvard Law School.

Joining us by teleconference is Mr. Tom Easterly. He has been the Commissioner of the Indiana Department of Environmental Management since 2005. After obtaining his M.S. in urban and environmental studies from Rensselaer Polytechnic Institute in Troy, New York, Mr. Easterly joined the New York State Department of Environmental Conservation where he held various engineering positions in the Air and Solid and Hazardous Waste Divisions. He has also worked for Bethlehem Steel Corporation as their corporate air pollution expert and as superintendent of environmental sciences for Bethlehem Steel's Burns Harbor Division. He also served as President of Environmental Business Strategies, an environmental consulting firm he started in 2002. He is a board certified environmental engineer and a qualified environmental professional.

As I said, we have very distinguished panel today, and with that, Mr. Kovacs, you are recognized for your opening statement.

**TESTIMONY OF WILLIAM L. KOVACS, SENIOR VICE PRESIDENT, ENVIRONMENT, TECHNOLOGY & REGULATORY AFFAIRS, U.S. CHAMBER OF COMMERCE**

Mr. KOVACS. Thank you, Chairman Bachus and Ranking Member Cohen and Members of the Committee, for letting me come here today to testify in support of H.R. 1493, the “Sunshine for Regulatory Decrees and Settlements Act of 2013” and to discuss the Chamber’s recent report, “Sue-and-Settle: Regulating Behind Closed Doors.”

H.R. 1493 is a balanced approach to inject more transparency and public participation into the rulemaking process, which has been the overriding goal of Congress since 1946.

If enacted, 1493 would do three simple things, and I think we need to keep in mind how simple this bill is.

First, it would require agencies to publish on their Web site and in the Federal Register notices of intent to sue and complaints filed against agencies so the public knows when the agency is being sued.

It would require agencies to post on their Web site and on the Federal Register the filings of consent decrees before they are actually presented to the court so that the public can comment on the consent decree before it is presented to the court.

And finally, it would allow impacted parties, those who have standing—not anyone—those who the courts have—allow—recognized constitutional standing to—to intervene in the court case if they can establish that their rights are not being adequately represented by the parties before the court.

The Chamber’s involvement in this issue started when we started getting a number of growing complaints not only from the business community but from States talking about the fact that they were shut out of major regulatory decisions by Federal agencies. We decided to investigate the matter, and it became clear that EPA and other agencies were not in any manner—all we are asking for is that they publish it on their Web site. They were not in any manner informing the public of the notices of the lawsuits or of the lawsuits brought against the agencies or of the consent decrees.

Because of this, we saw more and more regulatory activity and we asked—and I believe it was—one of the Members referenced last year’s hearing where what is the problem, there are not many cases. We decided that what we would do is we would literally sit down and try to figure what it is out because when EPA was asked the questions, they were saying there is no centralized database. So we cannot give not the industry, not the environmental group, but the Congress even the information on the lawsuits.

So what we did is for an 18-month period, we used several databases containing court documents, and from these databases, we identified 71 separate lawsuits from 2009 to 2012 and the agencies that entered into these environmental suits, as well as the environmental groups that were party to the case.

On May 20, 2013, we published our list of cases which impact virtually every industry in the United States, and we have put all the supporting materials from the complaint, the consent decree, the court order, everything on our Web site. So there is total transparency here because since the agencies have not been willing to

provide a database, we decided we would. And that is really the essence of what the report says. It is a database. And we are not saying it is 100 percent accurate. What we are saying is this is what we could find over 18 months.

But each case we found followed the same pattern: the NGO and the agency negotiated in private a deadline for the proposal of new regulation. When they come to an agreement, they prepare, sign, and present the decree to the court, and this is before they put it out for public comment. In some instances, the court asks the agencies to submit the proposed consent decree for public comment, but that very rarely leads to any changes in the consent decree as drafted.

Once a consent decree becomes an order of the court, public policy is forever changed. And that is really the key point because once the consent decree is issued by the court, the court retains jurisdiction over the agency and the implementation of the order, while in most instances the only group that can enforce the order during this time period is the environmental group.

Agency priorities and the use of its resources are irrevocably changed by the consent decree. While a few consent decrees might not change agency priorities, when you have 71 consent decrees ordering the issuance of more than 100 regulations, it impacts the management of the agency.

Since the deadlines agreed to by the NGO and by the agency do not include industry, what usually happens is in the setting of the deadlines with no industry input to the agency, the agency is operating in a fundamental disagreement with the APA because it is not gathering the information it needs as to what is to be done. So what happens is you get poorly drafted regulations that lead to more litigation while all along during this time period of litigation, the regulated entity has to try to comply with a poorly drafted regulation.

And finally, the sue-and-settle process does a lot more. There are a lot more compromises than just simply the procedural safeguards that might be in any consent decree. The fact that the system is rushed by itself, it literally disallows the ability to go through the other regulatory statutes that Congress has imposed on agencies, such as the Regulatory Flexibility Act, the Informational Quality Act, Unfunded Mandates, several executive orders, and OIRA review, all of which we think are important and are in place and are statutes now. And one of the things that is mostly ignored are the small business panels, and you end up ignoring 26 million businesses in the country and how they impact.

My time is up. And thank you very much, and I would be pleased to answer questions at the appropriate time.

[The prepared statement of Mr. Kovacs follows:]



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# Statement of the U.S. Chamber of Commerce

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**ON:** LEGISLATIVE HEARING ON H.R. 1493, THE "SUNSHINE FOR REGULATORY DECREES AND SETTLEMENTS ACT OF 2013"

**TO:** HOUSE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

**BY:** WILLIAM L. KOVACS,  
SENIOR VICE PRESIDENT, ENVIRONMENT, TECHNOLOGY & REGULATORY AFFAIRS

**DATE:** JUNE 5, 2013

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The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 business people participate in this process.

BEFORE THE COMMITTEE ON THE JUDICIARY OF THE U.S. HOUSE OF  
REPRESENTATIVES, SUBCOMMITTEE ON REGULATORY REFORM,  
COMMERCIAL AND ANTITRUST LAW

Legislative Hearing on H.R. 1493, the  
“Sunshine for Regulatory Decrees and Settlements Act of 2013”

Testimony of William L. Kovacs  
Senior Vice President, Environment, Technology & Regulatory Affairs  
U.S. Chamber of Commerce

June 5, 2013

Good morning, Chairman Bachus, Ranking Member Cohen, and distinguished Members of the Subcommittee. My name is William L. Kovacs and I am senior vice president for Environment, Technology and Regulatory Affairs at the U.S. Chamber of Commerce. My statement provides an overview of the Chamber’s May 2013 report, *Sue and Settle: Regulating Behind Closed Doors*. The report provides detailed information on the extent of the sue and settle problem, as well as the public policy implications of having private parties exert direct influence on the regulatory priorities of federal agencies through agreements negotiated behind closed doors, without public participation. To address the sue and settle problem described in our report, the House should pass H.R. 1493, the “Sunshine for Regulatory Decrees and Settlements Act of 2013.” The bill provides for vital transparency and stakeholder/public participation in critical regulatory actions by federal agencies.

### Background

Over the past several years, the business community has expressed growing concern about interest groups using lawsuits against federal agencies and subsequent settlements approved by a judge as a technique to shape agencies’ regulatory agendas. Recent sue and settle arrangements have fueled fears that the rulemaking process itself is being subverted to serve the ends of a few favored interest groups. The Chamber set out to determine how often sue and settle actually happens, to identify major sue and settle cases, and to track the types of agency actions involved. After an extensive effort, the Chamber was able to compile a database of sue and settle agreements and their subsequent rulemaking outcomes. The overwhelming majority of sue and settle actions between 2009 and 2012 occurred in the environmental context, particularly under the Clean Air Act, Clean Water Act, and the Endangered Species Act.<sup>1</sup>

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<sup>1</sup> Clean Air Act, 42 U.S.C. § 7401 *et seq.*; Clean Water Act, 33 U.S.C. § 1251 *et seq.*; Endangered Species Act, 16 U.S.C. § 1531 *et seq.*

### **What is Sue and Settle?**

Sue and settle occurs when an agency intentionally relinquishes its statutory discretion by accepting lawsuits from outside groups which effectively dictate the priorities and duties of the agency through legally-binding, court-approved settlements negotiated behind closed doors – with no participation by other affected parties or the public.<sup>2</sup>

As a result of the sue and settle process, the agency intentionally transforms itself from an independent actor that has discretion to perform its duties in a manner best serving the public interest, into an actor subservient to the binding terms of settlement agreements, including using its congressionally-appropriated funds to achieve the demands of specific outside groups. This process also allows agencies to avoid the normal protections built into the rulemaking process – review by the Office of Management and Budget and the public, and compliance with executive orders – at the critical moment when the agency’s new obligations are created.

Because sue and settle agreements bind an agency to meet a specified deadline for regulatory action – a deadline the agency often cannot meet – the agreement essentially reorders the agency’s priorities and its allocation of resources. These agreements often go beyond simply enforcing statutory deadlines and themselves become the legal authority for expansive regulatory action with no meaningful participation by affected parties or the public. The realignment of an agency’s duties and priorities at the behest of an individual special interest group runs counter to the larger public interest and the express will of Congress.

### **What Did Our Research Reveal?**

#### *Number of sue and settle cases between 2009 and 2012*

Our research shows that from 2009 to 2012, a total of 71 lawsuits were settled under circumstances such that they can be categorized as sue and settle cases under the Chamber’s definition. These cases include EPA settlements under the Clean Air Act and the Clean Water Act, along with key Fish and Wildlife Service settlements under the Endangered Species Act. Significantly, settlement of these cases directly resulted in more than 100 new federal rules, many of which are major rules estimated to cost more than \$100 million annually to comply with.

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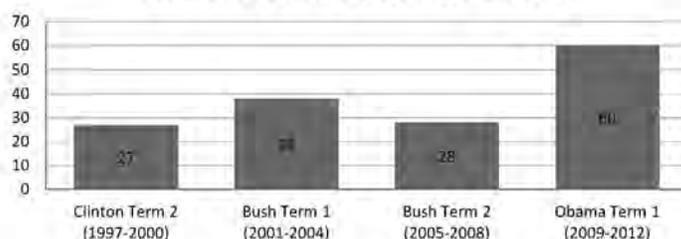
<sup>2</sup> The coordination between outside groups and agencies is aptly illustrated by a November 2010 sue and settle case where EPA and an outside advocacy group filed a consent decree and a joint motion to enter the consent decree with court *on the same day* the advocacy group filed its Complaint against EPA. See *Defenders of Wildlife v. Perciasepe*, No. 12-5122, slip op. at 6 (D.C. Cir. Apr. 23, 2013).

### *Comparing the use of sue and settle over the past 15 years*

Unlike other environmental laws, the Clean Air Act specifically requires EPA to publish public notices of draft consent decrees in the *Federal Register*.<sup>3</sup> These public notices gave the Chamber the opportunity to identify Clean Air Act settlement agreements/consent decrees going back to 1997. We were therefore able to compare the number of Clean Air Act sue and settle agreements between 1997 and 2012.

The Chamber's data shows that sue and settle is by no means a recent phenomenon;<sup>4</sup> the tactic has been used during both Democratic and Republican administrations. To the extent that the sue and settle tactic skirts the normal notice and comment rulemaking process, with its procedural checks and balances, agencies have been willing for decades to allow sue and settle to skirt the rulemaking requirements of the Administrative Procedure Act.<sup>5</sup> Moreover, our research found that business groups have also taken advantage of the sue and settle approach to influence the outcome of EPA actions. While advocacy groups have used sue and settle much more often in recent years, the tactic has clearly been abused by both sides. The following chart compares the consent decrees finalized under the Clean Air Act during that period.

**Sue and Settle Cases Between 1997 and 2012**



<sup>3</sup> Section 113(g) of the Clean Air Act, 42 U.S.C. § 7413(g), provides that “[a]t least 30 days before a consent decree or settlement agreement of any kind under [the Clean Air Act] to which the United States is a party (other than enforcement actions) . . . the Administrator shall provide a reasonable opportunity by notice in the Federal Register to persons who are not named as parties or intervenors to the action or matter to comment in writing.” Of all the other major environmental statutes, only section 122(i) of the Superfund law, 42 U.S.C. § 9622(i) requires an equivalent public notice of a settlement agreement.

<sup>4</sup> The sue and settle problem dates back at least to the 1980s. In 1986, Attorney General Edward Meese III issued a Department of Justice policy memorandum, referred to as the “Meese Memo,” addressing the problematic use of consent decrees and settlement agreements by government, including the agency practice of turning discretionary rulemaking authority into mandatory duties. See Meese, Memorandum on Department Policy Regarding Consent Decrees and Settlement Agreements (Mar. 13, 1986).

<sup>5</sup> 5 U.S.C. Subchapter II.

*The economic implications of our findings*

Since 2009, new regulatory requirements estimated at more than \$488 billion in compliance costs have been imposed by the federal government.<sup>6</sup> By itself, EPA is responsible for adding tens of billions of dollars in new regulatory costs.<sup>7</sup> Significantly, at least 100 of EPA's costly new rules were the product of sue and settle agreements. The chart below highlights just ten of the most costly rules that arose from sue and settle cases:

Sue and Settle Agreements Create Costly Federal Rules
1. Utility MACT rule - up to <b>\$9.6 billion</b> annual costs <sup>8</sup>
2. Lead Repair, Renovation & Painting rule - up to <b>\$500 million</b> in first-year costs <sup>9</sup>
3. Oil and Natural Gas MACT rule - up to <b>\$738 million</b> annual costs <sup>10</sup>
4. Florida Nutrient Standards for Estuaries and Flowing Waters - up to <b>\$632 million</b> annual costs <sup>11</sup>
5. Regional Haze Implementation rules: <b>\$2.16 billion</b> cost <sup>12</sup>
6. Chesapeake Bay Clean Water Act rules - up to <b>\$18 billion</b> cost to comply <sup>13</sup>
7. Boiler MACT rule - up to <b>\$3 billion</b> cost to comply <sup>14</sup>
8. Standards for Cooling Water Intake Structures - up to <b>\$384 million</b> annual costs <sup>15</sup>
9. Revision to the Particulate Matter (PM <sub>2.5</sub> ) NAAQS - up to <b>\$350 million</b> annual costs <sup>16</sup>
10. Reconsideration of 2008 Ozone NAAQS - up to <b>\$90 billion</b> cost <sup>17</sup>

<sup>6</sup> S. Batkins, American Action Forum, "President Obama's \$488 Billion Regulatory Burden" (Sept. 19, 2012).

<sup>7</sup> *Id.* Mr. Batkins estimates the regulatory burden added by EPA in 2012 alone to be \$12.1 billion.

<sup>8</sup> Letter from President Obama to Speaker Boehner (Aug. 30, 2011), Appendix "Proposed Regulations from Executive Agencies with Cost Estimates of \$1 Billion or More."

<sup>9</sup> 75 Fed. Reg. 24,802, 24,812 (May 6, 2010).

<sup>10</sup> Fall 2011 Regulatory Plan and Regulatory Agenda, "Oil and Natural Gas Sector-NSPS and NESHAPS," RIN: 2060-AP76.

<sup>11</sup> EPA, Proposed Nutrient Standards for Florida's Coastal, Estuarine & South Florida Flowing Waters (Nov. 2012).

<sup>12</sup> William Ycatman, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs* (July 2012).

<sup>13</sup> Sage Policy Group, Inc., *The Impact of Phase I Watershed Implementation Plans on Key Maryland Industries* (April 2011); *Chesapeake Bay Journal* (Jan. 2011).

<sup>14</sup> Letter from President Obama to Speaker Boehner, *supra* note 8.

<sup>15</sup> 2012 Regulatory Plan and Unified Agenda, "Standards for Cooling Water Intake Structures," RIN: 2040-AE95.

<sup>16</sup> EPA, "Overview of EPA's Revisions to the Air Quality Standards for Particle Pollution (Particulate Matter) (2012).

<sup>17</sup> Letter from President Obama to Speaker Boehner, *supra* note 8.

### **The Public Policy Implications of Sue and Settle**

By being able to sue and influence agencies to take actions on specific regulatory programs, advocacy groups use sue and settle to dictate the policy and budgetary agendas of an agency. Instead of agencies being able to use their discretion as to how best utilize their limited resources, they are forced to shift these resources away from critical duties in order to satisfy the narrow demands of outside groups.

Likewise, when advocacy groups and agencies negotiate deadlines and schedules for new rules through the sue and settle process, the ensuing rulemaking is often rushed and flawed. Dates for regulatory action are often specified in statutes, and agencies like EPA very often cannot meet most or all of those deadlines. To a great extent, these agencies must use their discretion to set resource priorities to meet their many competing obligations. By agreeing to deadlines that are unrealistic and often unachievable, the agency lays the foundation for rushed, sloppy rulemaking that often delays or defeats the objective the agency is seeking to achieve.<sup>18</sup> These hurried rulemakings typically require fixing through technical corrections, subsequent reconsiderations, or court-ordered remands to the agency. Ironically, the process of issuing rushed, poorly-developed rules and then having to spend months or years to correct them defeats the advocacy group's objective of forcing a rulemaking on a tight schedule. The time it takes to make these fixes, however, doesn't change a regulated entity's immediate obligation to comply with the poorly-constructed and infeasible rule.

Moreover, if regulated parties are not at the table when deadlines are set, an agency will not have a realistic sense of the issues involved in the rulemaking (e.g., will there be enough time for the agency to understand the constraints facing an industry, to perform emissions monitoring, and develop achievable standards?). Especially when it comes to implementation timetables, agencies are ill-suited to make such decisions without significant feedback from those who will have to actually comply with a regulation.

By setting accelerated deadlines, agencies very often give themselves insufficient time to comply with the important analytic requirements that Congress enacted to ensure sound policymaking.

These requirements include the Regulatory Flexibility Act (RFA)<sup>19</sup> and the Unfunded Mandates Reform Act.<sup>20</sup> In addition to undermining the protections of these statutory

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<sup>18</sup> In the Boiler MACT rulemaking, for example, EPA asked the court for an additional 16 months to properly consider comments it had received and finalize a legally defensible rule. In the face of opposition from the advocacy group, the court only granted an additional month, however, and EPA was forced to immediately reconsider the rule to buy itself more time.

<sup>19</sup> Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. §§ 601-612.

requirements, rushed deadlines can limit the review of regulations under the Office of Management and Budget's regulatory review under executive orders,<sup>21</sup> among other laws. This short-circuited process deprives the public (and the agency itself) of critical information about the true impact of a particular rule. An unreasonable deadline for one rule draws resources from other regulations that may also be under deadlines. Resulting delays will invite advocacy groups to reorder an agency's priorities further when they sue to enforce the other rules' deadlines.

This is illustrated clearly by recent sue and settle agreements entered into between advocacy groups and the U.S. Fish and Wildlife Service (FWS). FWS agreed in May and July 2011 to two consent decrees with an environmental advocacy group requiring the agency to propose adding more than 720 new candidates to the list of endangered species under the ESA.<sup>22</sup> Agreeing to propose listing this many species all at once imposes an overwhelming new burden on the agency, which requires redirecting resources away from other—often more pressing—priorities in order to meet agreed upon deadlines. According to the Director of the FWS, in FY 2011 the FWS was allocated \$20.9 million for endangered species listing and critical habitat designation; the agency was required to spend more than 75% of this allocation (\$15.8 million) undertaking the substantive actions required by court orders or settlement agreements resulting from litigation.<sup>23</sup> In other words, sue and settle cases and other lawsuits are now driving the regulatory agenda of the Endangered Species Act program at FWS.

Through sue and settle, advocacy groups also significantly affect the regulatory environment by getting agencies to issue substantive requirements that are not required by law.<sup>24</sup> Even when a regulation is required, agencies can use the terms of sue and settle agreements as a legal basis for allowing special interests to dictate the discretionary terms of the regulations.<sup>25</sup> Third parties have a very difficult time challenging the agency's surrender of its discretionary power, because they typically cannot intervene and the courts often simply want the case to be settled quickly.

One of the primary reasons advocacy groups favor sue and settle agreements approved by a court is that the court retains long-term jurisdiction over the settlement and the plaintiff group can readily enforce perceived noncompliance with the agreement by the agency. The court in the

<sup>20</sup> Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1531-1538.

<sup>21</sup> See, e.g., Executive Order 12,866, "Regulatory Planning and Review" (September 30, 1993); Executive Order 13,132, "Federalism" (August 4, 1999); Executive Order 13,211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (May 18, 2001); Executive Order 13,563 "Improving Regulation and Regulatory Review" (January 18, 2011).

<sup>22</sup> *Wildearth Guardians v. Salazar* (D.D.C. May 10, 2011); *Center for Biological Diversity v. Salazar* (D.D.C. July 12, 2011).

<sup>23</sup> Testimony of Hon. Dan Ashe, Director, U.S. Fish and Wildlife Service before the House Natural Resources Committee (December 6, 2011).

<sup>24</sup> For example, EPA's imposition of TMDL and stormwater requirements on the Chesapeake Bay was not mandated by federal law.

<sup>25</sup> Agreed deadlines commit an agency to make one specific rulemaking a priority, ahead of all other rules.

endangered species agreements discussed above will retain jurisdiction over the process until 2018, thereby binding FWS Directors in the next Administration to follow the requirements of the two 2011 settlements. For its part, the agency cannot change any of the terms of the settlement (e.g., an agreed deadline for a rulemaking) without the consent of the advocacy group. Thus, even when an agency subsequently discovers problems in complying with a settlement agreement, the advocacy group typically can force the agency to fulfill its promise in the consent decree, regardless of the consequences for the agency or regulated parties.

For all these reasons, “sue and settle” violates the principle that if an agency is going to write a rule, the goal should be to develop the most effective, well-tailored regulation. Instead, rulemakings that are the product of sue and settle agreements are most often rushed, sloppy, and poorly thought-out. These flawed rules often take a great deal of time and effort to correct. It would have been better—and ultimately faster—to take the necessary time to develop the rule properly in the first place.

### **Notice and Comment *After* Sue and Settle Agreements Doesn’t Give the Public Real Input**

The opportunity to comment on the product of sue and settle agreements, either when the agency takes comment on a draft settlement agreement or takes notice and comment on the subsequent rulemaking, are not sufficient to compensate for the lack of transparency and participation in the settlement process itself. In cases where EPA allows public comment on draft consent decrees, EPA only rarely alters the consent agreement, even after it receives adverse comments.<sup>26</sup>

Moreover, because the settlement agreement directs the timetable and the structure (and sometimes even the actual substance) of the subsequent rulemaking, interested parties usually have very limited ability to alter the design of the final rule or other action through their comments.<sup>27</sup> In effect, the “cement” of the agency action is set and has already hardened by the time the rule is proposed, and it is very difficult to change it. Once an agency proposes a regulation, the agency is restricted in how much they can change it before it becomes final.<sup>28</sup> Proposed regulations are not like proposed legislation, which can be very fluid and go through

<sup>26</sup> In proposed settlement agreements the Chamber has commented on, such as for the revised PM<sub>2.5</sub> NAAQS standard, the timetable for final rulemaking action remained unchanged despite our comments insisting that the agency needed more time to properly complete the rulemaking. Even though EPA itself asserted that more time was needed, the rulemaking deadline in the settlement agreement was not modified.

<sup>27</sup> EPA overwhelmingly rejected the comments and recommendations submitted by the business community on the major rules that resulted from sue and settle agreements. These rules were ultimately promulgated largely as they had been proposed. See, e.g., the Chamber’s 2012 comments on the proposed PM NAAQS rule and the proposed GHG NSPS rule for new electric utilities.

<sup>28</sup> See *South Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1<sup>st</sup> Cir. 1974) (“logical outgrowth doctrine” requires additional notice and comment if final rule differs too greatly from proposal).

several revisions before being enacted. When an agency proposes a regulation, they are not saying “let’s have a conversation about this issue,” they are saying, “this is what we intend to put into effect unless there is some very good reason we have overlooked why we cannot.” By giving an agency feedback during the early rule development stage about how a regulation will affect those covered by it, the agency learns from all stakeholders about problems before they get locked into the regulation.

Sue and settle agreements cut this critical step entirely out of the process. Rather than hearing from a range of interested parties and designing the rule with the panoply of their concerns in mind, the agency essentially writes its rule to accommodate the specific demands of a single interest. Through “sue and settle,” advocacy groups achieve their narrow goals at the expense of sound and thoughtful public policy.

### **Sue and Settle is An Abuse of the Environmental Citizen Suit Provisions**

Congress expressed concern long ago that allowing unlimited citizen suits under environmental statutes to compel agency action has the potential to severely disrupt agencies’ ability to meet their most pressing statutory responsibilities.<sup>29</sup> Matters are only made worse when an agency does not defend itself against sue and settle lawsuits and willingly allows outside groups to reprioritize its agenda and deadlines for action.

Most of the legislative history that gives an understanding of the environmental citizen suit provision comes from the congressional debate on the 1970 Clean Air Act (CAA). There is little legislative history beyond the CAA.<sup>30</sup> The addition of the citizen suit provision in later

<sup>29</sup> The Court of Appeals for the District of Columbia noted in 1974 that “While Congress sought to encourage citizen suits, citizen suits were specifically intended to provide only ‘supplemental ... assurance that the Act would be implemented and enforced.’ *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1974). Congress made ‘particular efforts to draft a provision that would not reduce the effectiveness of administrative enforcement... nor cause abuse of the courts while at the same time still preserving the right of citizens to such enforcement of the act.’ Senate Debate on S. 3375, March 10, 1970, *reprinted in* Environmental Policy Division of the Congressional Research Service, *A Legislative History of the Clean Air Act Amendments of 1970*, Vol. I. at 387 (1974) (remarks of Senator Cooper).” *Friends of the Earth, et al. v. Potomac Electric Power Co.*, 546 F. Supp. 1357 (D.D.C. 1982)(“[T]he agency might not be at fault if it does not act promptly or does not enforce the act as comprehensively and as thoroughly as it would like to do. Some of its capabilities depend on the wisdom of the appropriation process of this Congress. It would not be the first time that a regulatory act would not have been provided with sufficient funds and manpower to get the job done... Notwithstanding the lack of capability to enforce this act, suit after suit after suit could be brought. The functioning of the department could be interfered with, and its time and resources frittered away by responding to these lawsuits. The limited resources we can afford will be needed for the actual implementation of the act”)(Senator Hruska arguing against the citizen suit provision of the Clean Air Act during Senate debate on S.4358 on Sept. 21, 1970)).

<sup>30</sup> See, e.g. Robert D. Snook, *Environmental Citizen Suits and Judicial Interpretation: First Time Tragedy, Second Time Farce*, 20 W. New Eng. L. Rev. 311 (1998) at 318.

statutes was perfunctory and the statutory language used was generally identical to the CAA language.<sup>31</sup>

The inclusion of a citizen suit provision was far from a given when it was being considered in the CAA. The House version of the bill did not include a citizen suit provision.<sup>32</sup> The Senate bill did include such a provision,<sup>33</sup> but serious concern was expressed during the Senate floor debate. Senator Roman Hruska (R-NE), who was ranking member of the Senate Judiciary Committee, expressed two major concerns about the citizen suit provision: the limited opportunity for Senators to review the provision and the failure to involve the Senate Judiciary Committee:

Frankly, inasmuch as this matter [the citizen suit provision] came to my attention for the first time not more than 6 hours ago, it is a little difficult to order one's thoughts and decide the best course of action to follow.

Had there been timely notice that this section was in the bill, perhaps some Senators would have asked that the bill be referred to the Committee of the Judiciary for consideration of the implications for our judicial system.<sup>34</sup>

Senator Hruska entered into the record a memo written by one of his staff members. It reiterated the problem of ignoring the Judiciary Committee:

The Senate Committee on the Judiciary has jurisdiction over, among other things,“(1) Judicial proceedings, civil and criminal, generally.....(3) Federal court and judges.....” The Senate should suspend consideration of Section 304 [the citizen suit provision] pending a study by the Judiciary Committee of the section's probable impact on the integrity of the judicial system and the advisability of now opening the doors of the courts to innumerable Citizens Suits against officials charged with the duty of carrying out the Clean Air Act.<sup>35</sup>

Senator Griffin (R-MI), also a member of the Senate Judiciary Committee, noted the lack of critical feedback that was received regarding the provision:

[I]t is disturbing to me that this far-reaching provision was included in the bill without any testimony from the Judicial Conference, the Department of Justice, or the Office of Budget and Management concerning the possible impact this might have on the Federal judiciary.<sup>36</sup>

<sup>31</sup> *Id.* at 313-314, 318.

<sup>32</sup> *See e.g.* “A Legislative History of the Clean Air Amendments, Together with a Section-by-Section Index,” Library of Congress, U.S. Govt. Print. Off., 1974-1980, Conference Report, at 205-206.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* Senate debate on S. 4358 at 277.

<sup>35</sup> *Id.* at 279.

<sup>36</sup> *Id.* at 350.

The citizen suit provision in the CAA was never considered by either the House or Senate Judiciary Committees.<sup>37</sup> The same is true for the citizen suit provision in the Clean Water Act, which was enacted just two years later.<sup>38</sup> Until the 112<sup>th</sup> Congress, there was no House or Senate Judiciary Committee hearing focused specifically on citizen suits, dating back 41 years to the creation of the first citizen suit provision in 1970.<sup>39</sup>

### **The Sunshine for Regulatory Decrees and Settlements Act of 2013**

In 2012, during the 112<sup>th</sup> Congress, the House Judiciary Committee began considering the abuses of the sue and settle process. Representative Ben Quayle (R-AZ) introduced H.R. 3862, the Sunshine for Regulatory Decrees and Settlements Act of 2012. On July 24, 2012, the bill passed the House of Representatives as part of a larger bill by a vote of 245 to 172. As part of the development of the Sunshine for Regulatory Decrees and Settlement Act, the House Judiciary Committee held extensive hearings on sue and settle and issued a committee report on July 11, 2012. Unfortunately, the Senate never took action on the counterpart bill.

On April 11, 2013, the Sunshine for Regulatory Decrees and Settlements Act of 2013 was introduced in the House as H.R. 1493, and in the Senate as S. 714. These bills would (1) require agencies to give notice when they receive notices of intent to sue from private parties, (2) afford affected parties an opportunity to intervene *prior to the filing* of the consent decree or settlement with a court, and (3) publish notice of a proposed decree or settlement in the *Federal Register*, and take (and respond to) public comments at least 60 days prior to the filing of the decree or settlement. The bill would also require agencies to do a better job showing that a proposed agreement is consistent with the law and in the public interest. The bill takes a measured, moderate approach to the sue and settle problem. While some have advocated legislation to severely restrict agency settlements themselves, H.R. 1493 would simply ensure that these settlements are conducted out in the open and that interested parties can have a seat at the bargaining table.

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<sup>37</sup> “A Legislative History of the Clean Air Amendments, Together with a Section-by-Section Index,” Library of Congress, U.S. Govt. Print. Off., 1974-1980; The legislative history was also searched using Lexis.

<sup>38</sup> “A Legislative History of the Water Pollution Control Act Amendments of 1972, Together with a Section-By-Section Index,” Library of Congress, U.S. Govt. Print. Off., 1973-1978; The legislative history was also searched using Lexis.

<sup>39</sup> In 1985, the Senate Judiciary Committee did hold a hearing on the Superfund Improvement Act of 1985 that among other things did discuss citizen suits (S. Hrg. 99-415). The hearing covered a wide range of issues, such as financing of waste site clean-up, liability standards, and joint and several liability. To find hearing information, a comprehensive search was conducted using ProQuest Congressional at the Library of Congress. The search focused on hearings from 1970-present that addressed citizen suits.

## **Recommendations**

The regulatory process should not be radically altered simply because of a consent decree or settlement agreement. There should not be a two-track system that allows the public to meaningfully participate in rulemakings, but excludes the public from the “sue and settle” negotiation and settlement process that results in rulemakings designed to benefit a specific interest group. There should not be one system where agencies can use their discretion to develop rules and another system where advocacy groups use lawsuits to legally bind agencies to improperly hand over their discretion.

### ***Notice***

Federal agencies must inform the public immediately upon receiving notice of an advocacy group’s intent to file a lawsuit. The Department of Justice could also provide public notice of the filing of lawsuits against agencies, as well as settlements the agencies agree to. This public notice should be provided in a prominent location, such as the agency’s website or through a notice in the *Federal Register*.<sup>40</sup> By having this notice, affected parties will have a better opportunity to intervene in cases and also prepare more thoughtful comments.

### ***Comments and Intervening***

Federal agencies should be required to submit a notice of a proposed consent decree or settlement agreement before it is filed with the court. This notice should be published in the *Federal Register* and allow a reasonable period for public comment (e.g., 45 days). Because it is so difficult for third parties to intervene in sue and settle cases, courts should presume that it is appropriate to include a third party as an intervenor. At present, intervenors can be excluded from settlement negotiations, *sometimes without even being notified of the negotiations*. There should be clarification that all parties in the action, including the intervenors, should have a seat at the negotiation table. Intervenors should only be excluded if this strong presumption could be rebutted by showing that the party’s interests are adequately represented by the existing parties in the action.

### ***Substance of Rules***

Agencies should not be able to cede their discretionary powers to private interests, especially the power to issue regulations and to develop the content of rules. This problem does not exist in the normal rulemaking process. Yet, since courts readily approve consent decrees

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<sup>40</sup> It is our understanding that EPA has recently begun to disclose the notices of intent to sue it receives from outside parties on the agency’s website. While this is a welcome development, this important disclosure needs to be statutorily required, not just a voluntary measure.

that legally bind agencies in the sue and settle context, the decree itself becomes a vehicle for agencies to give up their discretionary rulemaking power – and even to develop rules with questionable statutory authority. Courts should review the statutory basis for agency actions in consent decrees and settlement agreements in the same manner as if they were adjudicating a case. For example, they should ensure that an agency is required to perform a mandatory act or duty, and if so, that the agency is implementing the act or duty in a way that is authorized by statute.

***Deadlines***

Federal agencies should ensure that they (and their partners, including states and other agencies), have enough time to comply with regulatory timelines. The public should be given enough time to meaningfully comment on proposed regulations, and agencies should take enough time to adequately conduct proper analysis. This would include agency compliance with the Regulatory Flexibility Act, executive orders, and other requirements designed to promote better regulations. This is particularly important because recent rulemakings are often more challenging to evaluate in terms of scope, complexity, and cost than earlier rules were.

***Congress Needs to Pass the Sunshine for Regulatory Decrees and Settlements Act of 2013***

H.R. 1493 would implement these and other important common-sense changes. It is a law based on good government principles recognizing the importance of open government and public participation. This legislation would address the “sue and settle” problem and make federal agencies’ regulatory agendas more transparent, open, and accountable.

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Mr. BACHUS. Thank you.  
Mr. Puckett, you are recognized.

**TESTIMONY OF ALLEN PUCKETT, III, PRESIDENT,  
COLUMBUS BRICK COMPANY**

Mr. PUCKETT. Chairman Bachus, Ranking Member Cohen, and Members of the Subcommittee, good morning.

I am President of Columbus Brick Company, a small business in Columbus, Mississippi. I am a member of the fourth generation of Pucketts to own and operate this company. Our fifth generation is also working in the company. Our family has been making fired clay brick in Mississippi since before the 1890's.

I am here today as a small business owner. I do not profess to be an expert on the Clean Air Act or on this bill you are considering today. We are an industry of mostly small companies, and we look to our trade associations and industry task forces for this kind of information.

I do, however, know how to run a business, and what I have seen happening in the past several years makes me extremely concerned about my ability to keep our business viable for the future.

I am also here today on behalf of our industry, our company, and the families we employ.

Over the past 10 years, our industry has been directly impacted by two sue-and-settle cases involving air toxic standards being developed by the U.S. Environmental Protection Agency.

Our first experience with sue-and-settle was a rule that was vacated after we had spent considerable money for compliance with the rule. I believe we were harmed by this first sue-and-settle.

We are understandably concerned about the second round of sue-and-settle rulemaking we are now facing. The rules I am referring to are the National Emission Standards for Hazardous Air Pollutants, or NESHAP's, commonly referred to as MACT standards. It is my understanding that virtually all original MACT standards were completed under either a sue-and-settle court order or the threat of a court order. I also understand that most of these rules were later subject to litigation by the same environmental groups who forced a short schedule, this time complaining that the EPA did not properly develop the rule. It appears there may be an obvious correlation between these two facts.

Recently the EPA restarted the MACT development process for our industry and has once again entered into a sue-and-settle consent decree with the Sierra Club for our rulemaking schedule. We asked to be included in the discussions of the settlement but were again excluded from the negotiations until a draft settlement was published in the Federal Register. I do not think anyone could possibly fault our industry for being extremely concerned.

If the EPA uses the same approach they have followed on recent rules as a default to lower litigation potential, Columbus Brick may cease to exist after almost 125 years of operation. Based on EPA's numbers I have seen for my company, I expect at minimum to have to permanently shut down two of our three kilns. That will mean a permanent job loss for 45 to 50 families in our small rural community.

Unfortunately, my story is not unique in our industry.

If this burden resulted in some great benefit to the environment, it might be worth it. However, the EPA has the data in house that demonstrates that there is no great benefit to the environment, that our industry's operations are already within safe levels in many, many cases. If there were no other options available under the Clean Air Act, it might be unavoidable. However, the EPA has the authority under the Clean Air Act to avoid disastrous impacts

that provide no benefit. The EPA needs to take the time to develop the rule correctly. They need to avoid sue-and-settle agreements that remove that time.

We actually have a great deal of faith in the EPA to do the right thing if they are allowed to do so, to look at the data and the requirements of the Clean Air Act, and then come to a decision that meets the requirements of the Clean Air Act, protects human health and the environment, and still allows our industry to continue to operate.

We are not asking for the rule to go away. We are asking that the practice of establishing unreasonable deadlines without input from the impacted industry go away. We are asking for the opportunity to be an integral part of a rulemaking process that could make or break our industry. We are asking that the time be taken to ensure that the public health and welfare is maintained but also allow the brick industry to continue to exist. I believe you can ensure that these decisions are made that allow my company to continue and our employees to remain gainfully employed. I would hate to see Columbus Brick put out of business because of a rule the EPA made it was forced to develop too quickly, especially a rule that does not benefit anyone.

Thank you.

[The prepared statement of Mr. Puckett follows:]

**COLUMBUS BRICK COMPANY**  
MANUFACTURERS OF BRICK SINCE 1890

**U.S. House of Representatives**  
**Committee on the Judiciary, Subcommittee on Regulatory Reform,**  
**Commercial and Antitrust Law**  
**Hearing on H.R. 1493, the “Sunshine for Regulatory Decrees and**  
**Settlements Act of 2013”**  
**June 5, 2013 10:00 am**  
**2141 Rayburn House Office Building**

Chairman Bachus, Ranking Member Cohen, and Members of the Subcommittee, my name is Allen Puckett III and I am the President of Columbus Brick Co, a small business in Columbus, Mississippi. I am a member of the fourth generation of Pucketts to own and operate Columbus Brick Co. Our fifth generation also works in the company. Our family has been making fired clay bricks in Mississippi since 1890 and we distribute our bricks to more than 15 states. The Columbus Brick company was founded by W.S. Lindamood and my great-grandfather, W. N. Puckett. They were helping build a women’s college but discovered there was not enough brick for the project, so they started Columbus Brick Company.

Like the rest of our industry, Columbus Brick has been negatively affected by the slumping economy and housing market in particular. In 2005, we employed 90 people; we currently have only 75. We have resisted layoffs and used early retirements and attrition to reduce our workforce. The production of brick has decreased at the plant by forty million brick per year. This represents about a 30 percent drop, which is actually less than the average for our industry.

We believe that most of our success is due to the loyalty and commitment of our employees. They have made us what we are. We are committed to our employees and strive to create a desirable work environment and culture at our company. We cover over 80% percent of employee health insurance premiums including their family, offer a fully funded profit sharing retirement plan, and a 401k match program. We also have a nurse practitioner come onsite twice a month to have a free clinic for all our employees. We believe that our commitment and support of our employees gives the company a long term stable workforce. Fifty-seven percent of our employees have

worked with us for over 10 years and we even have one who has been with us for 50 years, which is not uncommon. Our employee families have also worked for us for generations. Currently, we have several 2<sup>nd</sup>, 3<sup>rd</sup>, and even 4<sup>th</sup> generation employees. We are a good corporate citizen and support many social causes. I am here today as a small business owner. I do not profess to be an expert on the Clean Air Act or on this bill that you are considering today. We are an industry of mostly small companies and we look to our trade association and industry task forces for that kind of information. I do, however, know how to run a business and what I have seen happening in the past several years makes me extremely concerned about my ability to keep our business viable in the future. I believe that this bill and a few other changes in how the EPA creates rules would help keep Columbus Brick, and the brick industry, alive in the United States.

I am here today on behalf of my industry, our company and the families we employ. Over the past 10 years our industry has been directly impacted by **two** sue-and-settle cases involving air toxics standards being developed by the US Environmental Protection Agency. Our first experience with sue and settle was a rule that was vacated after we spent considerable money for compliance with that rule. We are understandably concerned about this second round of sue-and-settle rulemaking we now face. If EPA continues down the path that it has presented to us, our company and many other companies like ours will be forced to significantly downsize or close. This would mean the loss of jobs in our small community. Since Columbus Mississippi already has more than twice the national unemployment rate, further job loss, particularly with no environmental benefit, is unacceptable.

The rules I am referring to are national emission standards for hazardous air pollutants, or NESHAPs, developed by the EPA under Section 112 of the 1990 Clean Air Act. These rules are based on the level of control defined as the maximum achievable control technology, or MACT, so they are commonly referred to as MACT standards. The EPA was required to develop MACT standards for about 175 categories of sources at various intervals between 1990 and 2000. The CAA included a requirement, referred to as the MACT Hammer, which would make states and industries develop the standards themselves if EPA failed to accomplish their requirements. Throughout the 90's and into the early 2000's, environmental groups such as the Sierra Club used the court system to force EPA to meet these deadlines, as well. It is my understanding that virtually all original MACT standards were completed under either a sue and settle court order or a threat of an impending court order. I also understand that most of those rules were later subject to litigation by the same environmental groups who forced a short schedule, this time

complaining that EPA did not develop the rule properly. I believe there is an obvious correlation between these two facts.

Our first rule was no different. Due to its low risk relative to other source categories, our rule was in the last “bin” for regulation, with our rule due in November of 2000. Our small industry worked with EPA from the very beginning, providing data they requested and remaining abreast of the issues. As the deadline approached, we heard about the lawsuit and the settlement discussions and were concerned, but assured by EPA that they had sufficient time to complete our rule. However, with only seven months between the proposed rule being published in the *Federal Register* and the final rule signature date, we were concerned that EPA did not have adequate time to fully consider what we believed to be significant concerns about the proposed rule.

This shortened schedule was forced by a “sue and settle” arrangement between the EPA and the Sierra Club. We believe we were harmed in many ways by that first sue and settle deal:

1. EPA did not hold a small business panel we believe was required by the Small Business Regulatory Enforcement Fairness Act, or SBREFA. Since the majority of companies in our industry are small businesses and many were projected to be severely impacted by the rule, we believe a small business panel should have been convened.
2. The Brick MACT was the first proposed rule to mention the possibility of a health-based approach for a MACT, a discretionary approach allowed under the CAA that is both protective of the environment and has the potential to provide more operating flexibility to industry. However, the day after the public hearing and just a month after proposal, industry met with EPA to discuss the data they would need to pursue this option. We were told by the EPA that they had no plans to pursue this option due to time constraints. We believe a review of the data then could have saved us the problems we have faced since that time.
3. EPA did not have sufficient time to craft a defensible rule, as evidenced by what happened next. A bad rule hurts everyone.

The Brick and Structural Clay Products MACT was vacated by the courts as deficient in 2007. Unfortunately, the environmental groups seemed to have control of the timing of that, as well. The reconsideration process and then the litigation lasted until almost a full year after our industry had come into full compliance with the rule. Our actions included increasing the number of controlled sources in our industry by more than 400 percent. We believe the vacatur was a direct result of insufficient time to adequately support the

rulemaking process in the written preamble and insufficient time for critical review by both the upper levels of the EPA and the Office of Management and Budget.

Again, industry asked for more time, pointing out the obvious time crunch. Again, the EPA claimed that the schedule was “out of their control.” We asked for an extension of the compliance date, but that too was largely denied.

We recognize that environmental groups like the Sierra Club have a role to play in the process. However, so should the affected industry and the regulating agency. In this case, the control of the rule development was turned over to a third party with EPA agreeing to an unreasonable schedule. That same third party then sued EPA because the rule was technically deficient. I believe, in most cases including this one, that same third party is then paid back for the costs they incur to fight a bad rule that was created due to a shortened schedule they encouraged and that EPA did not defend. However, throughout the long reconsideration and litigation, no concern was shown for the millions of dollars that my industry was spending in good faith to comply with a rule that would later be vacated. Now those controls are being used as justification for increasing the stringency on the new MACT, potentially by orders of magnitude.

Recently, EPA has restarted the MACT development process for our industry. They have required us to conduct expensive stack tests on the controls that were installed because of the now-vacated first Brick MACT. They have changed their approach to establishing MACT limits to more stringent methods that would not even be possible with some of those earlier, higher risk categories. After completing larger priorities like the Boiler and Utility MACTs, focus has returned to our small industry. Our rulemaking is haunted by the ghost of the now-vacated “Brick MACT”, as EPA has frequently admitted. EPA has once again entered into a “sue and settle” consent decree with the Sierra Club for our rulemaking schedule. We asked to be included in the discussions of the timing in the settlement, but were again excluded from the negotiations until a draft settlement agreement was published in the *Federal Register*. I don’t think anyone could possibly fault our industry for being extremely concerned.

1. Over the past 10 years, we have spent over 100 million dollars installing controls to comply with that first MACT and continuing to operate those controls in most cases. EPA estimates that this new MACT could potentially cost close to TWICE that amount each and every year.
2. Columbus Brick spent \$750,000 to install a control device on our large kiln to comply with the first Brick MACT. Each year we incur ongoing

operational costs because the operation of this control device is still a requirement of our air operating permit.

3. Before the last rule, our industry had roughly only 20 controlled kilns of over 300 total kilns. Now we have over 100 out of about 250 kilns. Those newly controlled kilns were all installed because of a rule that is no longer on the books. Most of those controls remain in operation.
4. EPA is using the presence of those new controls and new interpretations of the CAA to create a nearly impossible standard for our industry. Our situation is now the “MACT-on-MACT” scenario. We are concerned that EPA does not know how to deal with this scenario which is further exacerbated by a mandated schedule.

The EPA should be focused on fulfilling the requirements of the CAA and not have their priorities dictated to them from a third party. The EPA should be interpreting the statutes as provided by Congress, not basing decisions on “what would Sierra Club say.” Even now, as we have discussions with EPA, they mention that they have to consider the “litigants” position as well. ***There are no litigants to this rulemaking. Not yet.*** There are only litigants to a lawsuit to establish the schedule for this rulemaking. There is a huge difference between the two. But, in a real sense, I think that EPA does see the environmental groups as the litigants to the actual rulemaking and it impacts every decision they make.

The CAA clearly gives EPA flexibility to do things differently than they have done on previous rules. They can fully follow the CAA, protect the environment AND give our industry a chance to exist and maybe even thrive once again. Consideration of flexible alternatives takes time. We are concerned because consideration of these discretionary actions tends to go away as the time crunch increases.

If EPA uses the same approach they have followed on recent rules as a default to lower litigation potential, Columbus Brick may cease to exist after 125 years of operation. Based on EPA’s numbers I have seen for my company, I expect at a minimum to have to permanently shutter two of our three kilns. Given these numbers, even if someone gave me fully paid-off control devices, we would have a difficult time paying to operate the controls and remain in business. That will mean a permanent job loss for at least 45 to 50 families in our small community.

Unfortunately, my story is not unique in our industry. Most of the companies that would be affected by this rule are small businesses who face similar fates. Our larger companies in our industry will not fare much better. They, too, operate plants in small towns and will face the potential of closing those plants. Even large plants will be severely stressed since EPA is taking an approach that appears to require development of new technologies and investment in technologies that have never been demonstrated as effective.

If this burden resulted in some great benefit to the environment, it might be worth it. However, EPA has the data in house that demonstrates that there IS NO great benefit to the environment- that our industry's operations are already well within safe levels in many, many cases. If there were no other options available under the CAA, it might be unavoidable. However, EPA has the authority under the CAA to avoid disastrous impacts that provide no benefit. EPA needs to take the time to develop the rule correctly. They need to avoid sue and settle agreements that remove that time.

We want to be able to make our case for sufficient time to assess the data while EPA is having discussions with the litigants, not after they have made their agreements. We are, most definitely, "interested parties" to these discussions.

We actually have a great deal of faith in the EPA to do the right thing, if they are allowed to do so. To look at the data and the requirements of the CAA and come to a decision that meets the requirements of the CAA, protects human health and the environment, and still allows our industry to continue to operate.

We are not asking for this rule to go away. We are asking that the practice of establishing unreasonable deadlines, without input from the impacted industry, go away. We are asking for the opportunity to be an integral part of a rulemaking that could make or break our industry. We are asking that the time be taken to ensure that public health and welfare is maintained, but also allow the brick industry to continue to exist. You can ensure that decisions are made that allow my company to continue and our employees to remain gainfully employed. I would hate to see Columbus Brick go out of business because a rule EPA was forced to be developed too quickly, especially a rule that benefits no one.

Thank you.

Mr. BACHUS. Thank you.  
Mr. Walke?

**TESTIMONY OF JOHN D. WALKE, CLEAN AIR DIRECTOR AND  
SENIOR ATTORNEY, NATURAL RESOURCES DEFENSE COUN-  
CIL**

Mr. WALKE. Thank you, Chairman Bachus and Ranking Member Cohen, and Members of the Subcommittee. My name is John Walke and I am clean air director and senior attorney for the Natural Resources Defense Council. NRDC is a nonprofit organization of scientists, lawyers, and environmental specialists dedicated to protecting public health and the environment.

My testimony today will focus on three main points.

First, allegations that Federal agencies collude with nongovernmental organizations in the filing and settling of lawsuits are entirely unsubstantiated.

Second, H.R. 1493's solutions to this unsubstantiated problem would prevent the enforcement of laws that establish critical health safeguards.

Third, this bill ignores the existing administrative and judicial safeguards that prevent litigation abuses.

First, the witnesses at today's hearing, like their counterparts at last year's, have provided no evidence of Government attorneys seeking to limit agency discretion by colluding with plaintiffs to settle cases. The U.S. Chamber of Commerce recently issued an entire report on this subject and was unable to identify any evidence of collusion, conspiracy, or agencies manipulating settlements or laws to carry out improper exercises of authority.

Instead, critics such as the Chamber have resorted to redefining what the term "sue-and-settle" means. The Chamber chose a methodology that focused on all EPA settlements with environmental groups but only during this Administration. Now why? First, because this allowed the Chamber to quietly dispense with any need to prove collusion or impropriety. Next, because a fuller picture that included EPA settlements with industry and Bush administration settlements with environmental groups would have destroyed the Chambers' mythical story.

What the Chamber and this bill truly target is the legal rights of citizens to hold government accountable by enforcing laws designed to protect public health, safety, and the environment. Settlements have led to EPA having to fulfill clear statutory obligations that the Chamber would prefer to remain unenforced.

Second, under H.R. 1493, third party intervenors would be given the unprecedented ability to obstruct settlement talks. The result would waste taxpayer money as agencies would be forced to take more time settling or even litigating cases in which they know they have broken the law. H.R. 1493 would give intervenors opportunities to disrupt and obstruct the settlement of lawsuits in ways that courts have rejected. In fact, this bill would overturn a Supreme Court precedent that made clear that intervenors cannot prevent parties from resolving their disputes in settling a case.

The legal obligations in settlements overwhelming entail requiring agencies to comply with nondiscretionary duties that are clearly mandated by law such as statutory deadlines. These laws protect

Americans' health, safety, environment, food supply, investor confidence, and other values. For example, just two overdue clean air standards that followed consent decrees attacked by the Chamber are projected to save over 10,000 lives annually. If Congress does not like the deadlines or safeguards, it is free to amend them. It should not be creating end runs around the law.

Third, H.R. 1493 ignores the legal mechanisms already in place to ensure transparency, public participation, and an agency's maintenance of its discretionary powers and legal responsibilities. Notably, no witness at last year's hearing or in written testimony today has identified a single rule that followed a settlement that did not go through public notice and comment. The settlements cited did not mandate a result but merely a timetable for rulemaking, meeting all administrative laws.

Some of today's testimony conflates and confuses the terms of settlements which do not establish regulatory deadlines or mandates with subsequent rulemakings that do establish deadlines and mandates but only pursuant to call and comment rulemakings. Again, no regulatory outcomes were fixed by any settlements discussed in the witnesses' testimony, and any criticisms of the regulatory deadlines and measures could have been and in many cases were raised during public comment opportunities during these rulemakings.

Settlements include specific language barring modifications of agency authority, and deadlines and settlements can be extended by agreement of the parties or unilaterally by the agency with court approval. But agency critics ignore these safeguards. Instead, the critics have offered H.R. 1493 which would hinder all plaintiffs seeking to uphold the law, including States, corporations, and individuals. It is hard to understand why even conservatives would back legislation that hinders enforcement of the law, requires agencies to waste money in court on cases they believe they cannot win, and would stymie industry and State settlements along with all others.

I urge the Subcommittee to reject this harmful legislation. Thank you.

[The prepared statement of Mr. Walke follows:]

TESTIMONY OF JOHN D. WALKE  
CLEAN AIR DIRECTOR  
NATURAL RESOURCES DEFENSE COUNCIL

HEARING ON H.R. 1493, "SUNSHINE FOR REGULATORY DECREES AND  
SETTLEMENTS ACT OF 2013"

BEFORE THE SUBCOMMITTEE ON REGULATORY REFORM,  
COMMERCIAL AND ANTITRUST LAW,  
COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

June 5, 2013

Thank you, Chairman Bachus and Vice Chairman Farenthold, and Ranking Member Cohen for the opportunity to testify today. My name is John Walke, and I am clean air director and senior attorney for the Natural Resources Defense Council (NRDC). NRDC is a nonprofit organization of scientists, lawyers, and environmental specialists dedicated to protecting public health and the environment. Founded in 1970, NRDC has more than 1.3 million members and online activists nationwide, served from offices in New York, Washington, Los Angeles, San Francisco, Chicago, and Beijing.

I have worked at NRDC since 2000. Before that I was a Clean Air Act attorney in the Office of General Counsel for the U.S. Environmental Protection Agency (EPA). Prior to that I was an attorney in private practice where I represented corporations, industry trade associations and individuals. Working in each of these three capacities, I have represented my clients in lawsuits that resulted in settlement agreements or consent decrees involving the EPA. My testimony today draws upon these different experiences as well as the experiences of other NRDC attorneys.

H.R. 1493, the Sunshine for Regulatory Decrees and Settlements Act of 2013, arises out of the baseless belief that government lawyers engage in “sue and settle” litigation strategies. The “sue and settle” expression alleges that government agencies seek to limit their discretion by colluding with plaintiffs to settle cases. This suggestion is squarely at odds with NRDC’s experience, as well as my own experience as a private practitioner and government attorney. In litigation against the United States over four decades, NRDC attorneys have observed that Department of Justice and agency attorneys zealously advocate for the government’s position. This has been true under both Democratic and Republican administrations.

Moreover, we fail to see real world evidence of the “sue and settle” phenomenon. A careful examination of the record, including testimony by witnesses for the majority at last year’s hearing<sup>1</sup> for H.R. 1493’s predecessor, H.R. 3862,<sup>2</sup> fails to establish real world problems that would justify this harmful and heavy-handed legislation. H.R. 1493 purports to solve problems that do not actually exist. It is a fundamentally flawed piece of legislation that we urge the subcommittee to oppose for the reasons discussed below.

#### Lack of Factual Foundation for Charges

The premise of the legislation is unfounded and indeed unsubstantiated. The “sue and settle” allegations implicit in the bill and reflected in last year’s hearing testimony on H.R. 3862 amount to serious charges of intentional wrongdoing — that federal agencies and third parties conspire to settle litigation to advance untoward policy and legal objectives.

Yet last year’s testimony on H.R. 1493’s predecessor is devoid of any evidence whatsoever of that allegation. For example, majority witness Andrew Grossman of The Heritage Foundation asserted in his written testimony that “[i]n some cases, these [consent] decrees appear to be the result of collusion, where an agency shares the goals of those suing it and takes advantage of litigation to achieve those shared goals.”<sup>3</sup> Nowhere

<sup>1</sup> *Hearing on H.R. 3041, the “Federal Consent Decree Fairness Act,” and H.R. 3862, the “Sunshine for Regulatory Decrees and Settlements Act” Before the Subcomm. on Courts, Commerce and Admin. Law of the H. Comm. on the Judiciary*, 112<sup>th</sup> Cong. (Feb. 3, 2012) (hearing notice available at [http://judiciary.house.gov/hearings/Hearings%202012/hear\\_0203012.html](http://judiciary.house.gov/hearings/Hearings%202012/hear_0203012.html)) (“Hearing on H.R. 3862”).

<sup>2</sup> H.R. 3862, 112<sup>th</sup> Cong. (2012) available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3862rh/pdf/BILLS-112hr3862rh.pdf>.

<sup>3</sup> Hearing on H.R. 3862 (Testimony of Andrew Grossman, Visiting Legal Fellow, The Heritage Foundation available at <http://judiciary.house.gov/hearings/Hearings%202012/Grossman%2002032012.pdf>). See also, e.g. the

in his written testimony, however, does Mr. Grossman furnish evidence backing this claim; the most he could muster was the weak statement that this “appear[s]” to be the case to him. Similarly, no other witnesses or members at the hearing offered proof that rose above their subjective interpretation or speculation. Unsubstantiated charges from those with an anti-regulatory political agenda should not form the basis for legislation.

Similarly, the office of Majority Leader Eric Cantor issued a report entitled “The Imperial Presidency”<sup>4</sup> that leveled the serious charge that the current administration engages in improper and possibly unconstitutional collusive litigation practices:

The Obama Administration regularly relies on “sue-and-settle” tactics to avoid Congressional scrutiny and minimize public participation in the rulemaking process, while fast tracking the priorities of environmental groups. In practice, groups like the Sierra Club and the Natural Resources Defense Council will sue the EPA for failing to meet a nondiscretionary duty, usually a statutory deadline. Rather than fighting the lawsuit, EPA officials – many of whom used to work for the very groups that are now suing – will make enormous concessions in a settlement agreement that requires the agency to take a particular action. These settlement agreements are the product of closed-door negotiations between the EPA and environmental groups – states, industry, stakeholders, and the public have no voice in the process. Furthermore, these settlement agreements can be legally binding on future Administrations, raising serious constitutional concerns.

The first thing one notices when reading this passage is there is no evidence to support the charges. No facts, no examples, no footnotes.

The next striking thing is the basic irony that Majority Leader Cantor is arguing that the Executive Branch should defend in court to the bitter end its failure to comply with statutory deadlines set by Congress, since statutory deadlines are overwhelmingly the “nondiscretionary duties” at issue in government consent decrees and settlements. If Congress does not like a statutory deadline, it can change it. If Congress no longer supports statutory programs, it may amend them. But statutory deadlines and requirements are the law, and Congress surely does not want the Executive Branch to violate a duly enacted law. An administration that defied congressionally enacted deadlines or other provisions, even when sued to comply with them, would be thumbing

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majority report accompanying H.R. 3862 available at <http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt593/pdf/CRPT-112hrpt593.pdf>.

<sup>4</sup> The Office of Majority Leader Eric Cantor, *The Imperial Presidency: Implications for Economic Growth and Job Creation*, at 23 available at <http://majorityleader.gov/theimperialpresidency/files/The-Imperial-Presidency-Majority-Leader-Eric-Cantor%27s-Office.pdf>.

its nose at Congress—intruding on congressional prerogatives—not the other way around.

Most striking of all is the consistent failure in Majority Leader Cantor’s report and elsewhere by critics of agency settlements and consent decrees to identify instances of collusion or other impropriety, notwithstanding an entire political narrative developing without supportive facts. Critics have not identified settlements that dictated particular regulatory outcomes by skirting required administrative rulemakings. Conservative authors of editorials, op-eds and blogs have taken up this narrative without so much as the barest facts to support the charges.<sup>5</sup> The U.S. Chamber of Commerce recently issued an entire report<sup>6</sup> on this subject and was unable to identify any evidence of collusion, conspiracy or agencies manipulating settlements or laws to carry out improper exercises of authority. My testimony examines the Chamber Report in greater detail below.

#### Shifting Arguments

Faced with the inability to identify collusion or impropriety and the dilemma this represents for their agenda, critics have resorted to shifting their arguments and re-defining what the term “sue-and-settle” means. The Chamber of Commerce report provides a particularly stark example of this shell game.

The Chamber chose a “sue-and-settle” methodology for its report that consists of Internet searches identifying all cases in which EPA and an environmental group entered into a consent decree or settlement agreement between 2009 and 2012. One cannot help noticing the report’s slanted, partisan failure to examine any settlements between EPA and industry parties or conservative organizations, or any settlements involving the Bush administration. EPA regularly enters into settlements with industry parties, and I provide a list of illustrative examples in a footnote to my testimony.<sup>7</sup> Had the Chamber examined settlements prior to 2009, the results would have disclosed that the Bush administration

<sup>5</sup> See, e.g., Op-Ed., *EPA's back-room 'sue and settle' deals require reform*, WASH. EXAMINER, May 25, 2013 available at <http://washingtonexaminer.com/epas-back-room-sue-and-settle-deals-require-reform/article/2530505> & Op-Ed., *No more back-room deals between bureaucrats and liberal activists*, WASH. EXAMINER May 27, 2013, available at <http://washingtonexaminer.com/national-editorial-no-more-back-room-deals-between-bureaucrats-and-liberal-activists/article/2530584> (last visited May 31, 2013) (“Washington Examiner Op Eds”).

<sup>6</sup> U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors*, May 2013 available at <http://www.uschamber.com/sites/default/files/reports/SUEANDSETTLEREPORT-Final.pdf> (“Chamber Report”).

<sup>7</sup> See *infra* n. 37.

entered into settlements and consent decrees with environmental groups, industry, states and other organizations just like the present administration.

Most striking of all is that by merely compiling EPA settlements (with just environmental groups, under just this administration), the report's methodology<sup>8</sup> quietly dispenses with any need for proof of collusion or impropriety in consent decrees or settlement agreements. The Chamber cannot remotely back up the charge that collusion was involved in all of these settlements, or even in any of them, so the report does not even try.

It is not surprising that the Chamber's methodology found instances of settlements with EPA, since settlements are a common and long-accepted form of resolving litigation over clear legal violations under any administration. But the Chamber Report then proceeds to assert that these unremarkable facts are evidence of the collusion imagined by critics. As such, the Chamber Report redefines and significantly expands the already politically loaded sue-and-settle allegation to encompass settlements generally, precisely because there is no evidence of collusion.

The Chamber continues this argument-shifting tactic elsewhere in its report. The report reveals that one of the Chamber's grievances concerns not just settlements (lacking any evidence of impropriety), but even the basic legal rights of citizens (and corporations and states, among others) under various federal laws to hold government accountable when it breaks the law: "In the final analysis, Congress is also to blame . . . . Most of the sue and settle lawsuits were filed as citizen suits authorized under the various environmental statutes."<sup>9</sup>

These citizen suit authorities are one of the longest-standing and proudest features of modern administrative laws. Courts have recognized the importance of these suits, noting that they represent a "deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that [environmental laws] would be implemented and enforced."<sup>10</sup>

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<sup>8</sup> Chamber Report at 46-49.

<sup>9</sup> *Id.* at 8.

<sup>10</sup> *Natural Res. Def. Council v. Train*, 510 F.2d 692, 700 (1974); *See also Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 263 (1975) ("Congress has opted to rely heavily on private enforcement to implement public policy"); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 737 (1987) (Blackmun, J., dissenting) (noting reasonable fees provisions of environmental laws "to encourage the enforcement of federal law through lawsuits filed by private persons").

The Chamber is taking aim not at collusion, for which it lacks any proof, but instead at this “deliberate choice by Congress.” The Chamber is directly targeting the legal rights of citizens to hold government accountable by enforcing mandatory statutory duties that agencies have unlawfully delayed or entirely failed to execute. The reason for this targeting is plain. The Chamber dislikes the rights that Congress has conferred upon Americans to protect themselves against health and environmental hazards when the government fails in its obligations to do so. The Chamber so dislikes these citizens’ rights because the result may mean that agencies are required to enforce the law, making some of the Chamber’s members comply with health, safety and environmental standards.

#### Nondiscretionary Statutory Duties

Consent decrees between federal agencies like EPA and plaintiffs are most commonly lodged in federal district courts to address an agency’s failure to perform a nondiscretionary (or mandatory) statutory duty under federal law. These nondiscretionary duties most frequently concern failure to meet one or more plain statutory deadlines.<sup>11</sup>

The Republican co-sponsors of the companion Senate bill, S. 714, recognize the nature of these legal obligations. They have noted that the settlement agreements and consent decrees targeted by their legislation “[t]ypically” arise in cases where “the defendant agency has failed to meet a mandatory statutory deadline for a new regulation or is alleged to have unreasonably delayed discretionary action.”<sup>12</sup> In my experience, consent decrees with federal agencies overwhelmingly concern nondiscretionary statutory duties like legal deadlines, and settlements are entered into far less often for unreasonably delayed discretionary actions. Indeed, caselaw tells us that agencies like EPA routinely litigate unreasonable delay lawsuits rather than settling them, sometime winning such cases, sometimes losing them.<sup>13</sup>

<sup>11</sup> See, e.g., *American Lung Association et al., v. U.S. EPA*, No. 1:12-cv-00243, at 2 (D. D.C. Sept. 4, 2012) (consent decree in a “suit[] against EPA alleging that the Agency has failed to perform a nondiscretionary duty required by the Clean Air Act”) (“PM<sub>2.5</sub> Consent Decree”) available at <http://switchboard.nrdc.org/blogs/jwalke/PM2.5%20consent%20decree.pdf>; *American Nurses Assoc. et al. v. Johnson*, No. 1:08-cv-02198 (D. D.C. Dec. 18, 2008) (consent decree requiring action by EPA to issue final regulations relating to toxic air pollution from power plants).

<sup>12</sup> Press Release, Senator Chuck Grassley, “Regulatory Reform Initiative Seeks Sunshine, Accountability, and Pro-Jobs Environment,” April 11, 2013 [http://www.grassley.senate.gov/news/Article.cfm?RenderForPrint=1&custome1\\_dataPageID\\_1502=45458](http://www.grassley.senate.gov/news/Article.cfm?RenderForPrint=1&custome1_dataPageID_1502=45458) (“Senator Grassley Press Release”).

<sup>13</sup> See, e.g., *WildEarth Guardians et al., v. US EPA*, No. 11-02064 (D. D.C. Nov. 17, 2011) (Defendant EPA currently litigating case brought by WildEarth Guardian, Sierra Club, Earthjustice relating to air pollution from coal mines); *In re Natural Resources Defense Council*, 645 F.3d 400 (D.C. Cir. 2011)

There is a misconception that settlements to resolve agency failures to meet statutory deadlines pressure agencies to act hastily and sloppily. This is an unfounded concern. First and most obviously, agencies only consent to decrees and agree to settlements when the agency believes in good faith that it can meet the specified deadlines. Presenting settlements and decrees to judges for approval means an agency is making a representation to the court that it can satisfy the terms of the document. As with the absence of any proof of collusion, I have seen no evidence that agencies agreeing to deadlines in settlements are acting in bad faith or making misrepresentations to courts.

Second, settlement agreements and consent decrees also contain standard language allowing the parties to modify the agreements with mutual consent and court approval, or even for the agency to modify the agreement over the plaintiffs' objection if the court approves the modification.<sup>14</sup> In my experience, if the agency determines that it needs more time then deadlines in these agreements are extended.<sup>15</sup>

Finally, EPA has addressed this issue directly and corrected the misunderstanding that settlement deadlines pressure agencies. Republican Senators recently submitted questions to EPA Administrator nominee Gina McCarthy and asked whether "deadlines in settlements sometimes put extreme pressure on the EPA to act."<sup>16</sup> To the contrary, EPA responded: "Where EPA settles a mandatory duty lawsuit based on the Agency's failure to meet a statutory rulemaking deadline, the settlement agreement or consent decree *acts to relieve pressure on EPA* resulting from missed statutory deadlines by establishing extended time periods for agency action."<sup>17</sup>

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(NRDC case in which FDA litigated, and won, case regarding regulation of bisphenol A); *Chicago Ass'n of Commerce and Industry v. U.S. EPA*, 873 F.2d 1025 (7th Cir. 1989) (EPA litigated and won case regarding unreasonable delay on municipal waste agency application for sewage removal credits).

<sup>14</sup> See, e.g., PM<sub>2.5</sub> Consent Decree, at 4, ¶ 6 ("The Parties may extend the deadline established in Paragraph 3 by written stipulation executed by counsel for all Parties and filed with the Court on or before the date of that deadline; such extension shall take effect immediately upon filing the stipulation. In addition, EPA reserves the right to file with the Court a motion seeking to modify any deadline or other obligation imposed on EPA by Paragraphs 3, 4, 5 or 14. EPA shall give Plaintiffs at least five business days' written notice before filing such a motion. Plaintiffs reserve their rights to oppose any such motion on any applicable grounds.") *available at* <http://switchboard.nrdc.org/blogs/jwalke/PM2.5%20consent%20decree.pdf>.

<sup>15</sup> Agencies may determine more time is needed due to unforeseen circumstances or last-minute crunches, often leading to relatively short extensions. See, e.g., *American Nurses Assoc. et al. v. Johnson*, *supra* n. 11 (consent decree modified on Oct. 24, 2011, to allow final standards no later than Dec. 16, 2011).

<sup>16</sup> Senator Vitter, Questions for the Record, Gina McCarthy Confirmation Hearing, Environment and Public Works Committee, May 6, 2013, at p. 23 *available at* [http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=9a1465d3-1490-4788-95d0-7d178b3dc320](http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=9a1465d3-1490-4788-95d0-7d178b3dc320) ("Senator Vitter Questions").

<sup>17</sup> *Id.* (emphasis added).

Benefits of Enforcing Laws to Protect Health, Safety and the Environment

The statutory safeguards that federal agencies are bound to enforce with nondiscretionary duties and statutory deadlines exist to protect Americans' health, safety, natural environment, food supply, medication and other consumer products, and financial and investor interests. Let me list just two examples of the myriad ways that enforcing statutory deadlines through citizen suits have benefitted Americans:

- Enforcing the statutory deadline for long-overdue mercury and air toxics standards for power plants, which resulted in EPA adopting safeguards projected to avoid, *every year*:
  - Up to 11,000 premature deaths;
  - 2,800 incidents of chronic bronchitis;
  - 4,700 heart attacks;
  - 130,000 asthma attacks;
  - 5,700 hospital and ER visits; and
  - 3,200,000 restricted activity days.<sup>18</sup>
  
- Enforcing the statutory deadline for overdue clean air health standards for soot pollution (fine particles or PM<sub>2.5</sub>), which resulted in EPA adopting safeguards projected to avoid, *every year*:
  - Up to 1,500 premature deaths;
  - Up to 800 heart attacks;
  - Up to 250,000 asthma attacks among children; and
  - Up to 570,000 restrict activity or lost work days.<sup>19</sup>

Anti-Enforcement Agenda

H.R. 1493 subverts the power of the judiciary as well as the obligation of the executive branch to enforce congressional enactments, as a means of skewing outcomes. It is quite revealing that the complaints at last year's Subcommittee hearing on H.R. 3862 were more about opposition to the underlying statutory mandates than to the vehicles for

<sup>18</sup> U.S. EPA, Fact Sheet: Mercury and Air Toxics Standards: Benefits and Costs of Cleaning Up Toxic Air Pollution from Power Plants, *available at* <http://www.epa.gov/mats/pdfs/20111221MATSimactsfs.pdf>.

<sup>19</sup> U.S. EPA, Regulatory Impact Analysis for the Final Revisions to the National Ambient Air Quality Standards for Particulate Matter, *available at* <http://www.epa.gov/ttn/ccas/regdata/RIAs/finalria.pdf>, at 5-68 (Table 5-18).

enforcing those mandates. This opposition to the enforcement of mandatory statutory duties and substantive legal safeguards courses through the Chamber Report.<sup>20</sup>

H.R. 1493 creates the unprecedented legal opportunity for third party “intervenor” to obstruct settlement talks and prolong illegal, harmful actions when federal agencies are sued for violating federal laws. Specifically, the bill mandates that non-party intervenors be given the right to participate in federal agency settlement discussions. *See* Sec. 3(b) and (c). The bill then mandates that all settlement discussions be conducted only pursuant to time-consuming and open-ended mediation programs administration by the federal courts. (The bill carefully avoids placing any time limits on this mediation mandate.) *See* Sec. 3(c). This unprecedented elimination of informal settlement opportunities and the speedier resolution of lawsuits, provides intervenors with legally rejected<sup>21</sup> and heretofore unheard of opportunities to disrupt and obstruct the settlement of lawsuits that the government believes should not be defended in court.

This extreme approach would give industry intervenors the right to participate in and prolong settlement discussions to argue that agencies like the EPA have not broken the law—even when agencies admit that they have, and when it is inescapable that they have. These industry intervenors would be granted the opportunity to oppose rulemakings and schedules to remedy the legal violations, over the objections of injured plaintiffs, even when the agency is willing to follow the law and correct its illegal behavior. I discuss this feature of the bill more extensively in the section-by-section bill analysis on pages 20-24.

By targeting citizen suits, settlements, and longstanding judicial processes and caselaw, H.R. 1493 absolutely would make it harder to ensure that the federal government does not break the law or faces required legal remedies when it does. Notably, the bill includes no measures to ensure that the federal government does not break the law or that it faces the appropriate consequences when it does. Instead, the bill is a one-way ratchet weakening law enforcement.

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<sup>20</sup> *See* generally Chamber Report; Senator Grassley Press Release, *supra* n. 12; Senator Vitter Questions *supra* n. 16; Washington Examiner Op-Eds, *supra* n. 5.

<sup>21</sup> On pages 16-17 of this testimony, I discuss a Supreme Court decision that would be overturned by this aspect of the legislation. That decision declared that “[i]t has never been supposed that one party—whether an original party, a party that was joined later, or an intervenor could preclude other parties from settling their own disputes and thereby withdrawing from litigation.” *Local Number 93 v. City of Cleveland*, 478 U.S. 501, 528-29 (1986).

Disruption of Judicial Processes

The bill also creates new procedural obstacles to resolving litigation early in the process, wasting the time and resources of litigants and the courts and conflicting directly with the expressly stated and longstanding policy of the federal judiciary. The advisory committee notes to Federal Rule of Evidence 408 specifically invoke “the public policy favoring the compromise and settlement of disputes.”<sup>22</sup>

Above all, H.R. 1493 ignores the role of the judiciary in resolving disputes by ignoring the reason that many of these consent decrees occur in the first place. In drafting legislation, Congress sets deadlines and priorities when it directs agencies to undertake certain rulemakings. When these deadlines are missed, it is the proper role of the judiciary to ensure that laws, as written by Congress and signed into law by the president, are properly enforced.<sup>23</sup> The proper role of the judiciary is to enforce the statutory deadlines set and written into law by Congress rather than further impede the agency from meeting these deadlines. Preventing the judiciary from enforcing statutory deadlines is not an appropriate way to alter the regulatory system, and would gradually turn regulatory statutes into dead letters.

This bill, and the majority witnesses’ prior testimony, would have one believe that these radical shifts in the balance of power are costless and serve only to increase transparency in agency decision-making. This could not be further from the truth. This legislation creates a judiciary that is required to obstruct settlement agreements and consent decrees, increasing transaction costs for all parties and the courts. This would mean less efficiency, flexibility and timely enforcement of the law. Costly and protracted litigation would mean that agency wrongs—violations of congressional mandates, mind you—would take even longer to be rectified.

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<sup>22</sup> See FED. R. EVID. 408 advisory committee’s note *available at* <http://www.law.cornell.edu/rules/frc/rule408>.

<sup>23</sup> Hearing on H.R. 3862, *supra* n. 1 (Statement of David Shoenbrod, Visiting Scholar, American Enterprise Institute) *available at* <http://judiciary.house.gov/hearings/Hearings%202012/Schoenbrod%2002032012.pdf>; *See also* Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMPORARY PROBLEMS 311, 323 (1991) (showing that EPA meets only a small percentage of statutory deadlines).

### Existing Safeguards and Public Participation Opportunities

H.R. 1493 ignores the legal mechanisms already in place to ensure transparency, public participation, and an agency's maintenance of its discretionary powers and legal responsibilities. Notably, the witnesses for the majority at last year's hearing on H.R. 3862 praise these existing mechanisms at length in their testimony. At last year's hearing, Mr. Grossman lauded the so-called "Meese Policy" as an exemplary non-partisan approach that recognizes the appropriate place for the Executive Branch of government, yet he failed to acknowledge current practices that limit what the federal government can agree to when it enters into consent decrees or settlements regarding discretionary duties.<sup>24</sup>

Roger Martella, another witness<sup>25</sup> for the majority at the H.R. 3862 hearing, also praises current administrative processes, identifying "every significant administrative law initiative" as having "three inexorable components: the agency's proposed rule, the final rule, and the litigation by the loser in the rulemaking."<sup>26</sup> Moreover, Mr. Martella does not think "we can or should endeavor to change those components."<sup>27</sup> As Mr. Martella highlights, in the rulemaking context an agency may not evade or subvert required notice and comment rulemaking procedures through a consent decree or settlement.

Notably, no witness at last year's hearing for H.R. 3862 identified rules that followed settlements with agencies and did not go through public notice and comment under the Administrative Procedure Act before taking effect. For today's hearing, the witnesses should be asked whether they can identify any such examples of rules that skirted required APA procedures and, if so, whether those actions escaped judicial review.

*American Nurses Association v. Jackson*, a case cited by both Mr. Grossman in his testimony on H.R. 3862 last year and in the Chamber Report, provides a perfect example of these procedures. I feel compelled to address this case at some length to rebut the

<sup>24</sup> Memorandum from Edwin Meese III, Attorney General, to All Assistant Attorneys General and All United States Attorneys (Mar. 13, 1986); See also Memorandum from Randolph D. Moss, Acting Assistant Attorney General Office of Legal Counsel, for Raymond C. Fisher, Associate Attorney General (June 15, 1999) available at <http://www.justice.gov/olc/consent-decrees2.htm>; 28 C.F.R. Subpt. Y (2012).

<sup>25</sup> Hearing on H.R. 3862, *supra* n. 1 (Statement of Roger R. Martella, Jr., Sidley Austin LLP, "Addressing Off Ramp Settlements: How Legislation Can Ensure Transparency, Public Participation, and Judicial Review in Rulemaking Activity.") available at <http://judiciary.house.gov/hearings/Hearings%202012/Martella%2002032012.pdf>.

<sup>26</sup> *Id.* at 1.

<sup>27</sup> *Id.*

Chamber's and Mr. Grossman's unfounded charges since NRDC was a plaintiff in that lawsuit. In that case, the EPA merely agreed to propose standards by a certain date and to finalize standards by a later date. No particular outcomes or substantive positions were mandated by the consent decree. The agency provided a formal comment period of 90 days on the proposed standards, but made the proposal publicly available for nearly 140 days before that comment period closed. And the consent decree was open to being modified jointly by the parties or unilaterally by the agency (with court approval), a common feature of agency consent decrees.<sup>28</sup> Further, section 113(g) of the Clean Air Act requires that the agency take public comment on consent decrees, providing yet another opportunity for public input.<sup>29</sup>

Moreover, what Mr. Grossman and the Chamber fail to note is that the clean air standards at issue in the consent decree already were over a decade overdue based on deadlines for action that Congress itself had set when amending the Clean Air Act in 1990. EPA had violated a nondiscretionary duty to issue these standards by a statutory deadline, the agency acknowledged that it had missed this statutory deadline, and the court would not have approved the consent decree had the court not agreed that EPA had violated a nondiscretionary statutory duty.<sup>30</sup> Mr. Grossman's testimony leveled complaints at the EPA mercury and air toxics standards, but these are all the same issues that industry raised during the comment period and are currently raising in court to challenge the final standards. This proves the point, echoed in Mr. Martella's statement, that existing administrative and judicial processes provide opportunities for public participation and the full exercise of legal rights, without the need for misconceived legislation like H.R. 1493.

Mr. Grossman represented groups opposed to the *American Nurses Association* consent decree and unsurprisingly he repeated that opposition in last year's testimony; but at bottom his disagreement is over the substance of the Clean Air Act's standards, not any procedural failings. The requirement to issue the standards originated with Congress (author of the 1990 Clean Air Act amendments) and was simply enforced by citizens and the courts.

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<sup>28</sup> See *supra* n. 11.

<sup>29</sup> Clean Air Act section 113(g), 42 U.S.C. §7413(g) (2013).

<sup>30</sup> Shortly before promulgation of the final regulations at issue in the consent decree, industry intervenors sought to interfere with the decree and unilaterally alter its terms to delay those regulations by a year. The court rejected that industry motion. When the industry intervenors sought to re-file an essentially identical motion a short while later, Mr. Grossman filed a brief supporting the industry intervenors. The court did not even bother to rule on that repetitive motion, making clear it was no more meritorious than the first one.

Some members of Congress opposed the mercury and air toxics standards in the 112<sup>th</sup> Congress, but several House bills to void these standards did not become law<sup>31</sup> and a Congressional Review Act resolution of disapproval aimed at the standards failed in the Senate.<sup>32</sup> Harmful legislation like H.R. 1493 should not be used to obstruct enforcement of laws that Congress chooses not to amend or repeal through regular legislative amendments.

#### EPA Settlements with Industry Parties

It is instructive to examine some of the many settlement agreements that EPA enters into with corporations or industry trade associations, because these settlements confound the sue-and-settle mythology and undermine the basis for H.R. 1493. What one finds in the creation and content of some of these settlements with industry is strikingly similar to settlement agreements with non-industry parties.

First, EPA concludes that it makes more sense to settle a lawsuit brought by industry rather than litigate the case, after the agency weighs the defensibility of its legal stance, the expenditure of resources, and the certainty provided by settling. Second, EPA enters into private discussions with the industry plaintiffs to craft a settlement agreement. (When parties to an EPA lawsuit are public health groups, industry critics hypocritically and pejoratively dub these talks “back-room negotiations.”)<sup>33</sup> These private settlement talks do not include intervenors or non-industry parties.

Third, EPA frequently agrees to deadlines to propose and finalize rulemakings (just like in settlements with non-industry parties).<sup>34</sup> EPA commits to schedules that it can represent to the court the agency will satisfy. The settlements contain standard language allowing EPA to seek extensions in these deadlines, with mutual consent of the parties or via unilateral agency motion if the court approves the extension.<sup>35</sup>

Fourth, EPA then often agrees to take comment in future proposed rulemakings on specific measures included as terms in the industry settlements.<sup>36</sup> One actually observes

<sup>31</sup> Transparency in Regulatory Analysis of Impacts to the Nation, H.R. 2401, 112th Cong. (2012).

<sup>32</sup> S.J. Res. 37, 112th Cong. (2012).

<sup>33</sup> See, e.g., U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors*.

<sup>34</sup> See, e.g., *infra* n. 37.

<sup>35</sup> See, e.g., *EnerNOC, Inc. v. U.S. EPA*, 2013 WL 655313 (D.C. Cir. Feb. 6, 2013) (Obama EPA settlement agreement described *infra* n. 37 modified twice); *Engine Mfrs. Ass'n v. U.S. EPA*, 2006 WL 1825298 (D.C. Cir. June 16, 2006) (“[3: “ The parties may extend the dates set forth in Paragraphs 1 and 2, or otherwise modify this Agreement”).

<sup>36</sup> See, e.g., *Am. Petroleum Inst. v. U.S. EPA*, No. 95-1098 (D.C. Cir. Feb. 9, 1995) *infra* n. 37.

this practice more in EPA settlements with industry than in settlements with public health groups.<sup>37</sup> The reason is that industry litigants often have very specific regulatory approaches or test methods that they want EPA to present for comment in proposed rulemakings. This practice inches closer to the line that critics charge (erroneously) that EPA crosses in settlements with public health groups: committing to substantive regulatory outcomes in settlement agreements. But in these industry settlements just as in those with public health groups, EPA does not cross that line: agreeing to take comment on a very specific proposed regulatory outcome “substantially similar” to the terms in a settlement agreement still preserves the EPA Administrator’s discretion to reach different decisions in final rules. And it still preserves the rights of the public to comment on and oppose the proposal reflecting that industry-preferred outcome.

Fifth, as discussed above, the subsequent proposed and final rulemakings satisfy all procedural requirements under the APA and the pertinent organic statutes—just as with rulemakings following settlements with health and environmental organizations.

There is nothing improper about this sequence of events. EPA and the industry plaintiffs are using long-accepted and even favored judicial tools. Industry is resorting to lawsuits under statutory citizen suit authorities and reaching private settlements with a federal agency to vindicate the industry plaintiff’s legal interests. The settlements do not include intervenors. But they do not harm non-parties because the agency is not limiting its legal discretion, it is not committing to substantive outcomes, and the agency is not bypassing procedural requirements for public participation in rulemakings.

#### Chamber of Commerce Report

The Chamber Report takes aim at the Obama administration and accuses federal agencies of engaging in collusive litigation practices with public interest groups (a practice they disparage as “sue-and-settle” litigation). As discussed above, the very methodology of the Chamber report reveals its misleading nature because it merely

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<sup>37</sup> See, e.g., *Am. Petroleum Inst. v. U.S. EPA*, No. 95-1098 (D.C. Cir. Feb. 9, 1995) (Clinton EPA settlement agreement with American Petroleum Institute agreeing to propose and take comment on amendment to certain federal regulations); *Engine Mfrs. Ass’n v. U.S. EPA*, 2006 WL 1825298 (D.C. Cir. June 16, 2006) (Bush EPA settlement agreement with a number of industry groups to propose, and one year later finalize, standards relating to heavy duty diesel engines); *Wisconsin Builders Assoc. v. U.S. EPA*, No. 09-4113 (7th Cir. Dec. 28, 2009) (Obama EPA settlement agreement with industry groups requiring proposed final rule, comment period, and final rule); *EnerNOC, Inc. v. U.S. EPA*, 2013 WL 655313 (D.C. Cir. Feb. 6, 2013) (Obama EPA settlement agreement requiring proposed and final rulemakings by certain dates).

compiles settlements with one type of private party whose views the Chamber does not share.

Early on, the report authors slip and reveal one of the secrets behind the Chamber's political enterprise. The Chamber confesses that its "major concern" is that agency settlements with private parties "will spread to other complex statutes that have *statutorily imposed dates* for issuing regulations."<sup>38</sup>

This tells us that the Chamber knows what's really going on and why it is resorting to misrepresentation throughout its report. Namely, the Chamber understands that the agencies it excoriates are entering into settlements and consent decrees to carry out *statutorily required obligations* for which the agencies lack discretion.

Here are some of the core falsehoods in the Chamber Report.

**Chamber Fiction:** "Perhaps the most significant impact of these sue and settle agreements is that by freely giving away its discretion in order to satisfy private parties, an agency uses congressionally appropriated funds to achieve the demands of private parties."<sup>39</sup>

**Facts:** The legal obligations in these agreements involve nondiscretionary duties written into laws passed by Congress. Agencies lack discretion as a matter of law to ignore or contravene these mandatory statutory duties. Most of these obligations concern statutory deadlines. For example, the Clean Air Act requires<sup>40</sup> EPA to review national air quality standards every five years. The Chamber Report does not begin to explain where EPA enjoys discretion to miss this deadline, even though the report lists this as a prime example where EPA has discretion to do something other than what the law says.<sup>41</sup>

Indeed, the Clean Air Act spells out in unmistakable language the basis for citizen suit lawsuits against the government: lawsuits in federal district court are permitted only when the act or duty to be performed by the EPA Administrator is "not discretionary."<sup>42</sup> The report's misrepresentation of nondiscretionary statutory duties for agencies ends up confirming the Chamber's agenda to prolong government violations of statutory health and safety obligations.

<sup>38</sup> Chamber Report, at 7 (emphasis added).

<sup>39</sup> *Id.*

<sup>40</sup> Clean Air Act section 109, 42 U.S.C. §7409 (2013) available at <http://www.law.cornell.edu/uscode/text/42/7409>.

<sup>41</sup> Chamber Report, at 43.

<sup>42</sup> Clean Air Act section 304(a), 42 U.S.C. §7604(a) (2013) available at <http://www.law.cornell.edu/uscode/text/42/7604>.

Take a recent EPA consent decree relating to soot pollution (fine particulate) standards<sup>43</sup> from the Chamber’s hit list.<sup>44</sup> EPA agreed to a date to finalize its review of air quality standards for soot pollution, after the agency missed the mandatory 5-year deadline. The decree contains the following language—typically included in similar decrees—that suggests that the Chamber might not even be reading the settlements it condemns for allegedly stripping agencies of legally preserved discretion:

Nothing in this Consent Decree shall be construed to limit, expand, or otherwise modify the discretion accorded to EPA by the Clean Air Act or by general principles of administrative law, including the discretion to alter, amend or revise any final action EPA takes [relating to soot standards], except the deadline specified therein. EPA’s obligation to [revise soot standards] by the times specified therein does not constitute a limitation, expansion or other modification of EPA’s discretion within the meaning of this paragraph.

Amazingly, the Chamber report highlights *this* consent decree as one in which EPA is denied discretion and rule outcomes are dictated.<sup>45</sup> This is demonstrably wrong.

**Chamber Fiction:** “The practice of agencies entering into voluntary agreements with private parties to issue specific rulemaking requirements also severely undercuts agency compliance with the Administrative Procedure Act . . .”<sup>46</sup>

**Facts:** The Chamber does not begin to show that the entry of a settlement agreement or consent decree violated administrative laws in the report’s catalogue of examined cases.<sup>47</sup> Nor does the report back its charge that the agreements in these cases committed agencies to adopt specific rulemaking requirements that violated administrative laws. The report resorts to mere assertions again and again because the Chamber knows (or should know) that its claims are legally unsupported.

The Chamber Report proposes to “fix” these problems through promoting legislation such as H.R. 1493. However, the “Sunshine for Regulatory Decrees and Settlements Act of 2013” is a dangerous piece of legislation. In addition to obstructing enforcement of safeguards, flouting traditional concepts of separation of powers and limiting the role of the judiciary, the proposed legislation casually overturns controlling

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<sup>43</sup> PM<sub>2.5</sub> Consent Decree, *available at* [http://switchboard.nrdc.org/blogs/jwalke/PM2.5 consent decree.pdf](http://switchboard.nrdc.org/blogs/jwalke/PM2.5%20consent%20decree.pdf).

<sup>44</sup> Chamber Report, at 43.

<sup>45</sup> *Id.* at 19.

<sup>46</sup> *Id.* at 6.

<sup>47</sup> *Id.* at 30-42.

Supreme Court precedent. In *Local Number 93 v. City of Cleveland*, 478 U.S. 501, 528-29 (1986), the Court stated that:

It has never been supposed that one party – whether an original party, a party that was joined later, or an intervenor – could preclude other parties from settling their own disputes and thereby withdrawing from litigation. Thus, while an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent.

The Chamber dislikes this established legal understanding because it prevents industry intervenors from obstructing agency decisions to follow statutory obligations that some of the Chamber’s member corporations might wish to remain unenforced.

So let’s review the list of villains in the Chamber Report:

- Congress is to blame for its nerve in giving citizens the right to hold government accountable when federal agencies break laws: “In the final analysis, Congress is also to blame . . . Most of the sue and settle lawsuits were filed as citizen suits authorized under the various environmental statutes.”<sup>48</sup>
- The courts are to blame for “rubber stamping” agency agreements that remedy government agencies’ law-breaking. The Chamber even charges that “generally it does not matter to courts if the decree or agreement is not required or authorized by statute.”<sup>49</sup> This is a very serious charge, made all the more outrageous by the Chamber’s absolute failure to substantiate it. The report identifies no instances of courts approving consent decrees or agreements requiring agencies to undertake actions contrary to statutes.
- And finally, of course, citizens and public health groups are to blame for having the nerve to hold government accountable, enforcing laws passed by Congress using means long authorized by Congress.

One will have anticipated this by now, but who remains blameless? The Chamber and its member corporations. They are only demanding the right to obstruct enforcement of laws on the books. They are only seeking to allow harmful levels of pollution and financial abuses to continue because they don’t like the laws that curtail these harms. The Chamber and its member corporations are happy to vindicate their legal interests by entering into settlements with federal agencies.

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<sup>48</sup> Chamber Report at 8.

<sup>49</sup> *Id.* at 4.

In the final analysis, the Chamber of Commerce report ends up being a thinly veiled attempt to promote a political agenda to obstruct enforcement of legal safeguards that protect Americans against harmful corporate activities.

EPA Consent Decree Concerning Air Toxics Standards for Brick Manufacturers

One of the majority's witnesses for today's hearing, Mr. Allen Puckett, is President and CEO of the company Columbus Brick Co. Columbus Brick submitted comments opposing an EPA consent decree addressing Clean Air Act air toxics standards for "brick and structural clay products manufacturing facilities". It is instructive to review the facts associated with this consent decree to understand how the public is harmed by the failure to enforce the law (or worse), and to examine how consent decrees begin to remedy those harms, albeit belatedly. As I will show, the actual facts associated with this consent decree don't even fit the story line of "sue-and-settle" collusion.

The Clean Air Act required EPA to adopt standards reducing toxic air pollution, including carcinogens like arsenic and chromium, from the brick manufacturing industry no later than November 15, 2000.<sup>50</sup> EPA did not get around to issuing those standards until 2003. In 2007, the D.C. Circuit Court of Appeals vacated those standards for being unlawfully weak and unprotective and remanded the rulemaking to EPA for further proceedings.<sup>51</sup>

In unusually pointed language, the judges rebuked EPA for defying the court's legal precedents by relying upon the same deregulatory legal arguments in the brick case that the court had already rejected repeatedly.<sup>52</sup> The industry should not have been surprised by this decision, given previous court rulings on the same dispositive legal issue.

As a result of the prior administration's unlawful actions, and the *vacatur* of the standards, there currently are no federal air toxics standards in place for brick manufacturers. The industry is in the 13<sup>th</sup> year past the time that Congress expected toxic pollution from these industrial facilities to be covered by Clean Air Act standards.

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<sup>50</sup> 42 U.S.C. § 7412(c).

<sup>51</sup> *Sierra Club v. EPA*, 479 F.3d 875 (D.C.Cir. 2007).

<sup>52</sup> *Id.* at 884 ("If the Environmental Protection Agency disagrees with the Clean Air Act's requirements for setting emissions standards, it should take its concerns to Congress. If EPA disagrees with this court's interpretation of the Clean Air Act, it should seek rehearing *en banc* or file a petition for a writ of certiorari. In the meantime, it must obey the Clean Air Act as written by Congress and interpreted by this court.")

In 2008, when EPA had not so much as proposed brick toxic standards that were by then eight years overdue, the Sierra Club filed a lawsuit over EPA's failure to perform a nondiscretionary statutory duty and promulgate standards by the required 2000 deadline.<sup>53</sup> EPA then moved to dismiss the Sierra Club's lawsuit, with the agency having the chutzpah to argue that the plaintiff's lawsuit was *too late* and the case should be dismissed under the federal statute of limitations. The court denied the EPA motion. Only after that court ruling—leaving EPA with no defense to its failure to meet the nondiscretionary statutory deadline—did the agency then agree to enter into settlement discussions with the plaintiffs. This is hardly an example of “sue-and-settle” collusion.

EPA published the consent decree for public comment in accordance with the Clean Air Act. Columbus Brick opposed the consent decree and urged that the schedule for issuing the long overdue standards be delayed further.<sup>54</sup> The company's primary argument was that “there is not enough time for EPA to develop health-based standards, which allow EPA to tailor the level of the standard so that it protects health without imposing unnecessarily stringent standards.”<sup>55</sup>

As a clean-air attorney working on air toxic standards for over 15 years, allow me to translate what a “health-based standard” is. It is an *exemption* from the law's rigorous technology-based air toxics standards to which all other industries are subject. EPA has never adopted such an exemption for the toxic pollution emitted by brick manufacturers, for the simple reason that neither the law nor science justifies such exemption. Notably, not even the Bush administration adopted this exemption for brick standards that were vacated in 2007. At any rate, EPA has had at least six years since 2007 to develop such an exemption if it cared to, and the agency has given no sign that it believes such an exemption is warranted.<sup>56</sup>

This industry-specific, situational desire for an exemption is unjustified under the Clean Air Act on multiple grounds. But it is a far cry from providing any justification for the harmful legislation that is the subject of today's hearing. The brick manufacturing industry has been effectively exempt from the rigorous safeguards required by the Clean

<sup>53</sup> *Sierra Club v. U.S. EPA*, No. 1:08-cv-00424-RWR (D. D.C. Mar. 11, 2008) (Consent Decree entered on April 18, 2013).

<sup>54</sup> Letter from Alan Puckett III, Columbus Brick Company, to EPA Docket Center (Jan. 7, 2012).

<sup>55</sup> *Id.*

<sup>56</sup> While the name “health-based standard” may sound laudatory and desirable, it is in fact an exemption from the law's more rigorous standards; Congress intended the so-called “health-based standard” only for hazardous air pollutants with health thresholds below which no harms are known or believed to occur. The hazardous air pollutants that brick manufacturers want to exempt do not meet this standard. 42 U.S.C. § 7412(d)(4).

Air Act's toxics program for over 13 years, in clear violation of mandatory statutory duties given to EPA.

The American people have been subjected to excessive levels of highly toxic air pollution from brick manufacturers for far longer than the law allows, while other industries have been meeting required standards for one to two decades. The unfairness here is certainly not an *accelerated* rulemaking schedule. And the only thing that gives the public any assurance of seeing the law enforced and toxic pollution reduced will have resulted from the legal right that citizens have to hold government accountable: first with a lawsuit to overturn badly unlawful standards in 2007, and then to hold EPA accountable for failing to meet a nondiscretionary legal duty.

#### Section-by-Section Analysis of H.R. 1493

H.R. 1493 would lead to a series of harmful consequences that we hope are unintended. But the bill's fundamental flaw is that it offers irresponsible, ideological "solutions" to a problem that, as noted above, does not exist. Passage of H.R. 1493 would prolong litigation, undermine law enforcement and legal protections for health and safety, and further overburden the courts, creating incentives for unlawful agency activities.

#### Section 2: Definitions

The definitions for "covered consent decree" and "covered settlement agreement" reveal the incredible breadth and ill-considered design of H.R. 1493. These terms are broader than "covered civil action." For example, in addition to lawsuits against federal agencies contemplated in the definition of "covered civil action," the term "covered consent decree" also encompasses the following:

(3) (B) any other consent decree that requires *agency action relating to a regulatory action that affects the rights of-*

- (i) private persons other than the person bringing the action; or
- (ii) a State, local, or tribal government.

This coverage sweeps in not only suits against government agencies for failure to meet deadlines or perform mandatory duties, but also an ill-defined and potentially much broader category of actions as well.

For example, this language would encompass consent decrees or settlements of actions to challenge permits issued by government agencies (including permits to individual sources where the agency has not delegated the state authority), including a company's challenges to its own permits. Settlement of a permitting dispute would require "agency action relating to a regulatory action..." This would result in intervenors—such as citizens groups, labor unions, or competitors to the company—being granted the legal right to participate in court-mediated settlement discussions involving the company and the federal permitting agency. These intervenors would have the opportunity to block and delay resolution of permitting disagreements, even if the company and permitting agency reached an agreement.

Another example of this provision's far-reaching disruption would include consent decrees or settlements involving government enforcement actions, including settlements favorable to corporate or municipal defendants. One common example under the Clean Water Act involves consent decrees that EPA negotiates with municipalities that violate the Act by discharging untreated sewage during overflow events. EPA and the Department of Justice frequently use negotiated consent decrees to relieve local governments of obligations associated with strict compliance with the Clean Water Act.

Environmental organizations sometimes challenge these decrees for their alleged leniency, often without success. H.R. 1493 now confers upon environmentalist-intervenors the legal right to derail settlements that EPA and municipalities have negotiated historically to relieve the latter of costlier compliance obligations. Now these intervenors can compel the municipalities and EPA to enter into open-ended mediation overseen by the courts, with the avowed purpose of blocking any settlements that relieve the local governments from strict compliance with the law. By opening up this Pandora's Box to differently motivated intervenors, this is what the authors of H.R. 1493 invite.

#### Section 3(a)(2)

Section 3(a)(2) prevents entry of a consent decree or a court's dismissal pursuant to a settlement agreement or consent decree, stating that "[a] party may not make a motion for entry of a covered consent decree or to dismiss a civil action pursuant to a covered settlement agreement until after the end of proceedings in accordance with paragraph (1) and subparagraphs (A) and (B) of paragraph (2) of subsection (d) or subsection (d)(3)(A), whichever is later." The section operates to prevent entry of a consent decree or settlement agreement until the federal agency publishes notice of a proposed consent decree, accepts comments, responds to those comments, and holds a

public hearing on the consent decree, if it chooses to. This provision ignores statutory mechanisms already in place in many statutes that require a version of just such procedures. However, by adding more procedural hoops in this provision and requiring that consent decrees and settlement agreements not be entered until whichever of these procedures is last completed, the bill would delay enforcement of federal statutes and the vindication of valid legal rights, while wasting public and judicial resources. As written, this provision could produce lengthy, even indefinite delays in litigation, with a corresponding burden on both the court and the parties’—including the taxpayers’—resources.

#### Section 3(b)

The presumption required by this section subverts the current understanding and evidentiary foundation regarding inadequate legal representation. Moreover, as noted above, it would upend Supreme Court precedent, as seen in *Local Number 93*. Section 3(c), below, continues this trend.

#### Section 3(c)

Section 3(c) subverts law enforcement and the rule of law. It allows parties that oppose such law enforcement the unprecedented opportunity to obstruct and delay requirements to follow federal law. Consider the situation in which a federal agency commits a gross violation of a federal law and a state challenges that lawbreaking in court. Today, the state and federal agency have the ability to resolve that obvious legal violation and to do so through a consent decree or settlement agreement, promptly, without wasting judicial resources, while ensuring federal law is upheld and the state’s valid legal interests safeguarded.

Section 3(c) thwarts all of that. The bill anoints third parties that support the perpetuation of the grossly unlawful behavior with the right to obstruct and delay a plaintiff state’s legal right to ensure that the law is followed and the plaintiff’s valid interests protected. It matters not under the bill whether those plaintiffs are individuals, corporations, nongovernmental organizations or any special interest, nor does it matter whether those third party interests are illegitimate and illegal, or whether the plaintiff is prejudiced and harmed. In all cases in which these third parties gain intervenor status, courts must delay and deny enforcement of the law by referring the case to a mediation program or magistrate judge to “reach an agreement on a covered consent decree or

settlement agreement” that must include the plaintiff, defendant agency and all intervenors. Thus, the bill jettisons the proper enforcement of federal statutes and the rule of law into a purgatory of continuing lawlessness. And intervenor(s) dedicated to the perpetuation of illegal behavior are granted legal standing to negotiate, obstruct or delay the obligation to follow the law, over the strong objections of the injured plaintiff(s).

Exactly how do the bill’s drafters imagine that settlement discussions will occur involving a defendant agency that broke the law but was willing to correct that wrongdoing; an intervenor committed (for whatever reason) to the continuing violation of the law and opposed to such correction; and a plaintiff whose interests and legal right concern the upholding of the law? This process will guarantee the prolonging of the illegal behavior and the continuing injury of the plaintiff.

Perversely, section 3(c) even forces plaintiffs to participate in costly mediation activities, with the bill making no provision for their costs to be paid, of course, thereby imposing an unprecedented legal and financial burden on the legitimate interests of states, individuals, businesses and other groups that want to ensure that the federal government follows the law. Requiring parties to enter into and pay for mediation could substantially burden the public right of access to the courts, and in doing so impinge on this fundamental First Amendment right. Section 3(c) fails to specify the duration of the mediation or any ability to opt out if the mediation is not working. In the real world all these defects are a recipe for failure and prolonged unlawfulness.

It bears emphasizing that the bill’s indiscriminate anointment of intervenors to exercise this manner of obstruction and delay will harm plaintiff corporations, state and local governments, nonprofit groups and individuals alike, when they or their interests have been harmed by federal agency lawbreaking. The bill guarantees equal opportunity unfairness and injustice for all plaintiff classes seeking to uphold the law. Worse, the legislation inexplicably and irresponsibly sides with parties supporting continued lawbreaking against parties seeking to require the upholding of laws, legally protected interests, and the rule of law itself.

#### Section 3(d)(1)

This section, like section 3(a)(2), underscores the extent to which this bill ignores current mechanisms in the law that prevent parties to a lawsuit from interfering with the rights of nonparties. The bill entirely ignores existing statutes’ relevant provisions that specifically allow for input from nonparties to a consent decree. For example, section 113(g) of the Clean Air Act requires that the EPA Administrator publish in the Federal

Register notice of a consent decree or settlement agreement 30 days before it is finalized. At that time, nonparties provide comments to the Administrator and Attorney General, who can then withhold his or her consent to the proposed order or agreement.

Section 3(d)(4)

Section 3(d)(4) creates the obligation to catalog all mandatory rulemaking duties and describe how certain consent decrees or settlement agreements “would affect the discharge of those duties.” This provision would be extraordinarily burdensome and time consuming for agencies and the section has no clear limitation on this vague directive. The determination of what constitutes a mandatory duty is not without controversy, and the very creation of the catalogue contemplated by the section could be an extremely contentious and lengthy process. Further litigation over whether the agency has accurately listed these duties would result, and would further burden the courts, benefiting no one but lawyers.

Section 4

This section upsets longstanding Supreme Court precedent on the standards for modification of consent decrees, and allows a settlement to be second-guessed *de novo* merely because of “changed circumstances” or “the agency’s obligations to fulfill other duties.” This is a radical reformulation of modification procedures that will result in more intrusive court interference with the executive branch, rather than less, since the federal government has little control over the resolution of a case that goes to trial. This provision provides a lopsided benefit to defendant agencies in all cases that are settled, allowing agencies to effectively escape settlement agreements and consent decrees they did not care to go forward with. This furthers obstructs the enforcement of congressional enactments that may already be long overdue, and the legislation imposes no time limit on the ability of agencies seeking to escape legal obligations reflected in agreements and decrees.

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Mr. BACHUS. Thank you.

Next testifying by video conference is Commissioner Thomas Easterly, Indiana Department of Environmental Management. At this time, Commissioner, we welcome you to our hearing and look forward to hearing your opening statement.

**TESTIMONY OF THOMAS EASTERLY, COMMISSIONER,  
INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT**

Mr. EASTERLY. Well, thank you, Chairman Bachus and Ranking Member Cohen, for inviting me. I would also like to thank Congressman Clay for letting me use his office here in St. Louis.

I am representing both the Environmental Council of the States, which is a nonpartisan, nonprofit organization of State and territorial environmental agencies and their leaders, and the State of Indiana in this testimony. The Environmental Council of the States—I refer to them as ECOS. They represent the States and together the States and the EPA implement the national environmental statutes. And we have a partnership to do that, and the partnership works because we communicate with each other. EPA's primary role is to provide national standards, conduct research on issues, and then based on their statutory authority and that research, implement regulations that we do on the ground, and then of course, conduct oversight of our activities to make sure that they meet the requirements and see that the environment is improved. And we both work together to have discussions on deploying the amount of resources that actually exist to make sure that the environment is protected.

As the States are the boots on the ground—and just to give you an indication of how much we do, we do—96.5 percent of the Federal environmental programs are actually implemented by the States, and that means that EPA does the rest. And EPA does some pieces of the programs that are delegated to the States because they just want to make sure there is good quality and things. But still, the States do over 90 percent of the work, whether it is inspections, enforcement, data collection, and other things.

Also, the States fund most of the work. Over 80 percent of the actual cost of delivering environmental protection in the United States is paid for by the various States and the rest comes from the Federal Government.

So we have a constant dialogue on how to do this best, and the dialogue breaks down when these consent decree activities happen because we are not at the table. So it is sort of like a marriage. So you need to work with your spouse and you have discussions and you come to conclusions. In this case, our partner, EPA, is having discussions with other people we are not a party to. They come to these agreements and we have to do the work even though we may not be capable. And at the very minimum, it requires us to divert resources from things that may be more important.

So I will give you a couple examples of Indiana, actually probably one now because I am talking too long. I am sorry.

There was Federal litigation over the deadlines in what is called the Visibility SIP's, and it is to make sure that the air—you can see through it and it does not obscure your views. And this is an important thing. It is a long-term action. And the reason that the States did not have—including Indiana—turn in their plans by the dates required in the original regulations is because there has been incredible uncertainty due to litigation over what the regulations for power plant emissions are. And these same controls on power plant emissions are the things we need to protect the visibility. So there was the Clean Air Interstate rule which was first overturned

by the courts—or vacated they call it—and then it was temporarily put back in place for EPA to do the other rulemaking for a better rule. That resulted in the Cross-State Air Pollution Rule, or CSAPR, which has been overturned by the courts. So the right answer for what is called best available retrofit technology, which we need to have in these plans, is that it equals these power plant controls. But we have to not do that because we do not have the answer. Those regulations continue to be overturned by the court, and they are saying we do not have an adequate plan. So you would say, well, that seems like sort of a tale of woe, but the challenge is we are diverting resources from protecting human health and the environment to deal with these legal issues that are not done.

So since I have used up most of my time, I will tell you two things. The Environmental Council of the States has reviewed this proposed bill, and it is consistent with the resolution we passed on this issue because this issue is important to all States. But they do not support general bills, but the State of Indiana believes this is an excellent bill.

And thank you for your indulgence.

[The prepared statement of Mr. Easterly follows:]

Testimony  
Thomas Easterly, Commissioner  
Indiana Department of Environmental Management  
to  
Committee on the Judiciary  
Subcommittee on Regulatory Reform, Commercial and Antitrust Law  
Hearing on H.R. 1493, the "Sunshine for Regulatory Decrees and Settlements Act of 2013"  
June 5, 2013

I am Thomas Easterly, the Commissioner of the Indiana Department of Environmental Management and the Chair of the Environmental Council of the State's Compliance Committee. I thank Chairman Bachus and Ranking Member Cohen for inviting me to testify today. I am representing both ECOS and my own state. ECOS is the national non-partisan, non-profit organization of the state and territorial environmental agencies and their leaders. Today I will be commenting on our organization's position on the Environmental Protection Agency's use of "consent decrees," and the impact this has on the operations of state environmental agencies. I will present some examples from my own state, but no national statistics on the impacts because we have conducted no study on these as yet. I will explain why in my testimony.

States implement most of the national environmental statutes. States and EPA have a partnership in implementing the nation's environmental statutes. EPA's primary role is to provide national standards, conduct research, issue rules based on statutory authority, conduct oversight of states, and implement those programs not delegated to the states. The states' role is to implement the national acts (and each state's own statutes), to issue permits, conduct inspections, conduct enforcement, set standards, monitor the environment, and, in general, to be the "boots on the ground." According to data gather by ECOS, states now implement 96.5% of the federal programs that can be delegated to the states. State agencies conduct over 90% of the environmental inspections, enforcement, and environmental data collection, and issue a similar amount of all the environmental permits. States also supply most of the funding for the implementation of the delegated federal programs – typically 80% of the actual cost.

EPA and the states have a constant dialogue on how best to implement the national environmental statutes. This dialogue is a necessary part of our partnership. However, from time to time, EPA does not conduct this dialogue. Sometimes this is by choice, but sometimes this stems from its actions on court cases in which a state or the states as a body are not a party. Not every one of these cases presents a problem for states, but sometimes they may. These cases are often settled through the entry of "consent decrees." Consent decrees are between the plaintiff and EPA, and the state environmental agencies are not usually parties in them. However, we are often affected by them. These Consent Decrees can result in unexpected costs to states and cause difficulties in implementing environmental programs.

These Consent Decrees that EPA negotiates with parties sometimes impose requirements on states without notice to, or participation by, the impacted states. At times, these requirements are beyond those clearly articulated in rule or statute. While the states' goals are clean air, clean water and clean land, the reality is that neither Congress nor the state legislatures have provided sufficient funds for states to meet every requirement of each federal environmental statute.

When Consent Decrees between EPA and plaintiffs require states to change their rules to incorporate new requirements – often without the input of states on either the substance or timing of those changes – states must necessarily adjust their programs to meet the new requirements and deadlines. In Indiana, and in other states, diverting resources to meet these unexpected federal requirements often comes at the expense of other pressing environmental priorities the state would like to achieve.

I will provide information on three examples where EPA Consent Decrees have adversely impacted Indiana. These examples are the regional haze requirements, and the Startup, Shutdown, and Malfunction emissions SIP call<sup>1</sup>, where EPA committed to a regulatory timeframe that does not give the states sufficient time to properly follow their own administrative processes and meet the deadlines committed to, and subsequently required by, EPA. In my other example, the ozone air quality designations, EPA committed to a schedule that did not allow sufficient time for EPA to perform a reasoned rulemaking with the necessary input from states.

In the case of the regional haze requirements, in early 2009, EPA published a notice of failure to submit SIP revisions incorporating the regional haze requirements for thirty seven states including Indiana. These SIP revisions were originally required to be submitted by the states by December 17, 2007. The reason Indiana, and a number of other states were not in a position to submit their SIPs is the continuing confusion over whether the requirements of the Clean Air Interstate Rule (CAIR), which was initially vacated and then remanded by the DC Circuit Court of Appeals, and the replacement Cross States Air Pollution Rule (CSAPR) also vacated by the same court could be relied upon to meet the visibility SIP requirements for the sources covered by the rule. While EPA has made formal proposals to allow the reliance on the emissions reductions from those regulations since 2005, there has not been a time of judicial finality long enough to allow states, like Indiana, to process rulemakings and SIP revisions through the public notice and environmental rulemaking process. Without a state regulation to implement any proposed limitations as part of the visibility SIP, the proposed SIP is not approvable (because there are no enforceable state regulations). Since the SIP process must necessarily follow the state rulemaking process which needs to follow the judicial finality on the regulation of power plant emissions under the yet to be proposed CAIR replacement rule, this settlement imposed a requirement on many states (those with electrical generating units subject to CAIR) that those states simply cannot meet. However, the EPA settlement did not give states

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<sup>1</sup> A "SIP call" occurs when EPA instructs a state to revise its Clean Air Act plan for attainment of a national ambient air quality standard. "SIP" means "state implementation plan."

sufficient time to complete the required SIP revisions in light of the continuing uncertainty over the regulation of emissions from electrical generating units. Instead, the EPA notice to meet the terms of the Consent Decree required state submission of SIP revisions under an abbreviated time frame.

The regional haze (visibility) requirements also provide an example of a federal action detracting from more important environmental regulations necessary to protect human health. The regional haze requirements are a welfare-based standard with a target date of 2064. Indiana has been making progress on the standard, but when EPA published its notice for failure to make SIP submittals, and required states to make submissions with an abbreviated timeframe, it took important resources away from more pressing matters. In this case the more pressing matter is that Indiana and other states must also constantly revise their air pollution control programs to meet the ever tightening National Ambient Air Quality Standards or NAAQS, which is a health-based standard. The requirements to meet these health based standards must also be adopted through the state rulemaking process so that they are enforceable and can be incorporated into permits. Given the specialized technical and legal expertise required to process a regulation into the Indiana Administrative Code, arbitrary new deadlines and adjustment of historical timeframes by EPA often detracts from and thus slows down more pressing matters such as the development of rules to incorporate new NAAQS that protect public health.

Similarly, the recent SIP call related to Startup, Shutdown, and Malfunction emissions provides only eighteen months for the states to complete their submissions to EPA. Indiana's rulemaking process cannot be completed in this limited window. Indiana has mandatory notice and comment periods, as well as public hearings and review process for the final rule that must be completed before its rules can be changed. While this process normally can be completed in about 18 months, it cannot be started until Indiana has reached some informal agreement with EPA on what would satisfy the SIP call. In the case of the Startup, Shutdown and Malfunction rule, we have not yet received any guidance on what would be acceptable to resolve any actual deficiency in our existing previously approve SIP.

A third example of the impact of consent decree deadlines on Indiana is in the designations for the 2008 ozone NAAQS. As a result of a citizens' suit, EPA agreed to finalize ozone designations by a date certain but allowed submission of data for determining the designations up to three months before that deadline. In Indiana's case, EPA sent the Governor the required 120 day letter stating that only a small portion of the state near Cincinnati Ohio would be nonattainment and the rest of the state would be attainment. After sending the 120 day letter, EPA received data from Illinois in December of 2011 that EPA believed required the creation of a new nonattainment area in Indiana only a few months before the designation deadline. Due to the Consent Decree deadline, EPA informed the state about this new data in March of 2011 and proposed a nonattainment area that included four Indiana counties. In spite of additional information and objections filed by Indiana, EPA signed a final rule designating additional Indiana counties as nonattainment for the ozone standard in May of 2011 depriving

Indiana of the 120 day consultation required by the Act, but meeting EPA's Consent Decree obligation. Indiana believes the abbreviated schedule EPA had committed to did not include sufficient time for either the states to respond to the new data provided by Illinois or for EPA to properly review the arguments and data presented by Indiana. As a result, Indiana believes the boundaries of a new nonattainment area and the inclusion of the Indiana counties were made in error. Indiana and several other states are currently challenging the 2008 ozone designations before the DC Circuit Court of Appeals.

Roughly two years ago, ECOS expressed its concerns about EPA's use of consent decrees to the agency's leadership and asked that the agency provide us a list of suits it has received that may affect our operations. We excluded many consent decrees from our request, such as those used to settle enforcement cases. What we wanted to focus on were the cases that would be most likely to affect the manner in which one or more states implemented the various environmental statutes. EPA ultimately agreed to provide such a list, but this took well over a year. We finally got the list last year, but the contents were already a year old and were simply a copy of material that had been presented to Congress in 2011. While we were glad to get the list, it was of limited value to us.

Finally, the impact of the consent decrees adversely impacting states happened often enough to enough states that ECOS drafted a resolution regarding our opinion on their use. We considered and passed that resolution at our recent March 2013 national meeting. This resolution presents our knowledge and opinion about the need for reform and state participation in EPA's consent decrees which settle citizen suits. I have attached our resolution as an appendix to this testimony, along with a comparison of ECOS' resolution's findings to the contents of HR 1493.

Overall, the bill provides more judicial oversight and increases court processes around settling notice requirements and participation opportunities for non-parties before allowing EPA to settle citizens groups' lawsuits. In general, the greater legal process that the bill requires benefits states in that we would have more notice of lawsuits and settlements that affect us. This would afford states more time to consider intervening in the lawsuits, or, at a minimum, more time to prepare for how we will deal with the settlement terms. However, for those cases where the state actually intervenes, more court legal process would also mean more resource expenditure for states. So, we have to balance the benefit of more formalized notice with the cost associated with those cases that we are a party to.

While ECOS generally does not endorse specific bill language, we find that the bill and our resolution are not in conflict. Our resolution is, of course, not written in the format of a law. The ECOS resolution and HR 1493 as currently written appear to have the same intent and consequence – that affected parties in lawsuits against federal agencies have more notice of the lawsuit and proposed settlement agreements. The bill formalizes this process which our resolution does not - but they are not in conflict.

In my role as Commissioner of the Indiana Department of Environmental Management, I do endorse this bill as a good approach to addressing the unintended consequences of the current use of Consent Decrees to settle litigation between EPA and interested plaintiffs.

Now I will move to the comparison in more detail. The items in bold are quotations from the current (May 31 2013) version of the bill. The items in italics are our comments, based largely on the contents of our resolution.

**Purpose: To impose certain limitations on consent decrees and settlement agreements by agencies that requires the agencies to take regulatory action.**

**Definition:**

**“Covered Civil Action” – a civil action seeking to compel agency action; alleging that the agency is unlawfully withholding or unreasonably delaying an agency action relating to a regulatory action that would affect the rights of (1) private persons other than those bringing the action; or (2) state, local or tribal government.**

**Requirements:**

**In any covered civil action, the agency against which the covered civil action is brought shall publish the notice of intent to sue by making it available online not later than 15 days after receiving the notice.**

*In the case where EPA is sued, this would be helpful to states, in that as long as they monitored the EPA website, they would have immediate notice of a third party's intent to sue EPA, and therefore, they could have time to assess, early in the process, whether they are affected and whether they should intervene.*

**A party may not make a motion for entry of a covered consent decree or to dismiss a civil action pursuant to a settlement agreement until after the end of proceedings.**

*This provision seems to discourage quick/early settlement in favor of longer court proceedings. If a state agency was an intervenor to the suit, the danger is greater resources spent in court. The benefit would be that issues raised by intervening parties might have a better chance of being heard before a settlement is reached (getting at the issue of regulatory burden being placed on states through settlements without states' input).*

**Efforts to settle a covered civil action or otherwise reach an agreement shall (1) be conducted pursuant to the mediations or alternative dispute resolution program of the court; and (2) include any party that intervenes in the action.**

*Part one of this provision forces the parties to use the court system. The second piece is favorable to state agencies who intervene in cases, but would also benefit other parties in their intervention (whose interests may be adverse to the state's) and could delay settlement.*

**Not later than 60 days before the date on which a consent decree or settlement agreement is filed with a court, the agency seeking to enter one of these shall publish in the Federal Register and online (A) the proposed consent decree or settlement agreement; and (B) a statement providing (1) the statutory basis; and (2) a description of the terms of the agreement.**

*This would benefit other agencies and parties in that they would be assured that they could see the proposal and possibly voice concern or intervene.*

**An agency seeking to enter a consent decree or settlement agreement shall accept public comment on any issue relating to the matters alleged in the complaint and an agency shall respond to any comment received.**

*As far as states are concerned, if a federal agency wanted to enter into a settlement agreement, this would ensure that state agencies have a chance to comment without having to formally intervene (and incur the attorney costs of doing so). This would generally delay proceedings though, which may or may not be in a state agency's interest.*

**When moving that the court enter a consent decree or settlement agreement or for dismissal pursuant to one of these, an agency shall (1) inform the court of the statutory basis, (2) submit to the court a summary of the comments received and the agency's response and (3) submit to the court a certified index of the notice and comment proceeding and make the record available to the court.**

*This provision ensures a complete record for the court. The benefit to intervenors and public commenters is that it could mean that a court would not approve a settlement that significantly burdens states based on reading states' comments. Basically, this would allow the court to take a more active role in the settlement proceedings if it chose to. A more active role could benefit or burden a state depending on the circumstances.*

**Each agency shall submit to Congress an annual report that, for the year covered by the report, includes the number, identity and content of civil actions brought against and consent decrees or settlement agreements entered against or into by the agency.**

*This provision would benefit state agencies in that each year they could look at a comprehensive list of the federal lawsuits and the settlements reached. If the states had been unaware of the suits and settlements as they progressed, at least they would see them in a comprehensive list once per year instead of requesting them from EPA.*

#### Conclusions

States are in the best position to determine how to allocate their scarce resources to advance the interests of clean air, clean water and clean land. Addressing requirements imposed upon the states by consent decrees or settlement agreements entered into by EPA with a citizens group on a single issue diverts state resources from their larger goals – and actually can slow states' progress in improving our environment.

Thus, states urge reform and state participation in EPA's consent decree process which settles citizen suits. In general, greater legal process would benefit states in that we would have more notice of lawsuits and settlements that affect us. This would afford states more time to consider intervening in the lawsuits, or, at a minimum, more time to prepare for how we will deal with the settlement terms.

**Appendix**

**ECOS Resolution Relevant to H.R. 1493**

Resolution 13-2  
March 6, 2013  
Scottsdale, Arizona  
As certified by  
R. Steven Brown  
Executive Director

**THE NEED FOR REFORM AND STATE PARTICIPATION  
IN EPA'S CONSENT DECREES WHICH SETTLE CITIZEN SUITS**

WHEREAS, federal environmental programs may be, and generally are, authorized or delegated to states;

WHEREAS, in addition to authorization and delegation, states are provided certain stand alone rights and responsibilities under federal environmental laws;

WHEREAS, the United States Environmental Protection Agency (U.S. EPA) may be sued in federal court by citizens over the alleged failure to perform its nondiscretionary duties, such as taking action on state environmental agency submissions, promulgating regulations, meeting statutory deadlines, or taking other regulatory actions;

WHEREAS, state environmental agencies may have information that would materially benefit the defense of a citizen suit or the reaching a settlement, and may have interests that should be considered in the evaluation of a settlement;

WHEREAS, state environmental agencies are not always notified of citizen suits that allege U.S. EPA's failure to perform its nondiscretionary duties, are often not parties to these citizen suits, and are usually not provided with an opportunity to participate in the negotiation of agreements to settle citizen suits;

WHEREAS, the agreements U.S. EPA negotiates to settle citizen suits may adversely affect states;

NOW, THEREFORE, BE IT RESOLVED THAT THE ENVIRONMENTAL COUNCIL OF THE STATES:

Affirms that states have stand alone rights and responsibilities under federal environmental laws, and that the state environmental agencies are co-regulators, co-funders and partners with U.S. EPA;

Urges the U.S. EPA to devote the resources necessary to perform its nondiscretionary duties within the timeframes specified under federal law, especially when required to take action on a state submission made under an independent right or responsibility (e.g., State Implementation Plans under the Clean Air Act).

Specifically calls on U.S. EPA to notify all affected state environmental agencies of citizen suits filed against U.S. EPA that allege a failure of the federal agency to perform its nondiscretionary duties;

Believes that providing an opportunity for state environmental agencies to participate in the negotiation of citizen suit settlement agreements will often be necessary to protect the states' role in implementing federal environmental programs and for the administration of authorized or delegated environmental programs in the most effective and efficient manner;

Specifically calls on U.S. EPA to support the intervention of state environmental agencies in citizen suits and meaningful participation in the negotiation of citizen suit settlement agreements when the state agency has either made a submission to EPA related to the citizen suit or when the state agency either implements, or is likely to implement, the authorized or delegated environmental program at issue;

Believes that no settlement agreement should extend any power to U.S. EPA that it does not have in current law;

Believes that greater transparency of citizen suit settlement agreements is needed for the public to understand the impact of these agreements on the administration of environmental programs;

Affirms the need for the federal government to publish for public review all settlement agreements and consider public comments on any proposed settlement agreements;

Encourages EPA to respond in writing to all public comments received on proposed citizen suit settlement agreements, including consent decrees.

### Comparison of H.R. 1493 to ECOS Resolution

H.R. 1493 defines the following terms:

A "covered civil action" is a civil action seeking to compel agency action and alleging that the agency is unlawfully withholding or unreasonably delaying an agency action relating to a regulatory action that would affect the rights of private persons other than the person bringing the action or a State, local, or tribal government.

A "covered consent decree" or a "covered settlement agreement" is a consent decree or settlement agreement entered into a covered civil action and any other consent decree or settlement agreement that requires agency action relating to such a regulatory action that affects the rights of private persons other than the person bringing the action or a State, local, or tribal government.

ECOS's Resolution "Asks"	H.R. 1493 Changes
Affirms that states have stand alone rights and responsibilities under federal environmental laws, and that the state environmental agencies are co-regulators, co-funders and partners with U.S. EPA;	The bill does not address this directly.

ECOS's Resolution "Asks"	H.R. 1493 Changes
<p>Urges the U.S. EPA to devote the resources necessary to perform its nondiscretionary duties within the timeframes specified under federal law, especially when required to take action on a state submission made under an independent right or responsibility (e.g., State Implementation Plans under the Clean Air Act).</p>	<p>The bill does not address this directly. However, it would require the agency to consider how the decree or agreement would impact its ability to perform its other duties: "If a proposed covered consent decree or settlement agreement requires an agency action by a date certain, the agency shall... inform the court of— (A) any required regulatory action the agency has not taken that the covered consent decree or settlement agreement does not address; (B) how the covered consent decree or settlement agreement, if approved, would affect the discharge of [those] duties...; and (C) why the effects of the covered consent decree or settlement agreement on the manner in which the agency discharges its duties is in the public interest" (Section 3(d)(4)).</p>
<p>Specifically calls on U.S. EPA to notify all affected state environmental agencies of citizen suits filed against U.S. EPA that allege a failure of the federal agency to perform its nondiscretionary duties.</p>	<p>The bill also requires that the decree or agreement "allows sufficient time and incorporates adequate procedures for the agency to comply with ... applicable statutes [and] the provisions of any Executive order that governs rulemaking" (Section 3(f)(2)).</p> <p>Agencies would be required to make such notification online: "In any covered civil action, the agency against which the covered civil action is brought shall publish the notice of intent to sue and the complaint in a readily accessible manner, including by making [them] available online not later than 15 days after" receiving them (Section 3(e)(1)).</p>

<p><b>ECOS's Resolution "Asks"</b></p>	<p><b>H.R. 1493 Changes</b></p>
<p>Believes that providing an opportunity for state environmental agencies to participate in the negotiation of citizen suit settlement agreements will often be necessary to protect the states' role in implementing federal environmental programs and for the administration of authorized or delegated environmental programs in the most effective and efficient manner.</p>	<p>States may intervene in relevant cases. "In considering a motion to intervene in a covered civil action or a civil action in which a covered consent decree or settlement agreement has been proposed that is filed by a State, local, or tribal government, the court shall take due account of whether the movant— (A) administers jointly with an agency that is a defendant in the action the statutory provisions that give rise to the regulatory action to which the action relates; or (B) administers an authority under State, local, or tribal law that would be preempted by the regulatory action to which the action relates." (Section 3(a)(2)).</p>
<p>Specifically calls on U.S. EPA to support the intervention of state environmental agencies in citizen suits and meaningful participation in the negotiation of citizen suit settlement agreements when the state agency has either made a submission to EPA related to the citizen suit or when the state agency either implements, or is likely to implement, the authorized or delegated environmental program at issue;</p>	<p>However, any affected and inadequately represented entity may also intervene. "In considering a motion to intervene in a covered civil action... that is filed by a person who alleges that the agency action in dispute would affect the person, the court shall presume, subject to rebuttal, that the interests of the person would not be represented adequately by the existing parties to the action." (Section 3(b)(1)).</p>
	<p>Settlement negotiations "include any party that intervenes in the action" (Section 3(c)(2)).</p>
	<p>Additionally, amicus participation by "any person who filed public comments or participated in a public hearing" is presumed, subject to rebuttal, to be properly allowed (Section 3(f)(1)).</p>

<p>ECOS's Resolution "Asks"</p>	<p>H.R. 1493 Changes</p>
<p>Believes that no settlement agreement should extend any power to U.S. EPA that it does not have in current law.</p>	<p>The bill does not limit the extension of agency power, but does require approval by the Attorney General or agency head, if the agency is litigating a matter independently, for:</p> <p>A consent decree if it "converts into a nondiscretionary duty a discretionary authority of an agency to propose, promulgate, revise, or amend regulations; commits an agency to expend funds that have not been appropriated and... budgeted [or] to seek a particular appropriation or budget authorization; divests an agency of discretion committed to the agency by statute or the Constitution...; or otherwise affords relief that the court could not enter under its own authority..."</p>
<p></p>	<p>Or a settlement agreement if it "provides a remedy for a failure by the agency to comply with the terms of the covered settlement agreement other than the revival of the civil action resolved by the covered settlement agreement" and "interferes with the authority of an agency to revise, amend, or issue rules...; commits the agency to expend funds that have not been appropriated and... budgeted...; or... commits the agency to exercise in a particular way discretion which was committed to the agency by statute or the Constitution..." (Section 3(e)).</p>

ECOS's Resolution "Asks"	H.R. 1493 Changes
<p>Believes that greater transparency of citizen suit settlement agreements is needed for the public to understand the impact of these agreements on the administration of environmental programs;</p>	<p>The bill states: "Each agency shall submit to Congress an annual report that... includes—(1) the number, identity, and content of covered civil actions brought against and covered consent decrees or settlement agreements entered against or into by the agency; and (2) a description of the statutory basis for—(A) each covered consent decree or settlement agreement...; and (B) any award of attorneys fees or costs in a civil action resolved by a covered consent decree or settlement agreement...." (Section 3(g)).</p>
<p>Affirms the need for the federal government to publish for public review all settlement agreements and consider public comments on any proposed settlement agreements;</p>	<p>Transparency would be greatly increased. A party "may not make a motion for entry of a covered consent decree or to dismiss a civil action pursuant to a covered settlement agreement" until at least 60 days after the agency has published online and in the Federal Register the proposed covered consent decree or settlement agreement, a statement providing the statutory basis for the decree or agreement, and a statement of the terms covered in the decree or agreement (including whether it awards attorney's fees) (Section 3(a)(2) and Section 3(d)(1)).</p>
<p>Encourages EPA to respond in writing to all public comments received on proposed citizen suit settlement agreements, including consent decrees.</p>	<p>The agency must accept and respond to public comments during this period, and may hold a public hearing as well (Section 3(d)(2)). When moving that the court enter a proposed consent decree or settlement agreement, the agency must inform the court of the statutory basis and terms of the proposed decree or agreement, submit a summary of the comments received and the agency's responses, and "submit to the court a certified index of the administrative record of the notice and comment proceeding." (Section 3(d)(2)(C)).</p>

Mr. BACHUS. Thank you. We look forward to you being with us for questions too.

The first question is to Mr. Kovacs. Mr. Kovacs, listening to Mr. Walke, his view of sue-and-settlement litigation, it seems to be that it is really as simple as that an agency's—if there is a broken deadline, then a court needs to fix that as soon as possible and can do

that. What is your response to that view or that the agency will extend the deadline?

Mr. KOVACS. Well, you know, Congress establishes the deadline. We are not here to talk about the deadlines at all. That is something you have decided to put in the statutes.

What we are here to talk about is the fact that we do not know about any of the sue-and-settle agreements or the notices of intent to sue. So our concern is, one, there needs to be some very simple transparency. For example, let me show you how easy it is.

We had been complaining for years on the fact that we had no notice of intent to sue. We do not even know how many lawsuits are brought against our Government. I think you ought to know that as just Members of Congress. But during the Gina McCarthy hearings, for example, one of the commitments that was made was that they would begin to finally post the notice of intent to sue, which is only one of the points. But it was up on the Web site in literally a week or so. So it can be done quickly. And the fact is that the notices of intent to sue and the lawsuits and the consent decrees are really something the American public are entitled to know because they are going to result in regulation.

And some of the regulations that are moving forward—all we are asking is that the affected parties, those who have constitutional standing, should have an ability to try to intervene if none of their interests are being protected. And there are some issues, especially on the MACT standards, for example, where had EPA been able to get the additional time, you would not have been in an additional 10 years of litigation. Really, it is about transparency and the right to intervene if we are not being represented and provided we have constitutional standing.

Mr. BACHUS. You know, at our last hearing—I know Ranking Member Conyers mentioned we have had other hearings on this matter, and I know today and earlier he and my other colleagues claimed that there was not really any evidence or sufficient evidence that sue-and-settle litigation practices were a problem. You know, they were not a major concern.

What are some of the important findings revealed in your new study of sue-and-settlement cases regarding whether this is—I think one of my colleagues referred to it as a fictional problem.

Mr. KOVACS. Well, the first thing I want to say because the term—I am not going to use the “C” word, the word “collusion.” There is absolutely no allegations anywhere in our report on that.

What this is about is at the last hearing, my recollection was—actually there have been two hearings, one last year and this year. My recollection was that the sue-and-settle was not a big issue. They were only a few of the cases. And what we were hearing from the brick manufacturers, the cement manufacturers, the boiler manufacturers, virtually every industry in the country is how did this process get started so quickly and we were not involved in the process. We thought, under the Administrative Procedure Act, we were supposed to be involved and get notice and comment. And the deadlines are very important because the deadline is how you bring technology into the system.

That is what started the report. And we did not know if we were going to find five cases or if we were going to find 100. What we

found is between 2009 and 2012 that there were 71 cases resulting in 112 rules. And in some of the cases, for example, the States like North Dakota and New Mexico—they were sued. Just to give you an idea on notice, they were sued without notice in Oakland, California. And the order that impacted those western States—so you may all think that notice is really not a big deal, but when you are being a regulated industry and you do not have notice of where your Government is going, it is a big deal. So it may be a simple concept, but to us it is a very important concept and that is why we did the report.

Mr. BACHUS. All right.

Mr. Walke, Mr. Kovacs identifies sue-and-settlement rulemakings that would impose mandates that are expensive on many regulatory—I mean, many regulated industries and entities. How can you assert that these industries should be ignored? Does your organization and a regulatory agency ask a court to order the rules and timetables under which such regulations will be imposed?

Mr. WALKE. Thank you, Chairman Bachus.

It is important to be very precise about what is happening here. The statutes passed by Congress established these obligations in the form of deadlines and mandates. The consent decrees merely enforce overdue, nondiscretionary duties that Congress has imposed. The consent decrees do not create any requirements. Those were done by Congress. What then happens is the consent decrees or settlement agreements merely provide for schedules for rulemakings which then happen with notice and comment involving the public and establish the actual regulatory obligations and deadlines and requirements of law. Consent decrees do not impose requirements of law upon third parties. They merely facilitate the enforcement of statutes passed by this body.

And so it is very important to understand what the Chamber report said and what it did not say. It did not say that there were settlement agreements or consent decrees improperly creating legal requirements by skirting rulemakings or public participation opportunities.

Mr. BACHUS. Mr. Cohen is recognized for 5 minutes.

Mr. COHEN. Thank you, Mr. Bachus.

Mr.—is it Walke or Walke?

Mr. WALKE. It is Walke.

Mr. COHEN. How many sue-and-settle collusive settlements that have been sanctioned by the Government are you aware of?

Mr. WALKE. None.

Mr. COHEN. None? I am shocked.

Mr. Kovacs, how many are you aware of?

Mr. KOVACS. Well, based on what we said in the report, we put the number at 71 where there was no transparency and no notice.

And second, just to correct the record, all the sue-and-settle arrangements are not necessarily deadline cases. For example, the Chesapeake Bay—

Mr. COHEN. Let me stop you for a minute because your answer was 71 and that was my question.

Mr. Walke, are you familiar with these 71 situations the Chamber cites?

Mr. WALKE. Yes, sir. What the Chamber did was Internet searches to find all settlements between EPA and environmental groups. They did not look at industry settlements because there were plenty of them. They did not look at the Bush administration.

Settlements are a natural and long-accepted area of the law. They happen across all of our different statutes involving agencies. They happen in enforcement cases. They happen between municipalities and Federal agencies. If one is to take the rather astounding position that all settlements involving the Federal Government are evidence of sue-and-settle, then the world has been turned up side down because every Administration in the modern administrative era has been entering into settlements with parties under Republican and Democratic administrations, and never has that been deemed improper per se.

Mr. COHEN. Let me ask you. You worked at the EPA during the Clinton administration. Is that right?

Mr. WALKE. That is correct, sir.

Mr. COHEN. And you have been at the NRDC. Tell us about some of the settlements that you are aware of in those areas and time periods and in the areas of your expertise that have benefitted the public and how.

Mr. WALKE. Absolutely. Let me just mention two that were in my testimony because they are under the clean air laws, and both of them share some very interesting features, which are actually true in explaining a phenomenon that has been discussed here today.

The Bush administration EPA had issued unlawful rules that defied the plain language of the Clean Air Act, one to regulate soot pollution and one to regulate mercury and toxic pollution from power plants. Courts found those rules to be squarely unlawful. As a result, the Obama administration inherited the legal obligation to follow the law.

Now, when the Obama administration took office, the duty to follow those laws were 5 years and 10 years overdue. So they had a nondiscretionary statutory deadline they had to meet. My organization brought a lawsuit in one of the cases but not the other, and we negotiated a consent decree to meet those overdue statutory deadlines exceeding 10 years in one case, and consistent with the Clean Air Act, those consent decrees were noticed for public comment. Some of the witnesses at last year's hearing for the minority opposed not just the consent decree but the rule in question to clean up mercury and toxic pollution from power plants. The judge rejected that opposition out of hand and entered the consent decree because it was appropriate.

EPA then went through notice and comment rulemaking. No one was prevented from submitting comments. No outcome was dictated by either consent decree. The proposed rules were offered. People weighed in. Now they have been finalized, and in just those two examples, EPA has projected that over 11,000 lives will be saved, hundreds of thousands of asthma attacks will be avoided, especially among children, and heart attacks among adults will be avoided.

Mr. COHEN. Those are all pretty commendable things.

Mr. Kovacs, how would you suggest that we should deal with the asthma attacks that children have and the other health problems that would have occurred but for this particular settlement?

Mr. KOVACS. Well, first of all, I just want to clear up a few statements. One is—

Mr. COHEN. I only have about 30 seconds. Would you answer my question please?

Mr. KOVACS. Well, we think that there should be regulations. We have never opposed regulations. What we are saying is that as you do the regulation, there needs to be—

Mr. COHEN. What is the Chamber's position on climate change?

Mr. KOVACS. The Chamber has specifically said that on the climate change issue, we have not opposed—we opposed Waxman-Markey because it was an unworkable bill that cost an enormous amount of money. But we do not have a line in the sand on the climate change issue.

Mr. COHEN. Do you have a line anywhere? Has the Chamber come out in any ways to resolve the problem that the earth faces with climate change?

Mr. KOVACS. Well, first of all, if the regulatory process were working in the way the Administrative Procedure Act would like it to work and was intended to work and there was public participation and there was transparency in the system, we would not be here having these kinds of discussions.

Mr. COHEN. But the issue is has the Chamber done anything to address what is the world's number one issue, climate change?

Mr. KOVACS. Absolutely. We have been—years before any of the environmental groups were in there, we were in there with the Bush administration pushing and pushing and pushing on the development of new and energy efficient technologies and alternative technologies for the Bush administration. We put out—

Mr. COHEN. Which Bush administration?

Mr. KOVACS. The second one. We put out our—

Mr. BACHUS. The gentleman's time has expired.

Mr. KOVACS [continuing]. Five-year energy impact analysis and we pushed DOT. We went to the Administration about energy savings performance contracts. So we have pushed and pushed and pushed on that issue.

Mr. COHEN. Thank you. That is commendable.

I yield back the balance of my time.

Mr. BACHUS. The time is already gone. [Laughter.]

All right. Thank you.

Mr. Collins is recognized for 5 minutes.

Mr. COLLINS. Thank you, Mr. Chairman. I appreciate it.

And moving back to the actual legislation and the discussion here, Mr. Puckett, I have a question. In your comments and in your testimony, you have talked about how you work with this now just having input and how it has affected business. I want to get back to how this actually affecting companies.

In your company, if you were able to intervene in a case such as the brick litigation, would you bring valid concerns to the table, a constructive effort? Because there has been a discussion here today that all you wanted to do is obstruct. All you wanted to do is put off or in some cases has been accused of killing kids in a sense by

being obstructive. What was your ultimate goal to be in wanting to be a part of this transparency?

Mr. PUCKETT. Well, I think, one—and we have already done this—is provide accurate data of what our stack emissions are and what we are doing as an industry. The main thing is just to have a place at the table so we know what is going on, but I think we can provide—instead of modeling and guessing at the data, we have already done this accurate stack testing on just about every facility that is in our industry.

Mr. COLLINS. And so you are currently looking out for what you are doing and being a responsible citizen is what I am hearing you say.

Mr. PUCKETT. Yes, sir. You know, under the first EPA mandate, the industry came into compliance. We were in compliance before the rule was vacated, and we are still operating those control devices. We cannot get rid of them because they are in our air operating permits. So we are still incurring the cost of operating those. And I think our industry is operating at pretty safe levels.

Mr. COLLINS. Well, from your perspective—and you had mentioned this in your testimony, that given some of the impacts—the practices being discussed here—elaborate a little bit further. You know, you talked about closing a kiln and you talked about the impact financially. What is it not only financially to the people who work in your facilities and the economic impact of the jobs that we are talking about today, which I think is a matter that Congress needs to address because everyone is talking about jobs and these kind of issues. Tell me more. Explain more to the Committee about that.

Mr. PUCKETT. From what I understand the new proposed rule requires—and the EPA sent numbers on my facility through our association to me. They asked to come into compliance would cost \$8 million, a capital expenditure, and close to \$2 million a year to operate these. Now, they also suggested that we go borrow this money to put in the control devices. Now, most of our industry, anyone connected with the construction industry, is out of favor with lenders, and if I walked into any bank and said loan me \$8 million on a project with no payback and really creates a negative cash drain, we will get laughed out of there.

So in two of our kilns, we could not support the expenditure. It would put the operation in a negative position. And that is the plants that we have most of our employees in. So just to get to where we could make it, we would have to eliminate 50 jobs. You know, these are real people. They are families. In a small southern rural town, the last thing we need, especially in Mississippi, is unemployed people. I do not think that is what the Congress wants either.

Mr. COLLINS. Thank you.

Mr. Easterly, can you hear my question?

Mr. EASTERLY. Yes.

Mr. COLLINS. I know this has been discussed and our friends from across the aisle talked about this is another hearing that we are having on this. But do you see right now, especially in light of even what was in The Washington Post just in the last couple days,

the rise of the fourth branch of Government which, by the way, Mr. Chairman, I would ask that it be submitted for the record for that. Mr. BACHUS. Without objection. [The information referred to follows:]

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The rise of the fourth branch of government - The Washington Post

## The Washington Post

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### The rise of the fourth branch of government

By Jonathan Turley, Published: May 24

Jonathan Turley is the Shapiro professor of public interest law at George Washington University.

There were times this past week when it seemed like the 19th-century Know-Nothing Party had returned to Washington. President Obama insisted he knew nothing about major decisions in the State Department, or the Justice Department, or the Internal Revenue Service. The heads of those agencies, in turn, insisted they knew nothing about major decisions by their subordinates. It was as if the government functioned by some hidden hand.

Clearly, there was a degree of willful blindness in these claims. However, the suggestion that someone, even the president, is in control of today's government may be an illusion.

The growing dominance of the federal government over the states has obscured more fundamental changes within the federal government itself. It is not just bigger, it is dangerously off-kilter. Our carefully constructed system of checks and balances is being negated by the rise of a fourth branch, an administrative state of sprawling departments and agencies that govern with increasing autonomy and decreasing transparency.

For much of our nation's history, the federal government was quite small. In 1790, it had just 1,000 nonmilitary workers. In 1962, there were 2,515,000 federal employees. Today, we have 2,840,000 federal workers in 15 departments, 69 agencies and 383 nonmilitary sub-agencies.

This exponential growth has led to increasing power and independence for agencies. The shift of authority has been staggering. The fourth branch now has a larger practical impact on the lives of citizens than all the other branches combined.

The rise of the fourth branch has been at the expense of Congress's lawmaking authority. In fact, the vast majority of "laws" governing the United States are not passed by Congress but are issued as regulations, crafted largely by thousands of unnamed, unreachable bureaucrats. One study found that in 2007, Congress enacted 138 public laws, while federal agencies finalized 2,926 rules, including 61 major regulations.

This rulemaking comes with little accountability. It's often impossible to know, absent a major scandal, whom to



blame for rules that are abusive or nonsensical. Of course, agencies owe their creation and underlying legal authority to Congress, and Congress holds the purse strings. But Capitol Hill's relatively small staff is incapable of exerting oversight on more than a small percentage of agency actions. And the threat of cutting funds is a blunt instrument to control a massive administrative state — like running a locomotive with an on/off switch.

The autonomy was magnified when the Supreme Court ruled in 1984 that agencies are entitled to heavy deference in their interpretations of laws. The court went even further this past week, ruling that agencies should get the same heavy deference in determining their own jurisdictions — a power that was previously believed to rest with Congress. In his dissent in Arlington v. FCC, Chief Justice John Roberts warned: "It would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed."

The judiciary, too, has seen its authority diminished by the rise of the fourth branch. Under Article III of the Constitution, citizens facing charges and fines are entitled to due process in our court system. As the number of federal regulations increased, however, Congress decided to relieve the judiciary of most regulatory cases and create administrative courts tied to individual agencies. The result is that a citizen is 10 times more likely to be tried by an agency than by an actual court. In a given year, federal judges conduct roughly 95,000 adjudicatory proceedings, including trials, while federal agencies complete more than 939,000.

These agency proceedings are often mockeries of due process, with one-sided presumptions and procedural rules favoring the agency. And agencies increasingly seem to chafe at being denied their judicial authority. Just ask John E. Brennan. Brennan, a 50-year-old technology consultant, was charged with disorderly conduct and indecent exposure when he stripped at Portland International Airport last year in protest of invasive security measures by the Transportation Security Administration. He was cleared by a federal judge, who ruled that his stripping was a form of free speech. The TSA was undeterred. After the ruling, it pulled Brennan into its own agency courts under administrative charges.

The rise of the fourth branch has occurred alongside an unprecedented increase in presidential powers — from the power to determine when to go to war to the power to decide when it's reasonable to vaporize a U.S. citizen in a drone strike. In this new order, information is jealously guarded and transparency has declined sharply. That trend, in turn, has given the fourth branch even greater insularity and independence. When Congress tries to respond to cases of agency abuse, it often finds officials walled off by claims of expanding executive privilege.

Of course, federal agencies officially report to the White House under the umbrella of the executive branch. But in practice, the agencies have evolved into largely independent entities over which the president has very limited control. Only 1 percent of federal positions are filled by political appointees, as opposed to career officials, and on average appointees serve only two years. At an individual level, career officials are insulated from political pressure by civil service rules. There are also entire agencies — including the Securities and Exchange Commission, the Federal Trade Commission and the Federal Communications Commission — that are protected from White House interference.

Some agencies have gone so far as to refuse to comply with presidential orders. For example, in 1992 President George H.W. Bush ordered the U.S. Postal Service to withdraw a lawsuit against the Postal Rate Commission, and he threatened to sack members of the Postal Service's Board of Governors who denied him. The courts ruled in favor of the independence of the agency.

It's a small percentage of agency matters that rise to the level of presidential notice. The rest remain the sole

concern of agency discretion.

As the power of the fourth branch has grown, conflicts between the other branches have become more acute. There is no better example than the fights over presidential appointments.

Wielding its power to confirm, block or deny nominees is one of the few remaining ways Congress can influence agency policy and get a window into agency activity. Nominations now commonly trigger congressional demands for explanations of agencies' decisions and disclosures of their documents. And that commonly leads to standoffs with the White House.

Take the fight over Richard Cordray, nominated to serve as the first director of the Consumer Financial Protection Bureau. Cordray is highly qualified, but Republican senators oppose the independence of the new bureau and have questions about its jurisdiction and funding. After those senators repeatedly blocked the nomination, Obama used a congressional break in January to make a recess appointment. Since then, two federal appeals courts have ruled that Obama's recess appointments violated the Constitution and usurped congressional authority. While the fight continues in the Senate, the Obama administration has appealed to the Supreme Court.

It would be a mistake to dismiss such conflicts as products of our dysfunctional, partisan times. Today's political divisions are mild compared with those in the early republic, as when President Thomas Jefferson described his predecessor's tenure as "the reign of the witches." Rather, today's confrontations reflect the serious imbalance in the system.

The marginalization Congress feels is magnified for citizens, who are routinely pulled into the vortex of an administrative state that allows little challenge or appeal. The IRS scandal is the rare case in which internal agency priorities are forced into the public eye. Most of the time, such internal policies are hidden from public view and congressional oversight. While public participation in the promulgation of new regulations is allowed, and often required, the process is generally perfunctory and dismissive.

In the new regulatory age, presidents and Congress can still change the government's priorities, but the agencies effectively run the show based on their interpretations and discretion. The rise of this fourth branch represents perhaps the single greatest change in our system of government since the founding.

We cannot long protect liberty if our leaders continue to act like mere bystanders to the work of government.

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Mr. COLLINS. Thank you, Mr. Chair.

Is there a more compelling reason today to pass this legislation than what we have seen maybe even in the past?

Mr. EASTERLY. The issue is coming up more often. Let us put it that way.

I think part of the problem is that you are dealing with acts that are 20, 40 years old, and the deadlines in those acts have passed. And so this allows outside groups to set the priorities for action, and I do not think they are the priorities that will result in the

best protection of human health and the environment. But once the court speaks, we have to follow the dictates of the court and use our resources for those things until the next lawsuit comes and moves it around again.

Thank you.

Mr. COLLINS. Thank you.

Very quickly because my time is coming up. Mr. Kovacs, does H.R. 1493 limit in any way the ability of citizens to hold the Government accountable?

Mr. KOVACS. No.

Mr. COLLINS. Mr. Walke, do you agree with that?

Mr. WALKE. No, sir, I do not as detailed in my testimony.

Mr. COLLINS. Can you explain why? Is there anything here that stops your organization or any from doing anything that you have currently done?

Mr. WALKE. Sure, it does.

Mr. COLLINS. How?

Mr. WALKE. Absolutely it does.

Mr. BACHUS. The gentleman's time has expired.

Mr. WALKE. It prevents us from having private talks with the Government to resolve a case where they have broken the law.

Mr. COLLINS. Thank you, Mr. Chairman. I will hold back, but I think the evidence is profoundly that this does in no way stop the citizen from holding the Government accountable to deadlines or other things. It just goes back to an issue of transparency and openness.

Mr. BACHUS. Thank you.

Mr. CONYERS is recognized for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman.

Can we not just let the witness finish his—he was asked a question. Our colleague ran out of time, and I am going to give up some of my time to get the fuller response from Mr. Walke.

Mr. WALKE. Thank you, Ranking Member Conyers.

As I said, the bill requires that really an unlimited number of outside parties be allowed to join settlement talks in contravention of governing Supreme Court law and provides them with an opportunity through open-ended mediation that the bill very carefully has no deadlines to govern, no timetables, allows them to draw out the settlement discussions indefinitely that under current law occur exclusively between the parties to litigation, whether that is industry, States, or environmental groups, and the Federal agency on the other hand. That is a very clear and harmful change to not only governing judicial case law but legislation and consistent practice under administrative law for 4 decades.

Mr. CONYERS. Thanks, Attorney Walke.

How do consent decree practices that have resulted in beneficial settlements for all parties, including corporations, and have produced good environmental outcomes—is that a fair conclusion to draw?

Mr. WALKE. That is absolutely fair. Taking just the Clean Air Act as an example, Congress expected Americans to be safeguarded against hazardous air pollution, including carcinogens, from all responsible industry sectors by the year 2000. That has not happened and the only reason it has happened faster, reducing hundreds of

thousands of tons of pollution and saving tens of thousands of lives, is because, first, citizen lawsuits that overturned unlawful rules by the Bush administration and, I would add, the Clinton administration, as well as consent decrees that accelerated the obligation to meet these overdue laws and to safeguard Americans.

Mr. CONYERS. Now, we cannot have a hearing like this without mentioning the Koch brothers and their roles in contributing to the Competitive Enterprise Institute which received \$700,000 to come up with the Chamber of Commerce report. What is the problem here?

The Chamber of Commerce report, as I have been advised, is a pretty flawed study. Is that too critical of them?

Mr. WALKE. That is my respectful view, Mr. Conyers, and I detail it extensively in my testimony. I cannot and will not speak to any funding or motivations behind the report, but what I do know is that there has been a really concerted ideological campaign with op eds timed in the paper this morning, in fact, to correspond to a story line which has also been picked up to block the nomination for the head of EPA by Republican Senators that has seized upon this just factually and legally false story line about so-called sue-and-settlement practices that, when you get down and read the Chamber report, are just broad side attacks on settlements in general and the right of citizens to hold Government accountable for violating the law.

Mr. CONYERS. Well, like you, I was not reading any implications in by the Koch brothers' contribution to the study, but you can draw your own suspicions, if you want.

Why does our legislature, the Congress, allow citizens to file suits against other agencies?

Mr. WALKE. Congress recognized that there was a very powerful incentivizing role to ensure enforcement of the law and safeguards by giving the public the right to hold Government accountable. And this is an evenhanded right for all citizens of this country. It has been praised by admirers across the globe. Corporations may do so. States and municipalities and public health groups. The Government, for whatever reason, does not always comply with the law and it is a laudatory feature of our democracy that we allow citizens to hold the Government accountable when they do not follow the law.

Mr. CONYERS. Thank you, Chairman Bachus, for this opportunity.

Mr. BACHUS. Thank you.

Mr. Holding?

Mr. HOLDING. Mr. Chairman, I am going to yield a minute to my colleague, Mr. Collins, so he can attempt one more attempt to get a direct answer from Mr. Walke.

Mr. COLLINS. Mr. Walke, I appreciate it and I appreciate your last comment because it basically answered the question. And sometimes we ask inartful questions. I will ask it a little more directly.

What my question was a moment ago—and I appreciate the Ranking Member giving you a chance to elaborate. But my question was very simple. It was does it stop the ability to bring the initial lawsuit.

Mr. WALKE. No, sir.

Mr. COLLINS. Thank you.

And it also does not affect the informal discussions before a lawsuit is brought.

Mr. WALKE. No, sir, that is incorrect. That is what I disagreed with in my earlier answer and my response to Mr. Conyers.

Mr. COLLINS. It does, and before the lawsuit is brought, you can still brought, you can still have conversations. This legislation does nothing to affect that.

Mr. WALKE. What it does is it prevents the entry of the consent decree into all manner of parties that have the ability to obstruct the settlement of the lawsuit over a plain and indefensible violation of law. And so—

Mr. COLLINS. I think we are talking about two different—if you could answer my direct question, I would appreciate it. I yield back to Mr. Holding.

Mr. HOLDING. I will reclaim my time.

This question is for Mr. Easterly. Mr. Easterly—is he still on the line?

Mr. EASTERLY. Yes.

Mr. HOLDING. There he is. All right.

Mr. Easterly, it must take a lot for an organization of 48 States, the District of Columbia, and Puerto Rico to agree on a specific set of reforms as the Environmental Council of the States has regarding the sue-and-settle reforms. I would like to ask you just how serious and deep are the States' concerns about how much the States and the regulatory systems' needs and effectiveness are being compromised by the current sue-and-settle practices.

Mr. EASTERLY. I think we are all concerned that—you are right. It takes a long time. It took about 2 years of understanding the problem and talking about what possible solutions to the problem are because we agree people need to hold their Government accountable, but we believe we also need a seat at the table for things that impact us. And this passed at our last meeting this spring and it passed unanimously. So all the States believe this is an issue, believe that it needs to be addressed, and we appreciate that the Congress is trying to do that.

Mr. HOLDING. Now, a follow-up, Mr. Easterly. In your view in the long run, can optimal environmental benefits be achieved if the expertise and views of the State co-regulators are not heard and accounted for when consent decrees and settlement agreements to establish new regulations are framed?

Mr. EASTERLY. I am sorry. I missed the first half of the question. There was not any audio.

Mr. HOLDING. Certainly. In the long run, if you are trying to achieve optimal environmental benefits from regulations and you do not consult with State co-regulators, if they are shut out of the process, just how successful are these regulations going to be at achieving optimal results for the environment?

Mr. EASTERLY. Well, we do not think very much because if you impose a requirement that we are not capable of doing, well, okay, then my friend, John Walke, comes and institutes litigation. But you need to be able to actually do the things. You need to have the proper science. You need to have the proper guidance, which is a

Federal EPA responsibility usually, because we all want to improve the environment. We all want clean air, clean land, and clean water, and the science is one of the issues. The science and law are not always completely in alignment. When you have discussions with EPA, you can usually get them to do the science until they are sued, and then they have to fall back on what the law says, whether it actually makes sense today or not.

Mr. HOLDING. And science and law, whether they are aligned or not—it is certainly the case that when you are dealing with 49 different States and two territories, you know, the situation in each of those places is not uniformly the same. So a one-size-fits-all piece of regulation coming out of the EPA might not work well all across the country. Would that be correct?

Mr. EASTERLY. Yes, that is correct. One of the benefits of there being 10 EPA regions and each region knowing more about the States that are in their region—and then you do have discussions on how best to meet the environment requirements.

Mr. HOLDING. Thank you very much.

Mr. Chairman, I will yield back.

Mr. BACHUS. Thank you.

Ms. DelBene?

Ms. DELBENE. I just want to thank all the witnesses for being here and taking the time to be with us today.

Mr. Walke, you talked about three things in terms of the issues, no substantiation in terms of the cases, the third party intervention in terms of the number of folks who could comment and that being unlimited, but you also talked about the bill ignoring existing safeguards, and I wanted you to elaborate on what those safeguards are.

Mr. WALKE. Thank you very much.

Well, first of all, under a longstanding Department of Justice policy, agencies are permitted from entering into settlements or consent decrees that negotiate away authorities reserved to them by Congress. This so-called “Meese memo” is discussed in my testimony, and it is a safeguard against abuse of consent decrees. And Mr. Cruden at last year’s hearing discussed this at length as well.

The product of settlement agreements and consent decrees is simply the initiation of a process that is not closed. It is a rulemaking process involving notice and comment opportunities for the public, public hearings, the submission of comments, the obligation of the agencies to respond to comments, all consistent with the Administrative Procedure Act.

So the obligations under law that bind third parties and do the things that we are hearing complaints about here are fixed like bookends by the statute passed by Congress and the regulations issued by agencies. The latter go through a full panoply of procedural opportunities consistent with the law. It is the middle of the bookcase, the consent decree, that concerns just the failure to meet a mandatory statutory duty and that does not fix any obligations upon third parties that are not open for reconsideration by the agency during the subsequent rulemaking process.

Ms. DELBENE. And so feedback, for example, from industry, et cetera would come as part of the rulemaking process.

Mr. WALKE. Absolutely. And in these very rulemakings and consent decrees that we are hearing complaints about, industry participated fully. Industry filed lawsuits, all things that they are allowed to do under the law.

I just want to note one thing. I wish my friend Tom were here so I could shake his hand. But the ECOS resolution is very instructive because it is equally unanimous in not supporting industry intervention in agency settlement talks. It does not support that, and yet that is what this bill does. It also does not support, as he noted, the codification of legal obligations for States to join settlements. I know that the organization does not support—endorse legislation, but I just wanted to get into the record that there is zero support and, in fact, implied opposition to my mind to allowing industry intervenors to join and obstruct settlement talks from ECOS.

Ms. DELBENE. Thank you very much.

Mr. Easterly, given Mr. Walke's comment and the fact that the definition right now in bill, an intervenor merely needs to be a private person who is affected by the regulatory action that is the subject of the lawsuit, so as this is written, it would allow someone who breathes air to intervene in a case that has the Clean Air Act rule at issue. Mr. Easterly, I was wondering do you think that is a good thing. Are you comfortable with the nearly unlimited intervention right?

Mr. EASTERLY. As John said, the Environmental Council of the States does not do specific legislation. We are very concerned about our ability—we are self-interested just like everybody else—to be at the table when the settlement is going to impose responsibilities on us or affect our existing responsibilities. We did not take a position on any other part of your question. I would say that 50 States would have at least three different views on that.

Ms. DELBENE. Thank you very much.

I yield back.

Mr. BACHUS. Thank you.

Let me just clarify something. You are saying that the employers, the people that hire American workers—your position is they should not have a seat at the table?

Mr. WALKE. They fully have a seat at the table when rules that affect their business interests are being discussed. Mr. Puckett's testimony was extremely sympathetic, and I really feel for the situation with—

Mr. BACHUS. But I am talking about in consent settlements. I am just asking. Is it your position from responding to Ms. DelBene that the employers, you know, the people that represent the employees, you know, who hire the people in those industries, that they should not have a seat at the table in these consent settlements?

Mr. WALKE. That is correct. They are not parties to the lawsuit, and even as intervenors, consistent with longstanding Supreme Court case law—

Mr. BACHUS. Well, yes.

Mr. WALKE [continuing]. Given that right.

Mr. BACHUS. So, I mean, but yes, the Supreme Court. But I am talking about your position clearly is that the folks who hire Amer-

ican workers in these industries—they should not have a seat at the table for these consent settlements.

Mr. WALKE. Mr. Bachus, I will tell you that in my experience it has really been the Washington trade associations that are the most active—

Mr. BACHUS. Well, yes, but I am not talking about them.

Mr. WALKE. And I frankly do not think they always represent the interests of the businesses—

Mr. BACHUS. Yes, but those businesses, you know, do hire people out there.

Mr. WALKE. Well, sure they do.

Mr. BACHUS. Do you think they ought to have a seat at the table for these consent settlements? I mean, I am just trying to get some—I think I heard you said no, you do not—

Mr. WALKE. My answer was no.

Mr. BACHUS. Okay, thank you.

Mr. Johnson, you have seniority, and I think on your side you all go by seniority and not who comes first. So you are recognized for 5 minutes, although Mr. Jeffries has been here forever. [Laughter.]

All right, thank you, Mr. Chairman.

Now, this bill is The Sunshine for Regulatory Decrees and Settlements Act of 2013. I think it is misnamed, Mr. Chairman. It should be the “Sunset for Regulatory Decrees and Settlements Act of 2013.” This bill has the Koch brothers’ fingerprints all on it. And passage of this bill would have a dramatic and dastardly impact on air and water quality. This is an anti-regulatory bill drafted by the American Legislative Exchange Council, also known as ALEC. The purpose of the bill is to paralyze the enforcement of clean air and clean water legislation and rules and regulations.

Now, for those of you who do not know ALEC, ALEC, as revealed by Lisa Graves of The Nation—Ms. Graves wrote as follows: ALEC gave the Kochs its Adam Smith Free Enterprise Award and Koch Industries has been one of the select members of ALEC’s corporate board for almost 20 years. She wrote that the company’s top lobbyist was once ALEC’s chairman. And she also wrote that as a result, the Kochs have shaped legislation touching every State in the country. Charles Koch fellows and interns stock ALEC and have gone on to direct ALEC task forces.

Mr. COLLINS. Would the gentleman from Georgia yield?

Mr. JOHNSON. No, I will not, not now.

Like ideological venture capitalists, the Kochs—

Mr. COLLINS. Would you yield later?

Mr. JOHNSON. Perhaps if I have time.

Like ideological venture capitalists, the Kochs have used ALEC as a way to invest in radical ideas and fertilize them with tons of cash.

Now, ALEC is an organization that is composed of corporate members and State and Federal legislative members from across the country, I think every State in the Union, many of which—the majority of those Members on the Republican side of the aisle are members of ALEC. And I dare say that perhaps some of those who sit on the other side of this dais today are or have been ALEC members.

And what ALEC does is puts the legislators and the business community together. The business community supplies the legislation. The legislators then go back and introduce the legislation either in their State legislatures or in some cases here in the Federal legislature.

Now, I would like to ask Mr. Easterly. Are you familiar with the American Legislative Exchange Council, sir.

Mr. EASTERLY. I know that there is such a place, yes.

Mr. JOHNSON. And you have attended meetings affiliated with ALEC or sponsored by members of the coal industry. Have you not?

Mr. EASTERLY. I have been invited to speak at one meeting that I am aware of, yes. I speak to everybody. I speak to environmental groups. I speak to business groups.

Mr. JOHNSON. Well, you spoke also to an ALEC conference on November the 18th of 2012. Did you not?

Mr. EASTERLY. Yes, I did.

Mr. JOHNSON. And the title of your comments were "America's Clean Air Success Story and the Implications of Over-Regulation." Is that not a fact?

Mr. EASTERLY. That is correct.

Mr. JOHNSON. And that conference was sponsored by members of the coal industry. Is that not correct?

Mr. EASTERLY. I do not know that.

Mr. JOHNSON. You would not be surprised if it were, though, would you?

Mr. EASTERLY. I do not know. I was invited to come by one of the members of the Indiana legislature, and I try and do what they ask me to do.

Mr. JOHNSON. Did they pay you for your comments?

Mr. COLLINS. Would the gentleman yield from Georgia?

Mr. JOHNSON. No, I will not.

Did they pay you for your comments, sir?

Mr. EASTERLY. No.

Mr. JOHNSON. I thank you. I will yield to the gentleman.

Mr. COLLINS. I thank my friend from Georgia.

Mr. JOHNSON. For a quick question.

Mr. COLLINS. For a quick question.

Well, the quick question that I have at this point in time is again with the questions and the way it was designed with some of us being members. There are also—it was named earlier by, I believe, the Ranking Member—organizations that probably you have been affiliated or others. I am trying to get legislation—

Mr. JOHNSON. I have never been associated with an organization like ALEC.

Mr. COLLINS. The NAACP?

Mr. JOHNSON. No way that it is like ALEC.

Mr. COLLINS. No. I am just asking. What I am saying is organizations on both sides of all issues. The question I have here is coming back to my reason—

Mr. JOHNSON. Well, at this point, ALEC is an organization that specifically puts legislators together with corporate interests and then takes them off to exotic locations for seminars and training, if you will, and indoctrination. And then it supplies the legislators with legislation which they then come back and introduce. And

thereafter, they are able to get campaign contributions from those interests that they have duly represented. And I believe that this—

Mr. COLLINS. At this point in time—

Mr. JOHNSON. Excuse me, sir. I am going to reclaim my time.

Mr. BACHUS. Yes, and the time has expired.

Mr. JOHNSON. I believe that this legislation is a clear example of the influence of the Koch brothers and the American Legislative Exchange Council on the work that this body is doing through this Committee.

And I will yield back.

Mr. BACHUS. Thank you.

I think the Bill of Rights gives everyone the right to have their political views known. I may want to get that out and review it.

Mr. JOHNSON. May I respond?

Mr. BACHUS. You have heard some of the back and forth. Do you have any comments? You are the only representative at the table who actually employs large numbers of individuals and provides them, as I noticed your testimony, with profit sharing, with at one time—I do not know. Do you still have a free health clinic? You used to have a free health clinic and health benefits and insurance. Do you have any comments?

Mr. PUCKETT. Well, it has been eye-opening listening to all of this. And respectfully to both sides, I hear what you are saying, but there is a problem. There is a problem. And I am not sure how to fix it, but I know for our industry, the previous process has not worked. If it had worked like it had claimed, the first rule would have been fine. We did not have access to any of that, and it came down to because of time. Now, regardless of what caused that, these 50 folks I may have to lay off do not care. You know, they just want a way to make a living. So something needs a fix. And I have heard a lot of comments that have credibility from both sides. But it is just very difficult when it continues to mount on a small business owner to try to just keep it afloat.

Mr. BACHUS. I understand. I think every Member of Congress has heard that a thousand times from small businesses and large businesses in their district. I know, Mr. Walke, I think whatever the cause, there is a problem.

Let me ask you this, Mr. Puckett. From what you know of Mr. Collins' legislation, do you think—it may not prevent the problems that we have, but do you think going forward it could have a positive effect or will have a positive effect?

Mr. PUCKETT. Yes, sir, I do think so.

Mr. BACHUS. Thank you.

Mr. Easterly, the Chamber of Commerce's study says that sue-and-settle cases are funneled heavily into just two courts, and that is the District of Columbia court here in Washington and the Northern District of California. Does that give you any unease? Do you think those courts, as opposed to, say, a Federal district court in Indiana or Illinois would be better positioned or be able to grasp or account for the needs of, say, the State of Indiana, its employers, its employees, even from a health standpoint? You testified earlier you did not think optimal environmental benefits to the citizens can be achieved without the participation of State environmental

regulators. But does that give you some unease, the fact that you were shut out of these decisions and the settlement negotiations that go into these consent settlements?

Mr. JOHNSON. Mr. Chairman, a parliamentary inquiry please.

Mr. BACHUS. Okay, go ahead. The gentleman is recognized.

Mr. JOHNSON. Thank you. My question is when a Chair of this Committee who has been asked to take the Chair by the Chairman who then departed and the current Chair, having already received 5 minutes for questions, then——

Mr. BACHUS. The gentleman is right. The gentleman is absolutely right, in fact, and I apologize. The proper procedure is to recognize Mr. Jeffries and then to go a second round of questioning. So I apologize. I will cease my questioning. The gentleman has a valid point.

Mr. Jeffries is recognized.

Mr. JOHNSON. Thank you.

Mr. BACHUS. I think that is what you were going to ask.

Mr. JOHNSON. Yes.

Mr. JEFFRIES. Thank you, Mr. Chair, and thank you, Representative Johnson.

Mr. Kovacs, with respect to your testimony and your presence here today, it is my recollection that the Chairman of the Judiciary Committee in his opening statements characterized consent decrees as a deal under the cover of litigation. Do you recall that statement?

Mr. KOVACS. I think you should just have the record read back, but I do not recall that.

Mr. JEFFRIES. Do you think that the consent decree phenomenon, as you understand it, is properly characterized as deals under the cover of litigation?

Mr. KOVACS. In our report, we did not make any accusations at all about anyone. We did not call it collusion. What we said was that you have a process which eliminates——

Mr. JEFFRIES. Okay, reclaiming my time. Notice and transparency.

Mr. KOVACS [continuing]. Eliminates——

Mr. JEFFRIES. Reclaiming my time.

With respect to the allegation that what the consent decree explosion represents is collusion between regulated Federal agencies and plaintiffs who sue those agencies, is collusion a fair characterization of what is going on?

Mr. KOVACS. We have never characterized this as collusion. The first time I heard of the word “collusion” was when I read some testimony that was submitted by Mr. Walke. Prior to that time, we had not used the word and it is not in the report. And so that should be made very clear.

What we are talking about is a hole in the process whereby the——

Mr. JEFFRIES. Okay, reclaiming my time.

With respect to your report, now this legislation is designed to cover consent decrees in multiple areas. Is that correct?

Mr. KOVACS. It covers agencies, yes.

Mr. JEFFRIES. Right. There is no limitation on the Environmental Protection Agency. Correct?

Mr. KOVACS. It covers Federal agencies.

Mr. JEFFRIES. Okay. Now, does your report provide evidence of issues with consent decrees in any other area than in the area related to environmental regulations? It is a yes or no question.

Mr. KOVACS. Yes.

Mr. JEFFRIES. It does provide evidence.

Mr. KOVACS. Yes.

Mr. JEFFRIES. Beyond the environmental area.

Mr. KOVACS. Well, the first case that moved out of the environmental area was a consumer case on the Food Safety Modernization Act and rather than being pivoted—resting on a citizen suit in an environmental statute, it rested on section 706 of the—

Mr. JEFFRIES. The 71 cases that you document where there were consent decrees, those 71 cases were in what area?

Mr. KOVACS. Fish and wildlife, forests, land management, air, water, Chesapeake Bay, food safety. So it was a broader group than just—

Mr. JEFFRIES. So essentially it was in the environmental area plus one food safety case that you mentioned.

Now, let me ask you this. Do you think that in the absence of any evidence in other areas, is it prudent for this Committee to move forward with legislation that would cover consent decrees, for instance, in the area of antitrust?

Mr. KOVACS. Congressman, we have a right to transparency as American citizens. We have a right to know when our Government is not obeying the law. We have a right to—

Mr. JEFFRIES. Okay, reclaiming my time.

You have got no evidence of consent decree problems in the antitrust area. Correct?

Mr. KOVACS. We did not do the report—we did the report for the consent decrees that we found where there was no transparency, and every one we found was put in the report. There was reference that we somehow—

Mr. JEFFRIES. Reclaiming my time.

No evidence—

Mr. KOVACS. We did not—

Mr. JEFFRIES. Reclaiming my time.

No evidence of consent decree problems in the area of civil rights, even though this legislation would affect it. Correct?

Mr. KOVACS. That was not the purpose of the study. The terms of the study were specifically put in the cover of the study and what it was that we covered.

Mr. JEFFRIES. Reclaiming my time.

No evidence of consent decree problems in the area of voting rights, even though voting rights consent decrees would be covered by this legislation. Correct?

Mr. KOVACS. We did not look at voting rights. When you have private parties versus private parties, they would not have been covered by the report under any circumstances.

Mr. JEFFRIES. Right, but it will be covered by this legislation. Correct?

Mr. KOVACS. If large segments of the country that had standing to sue and were injured, it would cover them, yes. What we are talking about is giving some notice to people who have constitu-

tional standing and have been harmed. If they have been harmed, they should have notice, and if they have been given notice, then they should have a right not to intervene but at least to have the court hear why they have been injured. This is about transparency and it is about the right to intervene if you are injured.

Mr. JEFFRIES. One last question.

Mr. BACHUS. And your time has expired, but I am going to let you go on.

Mr. JEFFRIES. Okay, thank you, Mr. Chair.

One last question. Even though this legislation will cover the consent decrees in the area of disability or employment discrimination or voting rights, which I believe I mentioned, your study is narrowly focused on 71 particular instances, but is being presented today as evidence to support legislation that would cover a wide range of areas under Federal jurisdiction with respect to agencies. Is that right?

Mr. KOVACS. There is so much secrecy in Government in how it handles lawsuits, whether it be these cases or the judgment fund or anything else, that spending 18 months to try to find out when our Government was sued and when they went into a settlement without public notice is a very difficult process. That is something the agencies should be doing. That is something we have asked for, and there is no reason why a Federal agency should not inform the Congress that they have been sued X number of times and that they have paid attorney's fees and that they were in the wrong and that they agreed to do something. The American public have a right to know. All we are talking about is a right to know that they are being sued, a right to know that they are going to go into a consent decree and change the rights of the American people, and a right, if we are one of the injured parties, to intervene in that case.

I do not think asking for those basic rights is something that should be so debated in this Committee. This is a basic right to know what our Government is doing, and this is all we are asking. I do not know why this is such a debate.

Mr. JEFFRIES. Thank you very much for that extended statement.

Mr. BACHUS. Thank you.

At this point, we will go into a second round of questioning, and I actually had started out and had consumed 2 minutes of time. So we have the clock. We will put 3 minutes on. I would like to continue with my line of questioning and then other Members are going to be offered a second round of questioning.

I think Mr. Jeffries brought up the Chairman of the full Committee's remark where what he said was: far too often costly new regulations are issued directly under the authority of consent decrees and settlement agreements to force Federal agencies to issue new rules. Regulators often cooperate with pro-regulatory organizations to advance their mutual agendas in this way. The technique used is simple: an organization that wants new regulations alleges that an agency has violated a duty to declare new rules. The agency and the plaintiff work out a deal under the cover of litigation. The deal puts the agency under judicially backed deadlines to issue the rule. These deadlines often give the public and even States that co-administer regulations little opportunity comment on proposed rules.

So with that having been said—and it said those to be regulated frequently do not know about these deals until the plaintiff's complaints and proposed decrees or settlements are filed in court.

Mr. Easterly, let me ask you this question. Chairman Goodlatte said: these deadlines often give the public and even States that co-administer regulations little opportunity to comment on proposed rules. Do you find that to be true?

Mr. EASTERLY. Yes, we do. The amount of time it takes to prepare competent technical comments is not small. In many cases—if I had more time, I would get my notes out and tell you, but we wind up with abbreviated public comment periods and neither can we get in all the information we would like to get in and then EPA does not have, because they have an abbreviated schedule to issue the final rule, time to properly consider and respond to those comments.

Mr. BACHUS. Thank you.

And I would say to my colleagues you have talked about people that have no interest being able to intervene. Mr. Collins drafted this legislation to say if they have constitutional standing, which means they have to prove to the court that under the Constitution they have the right to be informed of the negotiations. And we do not do away with the constitutional—they still have to meet the dictates of the Constitution.

Mr. Easterly, I was talking about that most of these cases or a heavy number of them go into the District of Columbia or the Northern District of California. Do you think those courts are well positioned to grasp and account for the needs of State co-regulators all across the country if the States are shut out of the litigation and consent decrees or settlement negotiations in those courts?

Mr. EASTERLY. I am not a lawyer. I am an engineer.

We are used to dealing with the D.C. Circuit because the Clean Air Act requires most, but not all, Clean Air Act suits to be filed in the D.C. Circuit. We were absolutely caught flat-footed when a case out of California—and it probably was the Northern District. I told you I am not a lawyer—required EPA to act on our Visibility SIP's and the fact that they were not done because we were waiting for other things. We did not see that coming and we were not there.

Mr. BACHUS. All right. Thank you.

I am going to yield to Mr. Collins the balance of my time. He has been, I think, quite effective. My time has expired, but I will yield every bit of that expired time to you.

Mr. Johnson?

Mr. JOHNSON. Thank you.

Mr. Kovacs, have you ever heard of the Competitive Enterprise Institute?

Mr. KOVACS. Certainly.

Mr. JOHNSON. And you make reference to the Competitive Enterprise Institute in your written statement to this Committee. Is that correct?

Mr. KOVACS. Could you tell me what page?

Mr. JOHNSON. Page 1.

Mr. KOVACS. Oh, okay. We recognized they had done some research for us.

Mr. JOHNSON. Okay. And are you familiar with Koch Industries and the Koch Foundations?

Mr. KOVACS. Actually I have heard of them, but I have very little knowledge of them.

Mr. JOHNSON. Are you aware that the Competitive Enterprise Institute received more than \$700,000 from various Koch brothers affiliated organizations?

Mr. KOVACS. I have no knowledge of that.

Mr. JOHNSON. If that were true, do you think that such contributions could influence the policies of the Competitive Enterprise Institute?

Mr. KOVACS. Well, first of all, even you do not know—I do not know. Maybe you know it. So I do not know that it is true, and I am not going to guess about something I do not know.

Mr. JOHNSON. Well, I am just asking you assuming that the Koch brothers have contributed more than \$700,000 to the Competitive Enterprise Institute, is it not logical to think that they would have some influence on the results of the research that that entity produced, which you are relying upon today?

Mr. KOVACS. Well, first of all, Congressman, with—

Mr. JOHNSON. Is that a—if you could answer yes or no, and then I will allow you to explain.

Mr. KOVACS. No. They would have no influence on this.

Mr. JOHNSON. The \$700,000 would not matter?

Mr. KOVACS. They would have no influence. We hired one specific person who was able to do—let me just be really clear. This one person did a word search of the Federal Register to pick up certain pieces of litigation as a means of checking what we found in our legal search. So the search went on two ways. One was we produced it from LexisNexus, Westlaw, PACER, and we assembled it, and then we asked one simple thing. We knew that there were some reports out—

Mr. JOHNSON. So you are going far afield of my question.

Mr. KOVACS. No. I am telling you how the report was done—

Mr. JOHNSON. I am just asking whether or not you think that the \$700,000 from the Koch brothers had any influence.

Mr. KOVACS. I know in this instance in this report, it had none. I personally supervised this report.

Mr. JOHNSON. Thank you, thank you, thank you.

What is your stance? Let us see. You are the Senior Vice President for Environmental, Technical & Regulatory Affairs at the U.S. Chamber of Commerce. What is your view on the issue of global warming?

Mr. KOVACS. I think I spent a long time with Mr. Cohen on that issue. And we have been, over the years, very active in promoting alternative technologies, energy—

Mr. JOHNSON. Well, do you believe that climate change actually exists?

Mr. KOVACS. We have pushed as many forms of technology, energy efficiency, and other ways in which to minimize electric use as any institution in this city. Years before the environmentalists picked up energy efficiency or alternative technologies, we were lobbying the Bush administration to move in that direction. We were the organization that pushed the energy savings performance

contracts literally from an inception into being one of the smartest ways in which to reduce energy. So I will put on the record against anyone's record on that issue.

Mr. JOHNSON. Okay. All right. Thank you, sir.

Mr. Walke, is it not a fact that this legislation would give the Koch brothers and their industries a right to intervene in any regulatory action that could be brought, given their interest in the energy field? Is that not correct?

Mr. WALKE. Yes, Congressman, I believe it is. The breadth of the language in the bill is astonishing and would allow a really unlimited array of business interests, whether they be the Koch brothers or others, to intervene. It is clear that the Koch brothers systematic anti-regulatory agenda is evidenced by the very interesting structure of this bill and also evidenced by really kind of the open admission to how the Chamber went about doing its report. It was not looking for impropriety. It was looking for Internet searches of settlements in one particular area of the law where the Chamber has historically been highly opposed in court and in Congress and that is environmental protection. So that speaks for itself that this has been driven by an anti-enforcement agenda which we see the Koch brothers devoted to with very high dollar support for groups that share its ideological agenda.

Mr. JOHNSON. Thank you.

Mr. BACHUS. Wow. Before I recognize Mr. Collins, you know, I think it is very important for Members not to impugn the honesty or the character of other Members or witnesses. And I am not saying that anyone did that.

I will say that Mr. Easterly referred to that he was entertained in an exotic location with ALEC, which kind of brought my antenna up. And for the record, we are all enjoying the exotic location of where that hearing was located. It was Washington, D.C. So I am so glad that I get to work in an exotic location.

Mr. JOHNSON. We do have some exotic locations in Washington, D.C.

Mr. BACHUS. Truly, the beach, the sun, the lack of humidity.

Mr. JOHNSON. The beautiful Chesapeake Bay is a great spot to go and fish.

Mr. BACHUS. We have got to work even though we are in the midst of a resort.

Mr. Collins?

Mr. COLLINS. Thank you, Mr. Chairman.

I just want to follow up briefly on that last question. This provides an ability for those who have constitutional standing to come forward and be a part of this, and it also has to prove that it has standing with the court. It also has to prove the Government was not representing its interest. So that would affect anyone, including the aforementioned Koch brothers to be a part if they meet constitutional guidelines. Is that not true, Mr. Walke? You said yes just a second ago. I just want to confirm it.

Mr. WALKE. That is true.

Mr. COLLINS. Thank you.

I yield back, Mr. Chairman.

Mr. BACHUS. Actually you have been recognized for your 5 minutes. Oh, you are through? Okay.

Mr. Jeffries, you will have the last opportunity for questions.

Mr. JEFFRIES. Thank you, Mr. Chair.

Mr. Kovacs, am I correct that it is your testimony that there is no evidence of collusion between plaintiffs initiating these litigations that result in consent decrees and Federal regulatory agencies?

Mr. KOVACS. We did not even look for collusion. The first time that word was ever brought up was today. The purpose of the study was to literally do a search, a legal search, to find out how many of these cases existed, and that search got started by the very simple fact that at a prior hearing, one of the other sides said, well, there are very few of these. There are only a handful. And we asked the very simple question, how many. And then we started hearing—

Mr. JEFFRIES. Thank you. No. I asked the question simply because in public comments that have been made by Members of this body not necessarily present here today in support of this legislation, the allegation has been made that the problem the legislation seeks to address relates to back room deals or collusion or conspiracy that has taken place to undermine the capacity of American citizens or others to be involved in the rulemaking that takes place at these Federal agencies. But I am thankful that you are saying that that is not a position that you agree with.

Now, would you take the position that under the Obama administration there has been an explosion of consent decrees, unlike in previous Administrations?

Mr. KOVACS. Well, look, consent decrees have been going on—these types of agreements. And we would argue that when the business community does it—they should not do it any more than the environmental community. We have a problem with the process because we think that transparency should be in the process.

During the Reagan administration, Attorney General Meese outlawed the process with a very strong memorandum which has later been morphed into some administrative language in the CFR, but it really does not do anything. The old Meese one is gone.

The records only go back, just so you know, only to 1995. So that was the best we could do. And using computers to find them what we were able to do using just the Clean Air act, is it seemed that it was around 20 to 30 bopping around Bush, Clinton, then—

Mr. JEFFRIES. Well, thank you. I am familiar with the process.

Mr. KOVACS. Then in Obama it went up to around 60. So it doubled or tripled.

Mr. JEFFRIES. Now, let me ask a question about consent decrees just so that we have it in the record. Consent decrees are essentially settlement agreements backed by a judgment. Correct?

Mr. KOVACS. That is correct.

Mr. JEFFRIES. In other words, those consent decrees are judicially approved. Is that correct?

Mr. KOVACS. That is correct.

Mr. JEFFRIES. So there really is no back room deal. This is a courtroom agreement. Correct?

Mr. KOVACS. Well, that is exactly where the problem comes in, and this is why we are so concerned because in so many of these what we would call “deadline cases,” the real concern is how you

set the schedule. It is not really an administrative decision there. It is really a discretionary decision because that is how the rule is going to be put into effect and that is how they are going to determine what they are going to do.

Mr. JEFFRIES. Now, there has been some reference to our constitutional fabric, including in testimony that you previously gave as it relates to what our citizens should be legitimately demanding from the Federal Government. Now, consistent with that constitutional fabric, am I correct that under Article 3 of the Constitution, the Federal courts have the authority to interpret the law? Is that a fair statement?

Mr. KOVACS. Actually if you are talking about the Federal courts and you are talking about how we are structuring it here, the Federal courts are courts of limited jurisdiction, and the jurisdiction that they have comes from Congress. Right now—and this is—

Mr. JEFFRIES. So you do not believe that the Federal courts have jurisdiction as it relates to Federal agency regulation?

Mr. KOVACS. Pardon?

Mr. JEFFRIES. You do not believe that Federal courts have jurisdiction as it relates to how to interpret regulations that Federal agencies have issued or should issue pursuant to congressional statute?

Mr. KOVACS. When a case is before the Federal court, they certainly have the constitutional authority to interpret the law and to interpret the regulations. The difficulty that you have with these consent decrees is the court is treating these the same as it would treat a private party. For example, if you and I had a contractual dispute and we came to a settlement agreement, we would just file that with the court, get a consent decree, and it would be enforceable by the both of us.

Mr. JEFFRIES. Let me reclaim the balance—

Mr. KOVACS. Because I think this—

Mr. JEFFRIES. Let me just reclaim the balance of my time. I want to give Mr. Walke an opportunity to respond to that statement that was made.

Mr. WALKE. Sure. I direct your attention to page 17 of my written testimony. You know, the Chamber report resorted to some eyebrow raising language for me impugning the Federal courts, accusing them of “rubber stamping agreements between Federal agencies and outside plaintiffs.” And I just think it is unsubstantiated in the report, first of all, but it is kind of of the same flavor that permeates their indictment of Congress for passing these laws that give citizens the right to hold Government accountable and courts rubber stamping them.

You know, everyone seems to bear a lot of fault except for the industry parties that want to get into these settlements and prevent the law from being enforced. I mean, this is what this is about. It is not about transparency. EPA has started putting up their notices of lawsuits on the Web. I think they were late coming to that. I actually agree with Mr. Kovacs about that. We should have transparency. We should not have obstruction of law enforcement, and that is what this bill does.

Mr. JEFFRIES. Thank you, Mr. Chair. I know my time has expired.

Mr. BACHUS. Thank you. We appreciate our witnesses' testimony today.

Members now have the right to introduce into the record any matter they would like to. And I have dusted off an old Law Review article that I am familiar with since I wrote it. It is called "Federal Policy Responses to the Predicament of Municipal Finance." And it was again published recently in the Cumberland Law Review under the title of the "Jefferson County Sewer Debacle: A Case Study in Law, Public Policy, Municipal Finance."

Now, there were many reasons for the largest municipal bankruptcy in the history of this country since Orange County, California. One of the contributors to that was a consent settlement that pretty universally went beyond EPA dictates and environmental dictates. It was made between the county and environmental groups and resulted in about a \$4 billion expenditure and what would have complied would have been about a \$2.5 billion expenditure and resulted in bondholders, some of which were—California held some of those bonds. Teacher retirement boards in 20 different States lost their money.

And I am certainly not saying that that was the sole cause. There were numerous causes including dishonesty, waste, incompetence, structure of the government, but the consent settlement certainly played a major role in it. There were a lot of people that were not at the table that got hurt as a result of that.

So without objection, I would like to introduce that Law Review article.

[The information referred to follows:]

## FEDERAL POLICY RESPONSES TO THE PREDICAMENT OF MUNICIPAL FINANCE

### INTRODUCTION

Jefferson County's debt crisis provides policymakers the opportunity to reconsider the role of the federal government in the regulation of municipal finance markets, and whether changes in federal regulation alone are enough to prevent municipalities from running into the same problems that Jefferson County encountered. That analysis must begin with an examination of the causes of the crisis. The external causes of Jefferson County's financial implosion have received considerable attention and are well understood: credit rating agencies downgraded the bond insurers that had guaranteed the county's variable-rate bonds, which accelerated the county's debt, coupled with the county's hedging strategy that turned out to be a losing bet on interest rate spreads. Although it is tempting to blame the county's parlous fiscal condition entirely on these external factors, blaming the municipal finance markets alone would be a mistake. Regulatory reform that focuses only on these external factors runs the risk of missing the political fragmentation and weak governance inside the county that set the stage for the county's fiscal collapse.<sup>1</sup> Improving the regulation of the municipal bond market is a task that is as important as it is timely, but until local governance is made effective and accountable to taxpayers and ratepayers, regulatory improvement is, at best, only a partial solution.

Jefferson County's descent into financial calamity begins with a grimy problem: raw sewage. After the county put off sewer system upkeep for decades, heavy rains overwhelmed the county's dilapidated sewer lines and sewage overflowed into the Cahaba and Warrior river

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<sup>1</sup>Robert J. Landry & Cynthia McCarty, *Causal Factors Leading to Municipal Bankruptcies: A Comparative Case Study*, 28 MUNICIPAL FINANCE JOURNAL 19, 30 (2007) (noting common systemic problems that have contributed to two different municipal bankruptcies).

basins. As a result of the county's deferral of sewer maintenance and its failure to build adequate treatment facilities, the county was sued under the Clean Water Act. The county settled the suit by entering into a consent decree that required the county to rehabilitate the sewer system deficiencies in an impractically short period of time. The consent decree required the county to remedy decades' worth of neglect within twelve years and to assume responsibility for maintaining additional sewer lines that had formerly been administered by cities within the county.<sup>2</sup>

To pay for the improvements mandated by the consent decree, Jefferson County turned to the municipal finance market. Although local governments frequently tap the municipal finance market to raise funds to pay for long-term projects, conflicts of interest and complexity in the municipal finance market can sometimes trap the unwary, particularly when local officials lack the expertise to independently assess the terms of the financing structures proffered by sophisticated underwriters. But Jefferson County's flawed form of county governance magnified these risks inherent in the municipal finance market. The county's fragmented political leadership and feckless governance structure laid the foundation for risky borrowing and stymied fiscal responsibility. Had the county enjoyed the benefits of effective leadership during the initial financing and refinancing of its sewer debt, the impact of systemic problems in the municipal finance markets might have been avoided or mitigated.<sup>3</sup>

This paper begins by summarizing how the county's governance structure set the stage for fiscal disaster. Following that, the paper focuses on the systemic problems in municipal finance markets that hastened the county's fiscal implosion and considers possible federal

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<sup>2</sup> December 9, 1996 Decree of the Court in the cases of *Kipp, et al v. Jefferson County*, No. CV-93-G-242-S and *U.S. v. Jefferson County*, No. CV-94-G-2947-S (hereinafter "Sewer Consent Decree").

<sup>3</sup> See Landry & McCarty, *supra*, note 1 at 32 (describing how effective leadership could have helped prevent bankruptcy in other municipalities).

responses to address those problems. These systemic issues include: (i) the prevalence of negotiated pricing rather than competitive pricing; (ii) the role of unregulated market participants; (iii) failures in the auction rate security (ARS) and variable rate demand obligation (VRDO) markets; (iv) inadequacies in the municipal disclosure regime; and (v) a lack of transparency in municipal swaps. Where applicable, possible reforms at the federal level to address these issues are suggested.

#### **I. THE ORIGINS OF JEFFERSON COUNTY'S PREDICAMENT**

To understand the events that led to Jefferson County's debt crisis, one must first understand the county's commission form of government and how that form of governance first facilitated the county's neglect of its sewer system and then abetted the county's risky and irresponsible borrowing strategy.

##### **A. COUNTY GOVERNANCE**

Jefferson County governs itself through a County Commission form of government, in which legislative, executive and administrative responsibilities are exercised collectively by the County Commission. Commissioners administer these responsibilities through departmental subdivisions, and different departments are responsible for different areas of county services. The county's form of government is the product of a 1985 federal consent decree stemming from a lawsuit brought under the Voting Rights Act.

Before 1985, the Jefferson County Commission consisted of three at-large members, each of whom was elected by the entire county, and each of whom represented and was accountable to the entire county. This arrangement was challenged on the grounds that it diluted the votes of minority voters, and, in 1985, a federal consent decree changed the structure of the county commission to allow for greater minority representation on the commission. The consent decree

replaced the three-member, at-large commission with a five-member, single-district commission in which commissioners were elected by and represented a single district.

The consent decree provided that “immediately following the 1986 elections, the new five member commission would distribute the powers and duties conferred by law upon the county commission and the members thereof as they deem fit and efficient.”<sup>4</sup> As the first order of business, the newly elected commissioners divided responsibility for county government among five departments: (1) Department of Finance and General Services; (2) Department of Roads and Transportation; (3) Department of Environmental Services; (4) Department of Health and Human Resources; and (5) Department of Community and Economic Development. Each commissioner individually assumed responsibility for one of these areas.<sup>5</sup>

Because each commissioner represented an individual district, rather than the county as a whole, this arrangement fragmented the administrative responsibility for Jefferson County. Dividing the commissioners’ responsibilities along departmental lines led each commissioner to focus on the narrow, parochial responsibilities of his particular department. Moreover, each commissioner viewed his department’s responsibilities through the prism of electoral self-interest. The four county commissioners who were not directly responsible for the sewer system had no incentive to raise the issue of sewer maintenance; sewer system maintenance was—literally—not their problem. The county commissioner who was responsible for sewer system maintenance also had no incentive to raise the issue; he would be blamed individually for rate increases necessary to pay for repairing the system.

The tendency to avoid action and ignore problems inherent in the single-district system of governance was exacerbated by the fact that not all of the districts were equally served by the

<sup>4</sup> *Taylor v. Jefferson County Commission*, No. CV-84C-1730-S at 2 (N.D.Ala. Aug. 17, 1985) (consent decree).

<sup>5</sup> See *Yeldell v. Cooper Green Hospital, Inc.*, 956 F.2d 1056 (11<sup>th</sup> Cir. 1992) (describing structure of county government).

county's sewer system. Most of the county's high-income residents live in suburbs where septic tanks are common. Commissioners representing these suburban districts would have little incentive to worry about the disrepair into which the sewer system had fallen. By fragmenting responsibility for county-wide problems among individual commissioners, Jefferson County's commission form of government all but guaranteed that the county's sewer system would fall into neglect, necessitating more extensive and more costly repairs at a later date.

#### B. CLEAN WATER ACT CONSENT DECREE

Years of neglect, sewage backup, and overflows developed into a serious environmental problem, a problem made even worse when other municipalities within Jefferson County connected their sewage facilities to the county's sewer lines. The county's sewage problem resulted in a suit brought under the Clean Water Act against the county. In 1996, the county negotiated a consent decree with the U.S. Environmental Protection Agency, under which the county agreed to correct decades of deferred maintenance within twelve years and to assume responsibility for all sewer lines in the county, many of which were in dire need of repair.<sup>6</sup>

Given the impracticality, if not outright impossibility, of complying with the terms set forth in the consent decree, one can surmise that the commissioners were in "crisis mode" when they accepted the court's mandate. At the time the consent decree was entered into, the local media and editorial pages were pressing for a resolution that would solve the county's sewage problem. Anyone who questioned the financial prudence of agreeing to the terms of the consent decree — no matter how onerous — was pilloried by the press as "pro-pollution" or "anti-environmental."<sup>7</sup> The local media did not protest the county's acceptance the consent decree, the terms of which were impossible to meet, or the county's risky borrowing to finance an

<sup>6</sup> Sewer Consent Decree, *supra*, note 2.

<sup>7</sup> Editorial, *Common Ground: County and Environmentalists Avoid Long Fight with a Sensible Settlement Suit over Raw Sewage Releases*, THE BIRMINGHAM NEWS, Aug. 3, 1995, at 10A.

unworkable project.<sup>8</sup> Accountability and good fiscal management became a concern to the journalists only when the house of cards came down. At the best of times it can be difficult for fragmented governance to produce good policy, but it is doubly difficult when controversial issues erupt.<sup>9</sup>

Notwithstanding the media's militating in favor of a quick settlement, some county officials tried to sound an alarm about the burden that would eventually be borne by the county's rate payers. At the time the county commission accepted the terms of the consent decree, the county's Department of Environmental Services expressed major concerns to the county commissioners about the feasibility of complying with the consent decree without increasing rates exponentially to pay for repairs.<sup>10</sup> These concerns went unheeded. Because no single county official was responsible to the county as a whole, tackling enormous projects like those called for in the consent decree required a level of coordination that was difficult to obtain with the fragmented commission form of government. The entanglement of executive, legislative, and administrative responsibility made oversight of county-wide problems an impossible task.

### C. SEWER SYSTEM FINANCING

The County Commission form of government resulted in the county's assumption of an impossible mandate; it also facilitated the county's disastrous foray into the municipal finance market. The cost of the extensive improvements mandated by the consent decree was originally estimated to be around \$1.5 billion. Additional projects and expansions inflated the county's

<sup>8</sup> See, e.g., Editorial, *Common Ground: County and Environmentalists Avoid Long Fight with a Sensible Settlement Suit over Raw Sewage Releases*, THE BIRMINGHAM NEWS, Aug. 3, 1995, at 10A; Karin Meadows, *Interest Rate Swap Nets \$3.1 Million for County*, THE BIRMINGHAM NEWS, Dec. 30, 1997, at 1B.

<sup>9</sup> See, e.g., Carol Robinson, *McNair Touts Sewer Plan, Hits Cahaba Advocates Suit*, THE BIRMINGHAM NEWS, May 20, 1995, at 5A; Steve Visser, *Lightning Rod: Love Her or Hate Her, Bettye Fine Collins Must Be Reckoned With*, THE BIRMINGHAM NEWS, Nov. 24, 1996, at 1A.

<sup>10</sup> See *Jefferson County Sewer Consent Decree: A Report by Commissioner Jim Carns* (available at <http://www.jimcarns.com/pdfs/exccsummary.pdf>).

sewer debt to over \$3 billion. The disparity between the project's estimated and final cost provides yet another example of the unwieldiness inherent in the county's governance structure.

Jefferson County's sewer debt is not a general obligation of the county. Instead, the county's sewer debt is payable solely out of sewer revenues, and not from county taxes or other revenue. Thus, an increase in the amount of sewer debt would result — all other things being equal — in rate increases on the users of the sewer system.

At inception, 95% of the county's sewer debt took the form of long-term fixed rate warrants.<sup>11</sup> To obtain lower interest rates, the county refinanced its sewer debt and replaced its fixed rate debt with variable rate debt. Perhaps more importantly, given the political pressure on county commissioners not to raise fees, refinancing the county's debt also permitted the county to avoid the rate increases necessary to fund sewer improvements. After the refinancing, the county was left with \$2.09 billion of auction rate securities, \$951 million of variable rate demand obligations, and \$234 million of traditional fixed rate bonds—a total of about \$3.2 billion.<sup>12</sup>

The refinancing of the sewer debt depended upon highly-rated bond insurers acting as third-party financial guarantors, and all of the sewer debt issuances were guaranteed by bond insurers. These guaranties from bond insurers with high credit ratings increased the market's perception of the credit quality of the county's debt, which provided the county with lower interest rates; the lower interest rates, in turn, permitted the county to avoid raising fees on users of the sewer system.<sup>13</sup>

The interest rate on the auction rate securities was reset weekly through an auction. Existing holders and potential investors were to take part in a competitive bidding procedure.

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<sup>11</sup> Letter from Commissioner Bettye Fine Collins, President Jefferson County Commission, to Mary L. Schapiro, Chairman U.S. Securities Exchange Commission (June 3, 2009) (available at <http://tpecontent.worldnow.com/wbrs/docs/collins2009nov4.pdf>) (hereinafter "Collins Letter")

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

Buyers specified the number of securities they wished to purchase with the lowest interest rate they were willing to accept. The interest rate paid by the county was set by the lowest bid at which all the securities could be sold at par. If there were too few bids to purchase all the securities, the auction failed and existing investors had to keep their securities. The interest rate would then be set at an alternate rate determined by a formula in the indenture. The designated broker-dealers could act as bidders of last resort and purchase warrants on their own account to prevent the auction from failing.<sup>14</sup>

The interest rate on the variable rate demand obligations was also reset weekly, based on market conditions. But, unlike the holders of the auction rate securities, who were compelled to hold their securities if the auction failed, the holders of the VRDOs had the right to tender their securities to a commercial bank on seven days' notice. The terms of the indenture required a stand-by purchase agreement from a commercial bank to secure the payment of the repurchase price upon tendering of the VRDO. If the bank purchased the VRDOs that were tendered to it, the stand-by purchase agreement required the county to retire the variable rate demand warrants over four years rather than thirty. The stand-by purchase agreement also gave the bank the right to terminate the stand-by purchase agreement if the bond insurers that guaranteed the warrants were downgraded below investment grade.<sup>15</sup>

The county's debt service was supposed to remain "synthetically fixed" by combining the variable rate debt payments on the bonds with interest rate swaps. The county was to make periodic fixed rate payments to a swap counterparty and to receive periodic variable rate interest payments from the counterparty, based on a percentage of an interest rate index. In theory, this

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<sup>14</sup> See, Song Han and Dan Li, *Liquidity Crisis, Runs, and Security Design—Lessons from the Collapse of the Auction Rate Securities Market*, Federal Reserve Board Division of Research and Statistics, Feb. 15, 2008 (available at <http://ssrn.com/abstract=1364732>) (examining systemic risks leading to collapse of ARS market).

<sup>15</sup> Collins Letter, *supra* note 11.

structure was a hedge by which Jefferson County could protect itself against the risk of future rises in interest rates. Because the variable payments received by the county on its interest rate swaps were supposed to offset the variable interest payments made by the county on its sewer warrants, the swap payments to the counterparty should have been the county's only cost—if the swaps worked as planned.<sup>16</sup>

At first, the county's refinancing and hedging appeared to have been in the county's interest. Refinancing permitted the county to obtain a lower interest rate, and hedging protected the county against interest rate fluctuations. But with the onset of the recession in 2008, the latent risks in the structure of the county's sewer debt became painfully apparent. The credit ratings of the county's bond insurers were downgraded, which caused the interest rates on the county's auction rate securities and variable rate demand obligations to skyrocket. And central banks cut benchmark borrowing costs to fight the recession, which caused the floating rate payments that the county received under the interest rate swaps to plunge. Terminating these swaps, which had ceased to be an effective hedge, would have cost the county hundreds of millions of dollars. Hence, the instrument meant to protect the county from fluctuations in interest rate movements had become a crippling liability.

#### D. A PRELIMINARY ASSESSMENT.

Events in the wider financial markets combined with this risky financing structure to produce a fiscal catastrophe for Jefferson County. The county's leadership failed to perceive the perils in its financial engineering, and that failure was the result of poor decision-making brought about by a flawed county governance structure. Looking at the responsibilities of the commissioners, one can easily understand how they could become so immersed in administrative

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<sup>16</sup> *Id.*

detail that there was no time for coordinated policy planning. It is difficult for five people to manage efficiently, on a collective basis, a budget of approximately \$809 million while providing varying levels of supervision to about 3,600 employees. The county-commission form of government resulted in the county's adoption of complex programs, like the sewer upgrades and accompanying financing, without fostering a sense of priorities or an appreciation of the long-term consequences.<sup>17</sup>

## II. SYSTEMIC PROBLEMS IN MUNICIPAL FINANCE MARKETS

While the root causes of Jefferson County's ill-advised borrowing strategy can be traced to the county's fragmented form of governance, the consequences of the county's weak governance were amplified by system-wide problems that plague municipal financial markets as a whole. Two lessons can be drawn from Jefferson County's disastrous foray into the municipal finance markets. First, unregulated, third-party "financial advisors" that advise municipalities on the issuance of bonds or the use of derivatives should be free from conflicts of interest, or at a minimum, fully disclose actual or potential conflicts of interests. Second, municipal issuers should provide more reliable, standardized disclosure to investors, which would help lower issuers' borrowing costs and reduce burdens on taxpayers and ratepayers.

### A. BACKGROUND

#### 1. The Market and Its Participants

There are over 55,000 issuers of municipal securities, including towns, cities, counties, and states, as well as other state and local government agencies and authorities—such as

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<sup>17</sup> For an interesting study on how to achieve greater efficiency and accountability in county government see FRANK J. COPPA, COUNTY GOVERNMENT: A GUIDE TO EFFICIENT AND ACCOUNTABLE GOVERNMENT, Praeger (2000).

hospitals and colleges—that issue securities for special purposes.<sup>18</sup> No other direct capital market has as many borrowers as the municipal finance market, and the sums raised by local governments are often much smaller than those raised by corporations. Local governments use funds tapped from the capital market to pay for projects ranging from bridges and schools to hospital wings and community parks.

Municipal securities have evolved into highly complex structures. Extensive variation in the laws among the fifty states, as well as in local ordinances and codes among the tens of thousands of localities, results in an enormous diversity of financing structures. These variations in regulation affect the authority of local governments to borrow, to lend credit, to impose taxes and special assessments, to enter into contracts related to municipal debt, to budget for debt service, and to conduct other necessary functions.<sup>19</sup>

The volume of municipal securities outstanding has multiplied. In 1975, yearly issuance of municipal securities was \$58 billion, mostly in the form of general obligation debt with fixed interest rates and maturities.<sup>20</sup> Annual issuance of municipal securities in recent years has averaged \$458 billion and the total principal value outstanding is \$2.7 trillion.<sup>21</sup> Historically, municipal securities have been considered safe investments, and the major credit rating agencies have conferred investment grade ratings upon municipal debt. In 2002, Moody's Investor

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<sup>18</sup> Council of State Governments, Resolution on Rating Agency Reform and Preserving the Tower Amendment, at p. 2 (available at

<http://www.csg.org/events/annualmeeting/documents/ResolutionRatingAgencyReformandTowerAmdt.pdf>)

<sup>19</sup> See *Legislative Hearing on Transparency and Regulation of the Municipal Securities Market: Before the Senate Committee on Banking, Housing, and Urban Affairs*, 111<sup>th</sup> Congress (2009) (statement of Ronald A. Stack) at 12 (hereinafter at "Stack Statement").

<sup>20</sup> THE BOND BUYER/THOMSON FINANCIAL 2004 Yearbook at 10.

<sup>21</sup> Stack Statement, *supra* note 19, at 30-31.

Service concluded that the default rate for investment grade municipal debt over a ten year period was .03% compared to 2.32% for investment grade corporate debt.<sup>22</sup>

But these low default rates mask the fact that not all municipal bonds are created equal when it comes to default risk. Municipal bonds are classified as either general obligation bonds (GO bonds) or revenue bonds. When a municipal borrower issues a GO bond, the bond is secured by the full faith, credit, and taxing authority of the municipal borrower. The municipality commits, if necessary, to impose higher taxes on its residents to meet debt service requirements. So long as the issuer has a viable tax base, the likelihood of default is low. Many states, however, limit the total amount of GO debt that their political subdivisions may have outstanding. Alabama is one of these states. Because Jefferson County's sewer debt exceeded Alabama's limit for GO bonds, the county financed its debt through the other major type of municipal obligation—revenue bonds.<sup>23</sup>

The debt service on revenue bonds is secured by anticipated user fees from the underlying project being financed. Because revenue bonds are backed by a specific stream of revenue, default risk varies with the strength of the underlying revenue source. If the fees from the underlying projects financed by the revenue bonds turn out to be unpredictable, these bonds can be extremely risky.

Although individual investor participation in the municipal securities market is quite high, the market remains an over-the-counter, dealer market.<sup>24</sup> There are no central exchanges,

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<sup>22</sup> Moody's Rating Service, "Special Comment: Moody's US Municipal Bond Rating Scale" (Nov. 2002), available at <http://www.moody's.com>

<sup>23</sup> Cite AL. code.

<sup>24</sup> Stack Statement, *supra* note 19, at 13

specialists, or formal market maker designations. Approximately 2,040 securities firms and banks were authorized to act as brokers and dealers in municipal securities at the end of 2008.<sup>25</sup>

## 2. Municipal Securities Regulation

Even though individual investor participation in the municipal bond market is quite high, municipal securities are exempted from the registration requirements and civil liability provisions of the Securities Act of 1933 (“Securities Act”),<sup>26</sup> and periodic reporting requirements under the Securities Exchange Act of 1934 (“Exchange Act”).<sup>27</sup> Transactions in municipal securities are subject to the antifraud provisions of Section 17(a) of the Securities Act,<sup>28</sup> Section 10(b) of the Exchange Act,<sup>29</sup> and Rule 10b-5.<sup>30</sup> These antifraud provisions prohibit any person—including municipal issuers, brokers, dealers and municipal securities dealers—from making a false or misleading statement of material fact, or from omitting any material fact that would make a statement not misleading, in connection with the offer, purchase or sale of any security.<sup>31</sup> Brokers, dealers, and municipal securities dealers are subject to regulations adopted by the Securities Exchange Commission, including regulations adopted to define and prevent fraud. However, the SEC’s authority to require affirmative disclosure from municipal issuers is limited.

Municipal securities dealers are also subject to rules promulgated by the Municipal Securities Rulemaking Board.<sup>32</sup> The MSRB is a self-regulatory organization established by

<sup>25</sup> *Id.*

<sup>26</sup> Securities Act § 3(a)(2); 15 U.S.C. § 77c.

<sup>27</sup> Exchange Act § 3(a)(12)(A)(ii); 15 U.S.C. 78c(a)(12)(A)(ii).

<sup>28</sup> 15 U.S.C. § 77q

<sup>29</sup> 15 U.S.C. § 78j

<sup>30</sup> 17 CFR § 240.10b-5

<sup>31</sup> *Id.*

<sup>32</sup> 15 U.S.C. § 78o-4; Lisa M. Fairchild and Nan S. Ellis, *Rule 15c2-12: A Flawed Regulatory Framework Creates Pitfalls for Municipal Issuers*, 55 WASH. U. J. OF URBAN AND CONTEMPORARY LAW 587, 623 (1999).

Congress in 1975 under Section 15B of the Securities Exchange Act.<sup>33</sup> The MSRB's mission is to develop rules for securities firms and banks that underwrite, trade, and sell municipal securities. Although the Exchange Act provides the MSRB with authority to regulate dealers in connection with their transactions in municipal securities, the MSRB does not have the authority to regulate other participants in the municipal finance market, such as independent financial advisors.

MSRB rules are "principles-based." For instance, MSRB Rule G-17 requires every broker, dealer, and municipal securities dealer, in the conduct of their municipal securities business, to deal fairly with all persons and not to engage in any deceptive, dishonest, or unfair practice. Under the "suitability rule," dealers must have "reasonable grounds" to believe that the securities they market to investors are suitable for those investors. Two particularly important rules are G-37 and G-38, which specifically address pay-to-play issues and the use of paid political operatives to obtain municipal securities business.

The MSRB does not have the authority to enforce its rules. Enforcement authority has instead been given to the Financial Industry Regulatory Authority (FINRA), the SEC, and the federal bank regulators.<sup>34</sup>

#### B. NEGOTIATED DEALS AND POTENTIAL CORRUPTION

In negotiated financings, also known as noncompetitive financings, a municipality communicates privately with an underwriter about public financing and negotiates an interest rate and price with the underwriter. By contrast, in a competitive deal, the municipality posts a public notice asking underwriters to put in bids and awards bond work to the bidder who offers

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<sup>33</sup> The Securities Act Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97 (codified as amended 15 U.S.C. § 78o-4(b) (2009)).

<sup>34</sup> See Lisa M. Fairchild and Nan S. Ellis, *Rule 15c2-12: A Flawed Regulatory Framework Creates Pitfalls for Municipal Issuers*, 55 WASH. U. J. OF URBAN AND CONTEMPORARY LAW 587, 623 (1999).

the lowest costs. Jefferson County has not used competitive financing for more than a decade.<sup>35</sup> Jefferson County is not unique in its reliance on negotiated financing; today most municipal debt is sold through negotiated financing.<sup>36</sup> In 1978, 54 percent of all municipal bonds were sold through negotiated sales. Today, it is up to 90 percent.<sup>37</sup>

The increasing prevalence of negotiated financing is troubling because it creates the opportunity for municipal officials and underwriters to strike deals that are not subject to public scrutiny, which increases the municipalities' susceptibility to being overcharged.<sup>38</sup> For example, until 2005, underwriting firms often employed former politicians and lobbyists from local markets as consultants to help win municipal bond sales.<sup>39</sup> In Jefferson County, politically connected consultants earned over one million dollars for persuading county officials to choose Bank of America as one of the parties to its interest rate swaps.<sup>40</sup> Even more egregious, J.P. Morgan is alleged to have paid as much as eight million dollars to friends of county commissioners to influence its selection as underwriter and swap provider.<sup>41</sup> The cronyism and bias encouraged by negotiated financings that take place in private are intolerable when local taxpayers are at risk of being overcharged.

Selling debt in private, without requiring competition, has made public officials vulnerable to underwriters' sales pitches. Open and competitive deals, on the other hand, make it more difficult for issuer officials to direct deals to favored parties. Thus, the potential for deal participants to use hidden payments or favors to obtain business is minimized in a competitive deal. Empirical studies have found that political favoritism in municipal bond issuance results in

<sup>35</sup> Martin Z. Braun, et al., *The Banks That Fleeced Alabama*, BLOOMBERG MARKETS 52, 54 (September 2005).

<sup>36</sup> *Id.*

<sup>37</sup> Arthur Levitt, *Taxpayers Fleeced When Leaders Tap Muni Markets: Arthur Levitt*, BLOOMBERG NEWS (Oct. 21, 2009).

<sup>38</sup> *Id.*

<sup>39</sup> In 2005, the MSRB changed Rule G-38 to an outright ban on broker/dealer use of such consultants.

<sup>40</sup> Braun et al., *supra* note 35, at 60.

<sup>41</sup> See *infra* note 68-69 and accompanying text.

greater credit risk, higher bond yields, and greater use of external credit enhancement, all of which result in a greater debt service burden for municipalities and taxpayers.<sup>42</sup>

### C. UNREGULATED FINANCIAL ADVISORS

In addition to negotiated financings, the role of unregulated financial advisors also exposes municipalities and taxpayers to potential abuse. Municipal issuers often rely on these unregulated financial advisors. Some issuers rely on unregulated financial advisors for all aspects of a bond transaction, while others employ unregulated financial advisors for more limited purposes.<sup>43</sup> Because the precise role of an unregulated financial advisor is determined by the advisor and the issuer hiring the advisor, the duties performed by the unregulated financial advisor can vary widely from deal to deal.

The term “financial advisor” is not defined in municipal securities regulation. MSRB Rule G-23(b) defines a “financial advisory relationship” for brokers, dealers, and municipal securities dealers, but the MSRB Rules are not applicable to financial advisors who are not brokers, dealers, or municipal securities dealers. Independent financial advisors were unregistered in approximately two-thirds, by par amount, of the municipal offerings in 2008 in which such advisors offered assistance. These unregulated financial advisors are not subject to any constraints on “pay-to-play”—the conflict of interest created when participants in the municipal bond underwriting process make contributions to political leaders in exchange for being chosen to participate in future negotiated bond sales. Although the MSRB implemented rules to prevent broker-dealers from making such political contributions in 1994, those rules do not apply to unregulated financial advisors.<sup>44</sup>

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<sup>42</sup> Alexander W. Butler, et al., *Corruption, Political Connections, and Municipal Finance*, AFA 2008 New Orleans Meeting Paper (available at [http://papers.ssm.com/sol3/papers.cfm?abstract\\_id=972471&download=yes](http://papers.ssm.com/sol3/papers.cfm?abstract_id=972471&download=yes)).

<sup>43</sup> See, e.g., *In Matter of Public Finance Consultants, Inc., et al.*, Sec. File No. 3-11465 (Feb. 25, 2005).

<sup>44</sup> MSRB Rule G-37

Unregulated financial advisors have significant influence on issuers and earn significant fees from arranging bond issuances and swaps. A truly knowledgeable and disinterested advisor can help guide issuers through the regulatory and financial complexity of issuing their bonds. Ideally, these advisors are independent—without connection to dealers or underwriters—and can preclude dealers or underwriters from being selected if the advisors determine that the underwriting charges are too high, bond terms are unfavorable to the issuer, or the underwriter’s services are inadequate.

But if advisors are not subject to a strictly imposed fiduciary duty, they may fall prey to perverse incentives. For instance, a financial advisor might advise an issuer to structure an offering in a particular way, even though that structure is not in the issuer’s best interest, because the financial advisor receives payments from a third party, such as the provider of a swap or guaranteed investment contract.<sup>45</sup>

Regulators have grown increasingly concerned about the role of unregulated advisors in the sale of derivative products to municipalities, particularly interest rate swaps.<sup>46</sup> Derivative products carry numerous embedded risks that may not be easily understood by less sophisticated issuers, such as interest rate risk,<sup>47</sup> termination risk,<sup>48</sup> and counterparty risk.<sup>49</sup> Recent market conditions in which municipalities found themselves losing millions of dollars on interest rate swaps—and were unable to exit these swaps without paying exorbitant termination fees—

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<sup>45</sup> See *Legislative Proposals to Improve the Efficiency of Oversight of Municipal Finance: Hearing H.R. 2549 Before the House Committee on Financial Services*, 111<sup>th</sup> Cong. (2009) (statement of Martha Mahan Haines).

<sup>46</sup> See *Legislative Hearing on Transparency and Regulation of the Municipal Securities Market: Before the Senate Committee on Banking, Housing, and Urban Affairs*, 111<sup>th</sup> Congress (2009) (statement of Ronald A. Stack) at 30-31.

<sup>47</sup> In Jefferson County’s case, interest rate risk means the risk of a mismatch in interest payments received from the swap counterparty and the interest payments owing on the outstanding sewer bonds.

<sup>48</sup> Termination risk means the risk that a counterparty may face a large termination fee to exit a swap that is unfavorable.

<sup>49</sup> Counterparty risk is the risk that a counterparty will default when suffering large actual or potential losses on its position. Such a default would mean that the other counterparty would have to go to the market to replace its contract at less favorable terms.

highlight this concern. Even many sophisticated issuers face large swap termination fees due to changes in short term interest rates. Jefferson County itself faced a swap termination fee of \$647 million.<sup>50</sup> The extent to which many issuers have underestimated the potential termination fees associated with interest rate swaps is disturbing, and raises questions about the failure of financial advisors to warn municipalities about these embedded risks.

Within the scope of their employment, independent financial advisors to municipalities should be bound by the highest duties of care and loyalty to the municipal issuers they advise. The municipal officials who engage an advisor are themselves fiduciaries. They are bound to the population of the municipality; the money they raise and spend belongs to the people in the municipality. Hence, these municipal officials are under an obligation to use the funds they borrow for the benefit of residents and to receive the best advisory services for the least amount of cost. These obligations mean that leaders must select the advisors who are most trustworthy and qualified.<sup>51</sup>

At a minimum, there should be a wall of separation between financial advisors providing services to a municipality and the municipality's counterparties in derivative transactions. Currently, advisors are often paid by the municipality's swap counterparty, which creates at least the appearance of a conflict of interest. When the financial advisor is paid by both the municipality and the counterparty, it is impossible to determine conclusively whether the financial advisor is representing the interests of the municipality or the swap counterparty. Because the fees that financial advisors receive depend on concluding a swap agreement, a

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<sup>50</sup> Martin Z. Braun & William Selway, *JPMorgan Ends SEC Alabama Swap Probe for \$722 Million*, BLOOMBERG NEWS (November 4, 2009).

<sup>51</sup> See Tamar Frankel, "Let Me Advise You How Much to Pay Me," *Subverting Fiduciary Duties and Rules*, 28 MUNICIPAL FIN. J. 53, 60 (2007).

strong temptation exists for financial advisors to market swaps by emphasizing the benefits of the swaps and minimizing the risks.<sup>52</sup>

All financial advisors should be held to minimum standards of conduct that protect issuers, taxpayers, and investors. Rules should be established to achieve the following: (i) prohibit fraudulent and manipulative practices; (ii) restrict real and perceived conflicts of interest; (iii) ensure rigorous standards of professional qualification; and (iv) promote market efficiencies. Preventing manipulative practices and eradicating conflicts of interest are necessary steps for ensuring that financial advisors protect their municipal clients from taking on excessive and inappropriate risks.

D. A TOXIC MIX: RATING AGENCIES, BOND INSURERS, AUCTION RATE SECURITIES AND VARIABLE RATE DEMAND OBLIGATIONS

1. Auction Rate Securities and Variable Rate Demand Obligations

Because short-term interest rates have historically been lower than long-term rates, many municipal borrowers issue bonds with an interest rate that periodically resets. In other cases, municipalities issue variable rate bonds and use swaps to convert their variable rate borrowing to a net fixed interest rate. Jefferson County used this strategy to ill effect.

Auction rate securities (ARS) and variable rate demand obligations (VRDOs) have been the most prevalent form of variable rate borrowing used during the past two decades. With ARS, investors' ability to sell their securities at par depends on the success of a periodic auction process. With VRDOs, issuers offer investors the opportunity to sell their securities at par through a designated "remarketing agent." But unlike ARS, if there are insufficient buyers to

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<sup>52</sup> See *A Special Investigation of the Bethlehem Area School District: A Case Study of the Use of Qualified Interest Rate Management Agreements ("Swaps") by Local Government Units in Pennsylvania, with Recommendations*, November 2009, pg. 42-43 (relating conclusions and recommendations regarding deceptive tactics of market advisors).

cover all VRDO offers, investors have the right to tender their securities to a third-party liquidity-provider. Banks typically act as third-party liquidity providers under standby purchase agreements obligating them to purchase, at par, any VRDOs that cannot be resold through the remarketing process. The interest rate paid by the issuer when the VRDO is tendered to the liquidity provider increases to a pre-determined maximum. After some defined period, usually 90 days, VRDOs put back to the bank—called “bank bonds”—require accelerated amortization.<sup>53</sup>

## 2. Bond Insurers: Only as Good as Their Credit Ratings

One of the factors that determine the interest rate paid by municipalities on bonds they issue is default risk. The greater the risk that the municipality will default on the bond, the higher the interest rate it must pay investors to compensate them for that risk. To lower the risk of default, the municipal finance markets have turned to bond insurers, which guarantee repayment of the bonds in exchange for premiums. Before the financial crisis, most of these bond insurers were rated triple-A by the major credit rating agencies. By wrapping their bonds with a guaranty from a triple-A rated insurer, municipalities were able to transfer the insurer’s rating to the municipal bond. Municipalities were thus able to rent the balance-sheet strength of the bond insurer—and the bond insurer’s investment-grade credit rating—in exchange for a premium. By transmuting their bonds into investment grade quality through this balance-sheet alchemy, municipalities lowered their borrowing costs.<sup>54</sup> This credit rating magic, however, depended upon misdirection and prestidigitation: rather than rating the underlying municipal bonds, the credit rating agencies instead relied on both the balance-sheet strength of the bond

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<sup>53</sup> See *Legislative Proposals to Improve the Efficiency of Oversight of Municipal Finance: Hearing on H.R. 2549 Before the House Committee on Financial Services*, 111<sup>th</sup> Cong. (2009) (statement of Michael J. Marz).

<sup>54</sup> *Legislative Proposals to Improve the Efficiency of Oversight of Municipal Finance: Hearing on H.R. 2549 Before the House Committee on Financial Services*, 111<sup>th</sup> Cong. (2009) (statement of David W. Wilcox).

insurers as well as the bond insurer's underwriting to assess the creditworthiness of the municipal issuers.

As long as the bond insurers maintained the robustness of their balance sheets, the arrangement worked well. But bond insurer's balance-sheet impregnability proved short lived. Beginning in 2000, the bond insurers diversified their business beyond providing insurance against bond defaults to providing guarantees for collateralized debt obligations (CDOs) and securitizations of various asset classes that were built from subprime mortgages.<sup>55</sup> As financial markets became aware of the risks associated with subprime mortgages and their securitization, the rating agencies required the bond insurers to increase the cash reserves they held against asset-backed securities that were increasingly perceived as risky. Because the bond insurers had failed to anticipate losses resulting from plummeting house prices and the effect of those losses on their liabilities, they were not prepared to respond to the rating agencies' calls for greater cash reserves. As losses materialized and the bond insurers were unable to satisfy the increased reserve requirements, the credit rating agencies downgraded them rapidly.<sup>56</sup>

When the bond insurers that had guaranteed Jefferson County's bonds lost their triple-A credit ratings, the bonds also lost their high ratings, and investors shunned the bonds because they were no longer perceived as safe investments. Bids for the auction rate warrants dried up, and the broker-dealers were no longer willing to act as bidders of last resort to keep the auctions from failing. When the auctions failed, holders of the ARS could not liquidate their investments, and interest rates on the ARS soared. The declining credit-worthiness of the bond insurers also

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<sup>55</sup>See, e.g. PMI Group Form 10-K filed March 11, 2005 at 85 (In 2004, FGIC, the bond insurer guaranteeing the majority of Jefferson County's debt, began to execute upon its business plan of expanding into new markets and broadening its presence in existing ones. In 2004, FGIC, on a selective basis, broadened its presence in the U.S. public finance area to include such sectors as health care institutions, municipal electric utilities, and investor owned utilities. Also in 2004, FGIC began to broaden its presence in the structured finance market to include classes of consumer-based and investment-grade corporate asset-backed securities, in addition to its established product lines within the mortgage-backed securities sector.)

<sup>56</sup>See Martin Z. Braun, *Bond Insurance Turns Toxic for Munis as Rates Soar*, BLOOMBERG NEWS (Feb. 11, 2008).

affected the VRDOs. Many holders of VRDOs tendered their bonds to the remarketing agent when the bond insurers that had guaranteed the VRDOs had their credit ratings downgraded.<sup>57</sup>

Among the investors that beat a hasty retreat from the county's bonds were money market mutual funds. Money market mutual funds were compelled to dump their VRDO holdings because Investment Company Act Rule 2a-7 requires them to invest in short-term securities with minimal risk; VRDOs met that objective so long as they had a triple-A credit rating.<sup>58</sup> But when the ratings agencies downgraded the bond insurers, the VRDOs lost their status as eligible investments for money market funds and the money market funds "put" the VRDOs back to the banks, who soon discovered that the VRDOs could not be remarketed to other funds.<sup>59</sup>

With no new investors to buy the VRDOs, the banks were obliged to purchase all the VRDOs under the stand-by purchase agreements. The banks' purchase of the VRDOs under the stand-by purchase agreement in turn accelerated the amortization schedule on all \$850 million of the country's VRDOs, requiring Jefferson County to fully repay its debt in four years instead of thirty.

### 3. What to Do About Bond Insurers and Rating Agencies?

At its height in the early 2000s, the municipal bond insurers guaranteed more than half of all municipal bond offerings. Now that share is only 10%. Two years ago the market for bond

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<sup>57</sup> *Id.*

<sup>58</sup> 17 CFR § 270.2a-7; Under Rule 2a-7, money market mutual funds (MMMFs) must meet strict portfolio quality, diversification, and maturity standards which are meant to limit the possibility of significant deviation between the share price of a fund and its per share asset value. MMMFs are limited to investing only in securities placed by at least two NRSROs in one of the two highest short-term rating categories. Also, MMMFs generally may not acquire any instrument having a remaining maturity of greater than 397 days and may not maintain a dollar-weighted average portfolio maturity of more than 90 days. The purpose of the maturity provisions is to limit the exposure of MMMFs to interest rate risk.

<sup>59</sup> See *Legislative Proposals to Improve the Efficiency of Oversight of Municipal Finance: Hearing on H.R. 2549 Before the House Committee on Financial Services*, 111<sup>th</sup> Cong. (2009) (statement of Mary Jo Ochson).

insurance had seven viable players; today only one company is writing business.<sup>60</sup> As a result of this contraction, low-rated municipal issuers attempting to refinance have been unable to find guarantors for their municipal debt.<sup>61</sup>

Some have suggested that the collapse of the municipal bond insurance market can be addressed through temporary reinsurance provided by the federal government for municipal bonds covered by a primary policy from a private bond insurer.<sup>62</sup> Under this proposal, the U.S. Treasury would offer \$50 billion of reinsurance to bond insurers and charge them risk-based premiums in return for this coverage. After the financial markets have stabilized, the reinsurance program would be privatized. Although such a program could benefit troubled municipal issuers in the short term, fiscal conservatives are dubious about extending yet more federal guaranties to private market participants.

Others have suggested that it would be preferable to restore confidence in the bond insurance market through long-term reforms aimed at making the bond insurance market more transparent and stable. Disclosure-based reforms would restore confidence in the bond market while avoiding moral hazard and the risk that taxpayers would be left holding the bag in a federal reinsurance program.

Currently, third-party financial guaranties of municipal bonds are not regulated under the federal securities laws. Given the crucial roles that third-party financial guaranties play in the municipal securities market, more comprehensive disclosure about the companies offering such guaranties would be useful. One way to ensure better disclosure would be to require ongoing

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<sup>60</sup> *Viewpoint: Revitalize Muni Bond Insurance Market*, AMERICAN BANKER, Oct. 28, 2009.

<sup>61</sup> See *Legislative Proposals to Improve the Efficiency of Oversight of Municipal Finance: Hearing on H.R. 2589 Before the House Committee on Financial Services*, 111<sup>th</sup> Cong. (2009) (statement of Bernard Beal).

<sup>62</sup> H.R. 2589, 111<sup>th</sup> Cong. (2009)

shelf-registration for entities that offer third-party financial guaranties for municipal securities.<sup>63</sup> The annual registration statements of the bond insurer would then be incorporated into the official disclosure statements for the municipal security guaranteed by that bond insurance company. This increased disclosure would give investors the information they need to enforce market discipline on the bond insurers.

Reforming the practices of credit rating agencies is an important task in encouraging transparency and market discipline. There were two separate but interrelated errors in judgment on the part of the credit rating agencies. First, the rating agencies had been free-riding on the bond insurers' assessments of the financial stability of municipal issuers. The rating agencies believed that if the bond insurers had already signed off on the municipality's credit worthiness by insuring the municipal issuance, then there was little point in the agencies' independent evaluation of the issuance. This state of affairs might have continued unnoticed but for the rating firms' second great blunder; they also failed to recognize the bond insurers' exposure to securitized assets cobbled together from subprime mortgages.

The magnitude of the effect that ratings downgrades of bond insurers had on municipal securities suggests the need for more meaningful disclosure of ratings criteria, especially for the criteria used to rate complex structured securities. The Credit Rating Agency Reform Act of 2006,<sup>64</sup> which required that credit rating agencies seeking "nationally recognized statistical rating organization" (NRSRO) status register with the SEC, was a halting step towards greater ratings transparency. However, the Act requires that only general information about the agencies' rating methodology be given to the public. Congress did not require greater disclosure out of concern

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<sup>63</sup> Jeffrey A. Nemecek, *Municipal Securities and Financial Institutions: Proposals for Reform*, 30 MUNICIPAL FINANCE JOURNAL 61, 65 (Spring 2009)

<sup>64</sup> Pub. L. 109-291, 120 Stat. 1327 (codified 15 U.S.C. § 78o-7 note)

that full disclosure of ratings criteria might compromise proprietary models.<sup>65</sup> But this solicitude about proprietary models notwithstanding, providing only general information about rating methodologies will not provide the investing public with sufficient data to evaluate the agencies' procedures and methodologies.

Instead, Congress should require that actual rating procedures and methods for specific types of securities be made available to the investing public. The lack of transparency for complex financial products and the companies that insured them was a major contributor to the crisis in the municipal securities markets.<sup>66</sup> Only through full transparency of the ratings criteria can public confidence in credit ratings be restored. Full disclosure and public evaluation will provide market discipline in the ratings process and minimize reliance on shaky ratings criteria.

#### E. LACK OF TRANSPARENCY IN MUNICIPAL SWAPS

As the ARS and VRDO markets became distressed, many municipalities, including Jefferson County, faced further pressure because the interest rate swaps that the county bought to hedge against rising borrowing costs completely backfired. It turns out that the "synthetic fixed rate" that the swaps were supposed to achieve were only "fixed" so long as market conditions behaved in a certain way.

When the insurance companies guaranteeing the county's debt lost their AAA credit ratings, and investors shunned those insured securities, interest rates on the warrants exploded. But the floating rate payments that the county received under the interest rate swaps plunged at the same time, as central banks cut benchmark borrowing costs to counter the financial crisis. Jefferson County's swap transaction demonstrates the risk that municipalities take when they

<sup>65</sup> See Jeffrey A. Nemecek, *Municipal Securities and Financial Institutions: Proposals for Reform*, 30 MUNICIPAL FINANCE JOURNAL 61, 77 (Spring 2009) ("The SEC Release No. 34-55858 specifically cites this policy of restricting public access to ratings criteria, in part, to 'avoid the disclosure of proprietary information' and to avoid the disclosure of 'proprietary models.'").

<sup>66</sup> *Id.* at 68.

gamble on interest rate spreads. The county's financial advisors should have warned county officials about the risks of hedging with swaps; clearly they did not.

There is, in fact, a growing perception that banks and advisors conspired to overcharge local governments on derivatives. As already discussed, issuer officials may not be well-served by supposedly independent advisers who receive kickbacks from the banks selling the deals.<sup>67</sup> But issuer officials themselves have also been implicated in scheming to overcharge on swaps. For example, the SEC has alleged that the chief underwriter and swap provider in Jefferson County's 2002 and 2003 refinancings, JPMorgan, made undisclosed payments to local broker-dealer firms whose owners were friends of county officials in order to enlist the local firm's "political support" for the county's hiring of JPMorgan. The payments may have totaled up to eight million dollars.<sup>68</sup> The SEC alleged that JP Morgan passed the cost of these payments on to the county by charging higher interest rates on swap transactions. Without admitting or denying the SEC's allegations, JP Morgan has agreed to forfeit the \$647 million the county would have had to pay to terminate the swaps.<sup>69</sup>

It is estimated that Jefferson County overpaid by \$100 million for its swaps, based on prevailing rates at the time.<sup>70</sup> Overpricing is difficult to detect because the fees charged by swap providers are not obvious to issuer officials (or anyone else for that matter); these fees are built into the swap interest rates. The swap provider charges a "spread fee"—the difference between mid-market interest rates observed at the time of pricing and the rates finally agreed to by the counterparties. This spread is what the swap provider earns on the transaction. The banks that act as swap providers use complex mathematical models, based on present values at the exact

<sup>67</sup> See Martin Z. Braun and William Selway, *Hidden Swap Fees by JPMorgan, Morgan Stanley Hit School Boards*, BLOOMBERG NEWS (Feb. 1, 2008).

<sup>68</sup> *SEC v. LeCroy, et al.*, CV-09-U-2238-S (N.D. Ala. filed Nov. 4, 2009).

<sup>69</sup> *In the Matter of J.P. Morgan Securities Inc.*, SEC Release No. 9078 (November 4, 2009).

<sup>70</sup> Ken Wells, *Armageddon in Alabama Proves Parable for Local U.S. Governments*, BLOOMBERG, (Oct. 19, 2009).

moment of pricing as well as other variables, to calculate the spread fee.<sup>71</sup> Without independent advice, issuers cannot be sure that these fees have been fairly calculated because issuers cannot easily evaluate the terms of their swaps against comparable ones done by other municipalities.<sup>72</sup>

Churning—entering into multiple swaps against a single bond issuance in order to make more fees—is another problem that affects the sale of derivatives transactions in the municipal finance market. Jefferson County appears to have been a victim of churning. When entering into interest rate swaps, municipalities typically match the notional value underlying the swap to the amount of the debt to be hedged. Jefferson County, however, had swaps valued at a notional \$5.4 billion, but its debt was only \$3.2 billion. While swapping interest payments on \$3.2 billion of debt would lock in a fixed cost for the county’s borrowing, the only conceivable purpose of exchanging interest payments on an additional \$2.2 billion would be to profit from rising future interest rates. The county’s swapping interest payments on the \$2.2 billion was akin to purchasing fire insurance on a building one does not own and then hoping the building goes up in flames.<sup>73</sup>

The current regulatory regime does not address the problems posed by the sale of derivatives to municipal issuers. Interest rate swaps entered into by municipalities are treated as private transactions between two counterparties, not subject to regulation under the current rules.<sup>74</sup> The SEC does not have the authority to impose or enforce rules, standards, or disclosure

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<sup>71</sup> See *A Special Investigation of the Bethlehem Area School District: A Case Study of the Use of Qualified Interest Rate Management Agreements (“Swaps”) by Local Government Units in Pennsylvania, with Recommendations*, November 2009, pg. 33-35 (relating information obtained on interviews with school district financial advisors).

<sup>72</sup> *Id.*

<sup>73</sup> Craig Karmin & Liz Rappaport, *How Jefferson County Got Crunched; Strategy to Cut Costs Instead Amplified Risk; Smart Move or Gamble?*, WALL STREET JOURNAL, March 7, 2008, at C.1.

<sup>74</sup> See Commodity Futures Modernization Act of 2000, Pub. L. 106-554, § 1(a), 114 Stat. 2763, 2763-A, as amended (codified 7 U.S.C. § 5 *et seq.*) (“CFMA”). The CFMA expressly made swaps and other over-the-counter derivative transactions not subject to the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*, and declared that federal law would

requirements to prevent fraud in any kind of swap agreement.<sup>75</sup> However, “security-based swap agreements” are subject to the anti-fraud, anti-manipulation, and insider trading provisions of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act. A “security-based swap agreement” is defined in Section 206B of Gramm-Leach-Bliley Act as a swap agreement “of which a material term is based on the price, yield or volatility of any security, or group or index of securities, or any interest therein.”<sup>76</sup>

In 2008, the SEC filed an action involving municipal swap contracts in *SEC v. Langford* asserting its jurisdiction over swaps for the first time. The SEC argued that interest rate swaps based on the Securities Industry and Financial Markets Association Municipal Swap Index are security-based swap agreements and, therefore, subject to the antifraud provisions of the federal securities laws.<sup>77</sup> The SEC brought this case over objections by industry groups that the interest rate swaps were not security-based swap agreements and, thus, were not subject to the SEC’s jurisdiction.<sup>78</sup>

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“preempt the field” of the regulation of the use of derivatives. See Lynn A. Stout, *Regulate OTC Derivatives by Deregulating Them*, 32 REGULATION 30 (2009).

<sup>75</sup> Securities Act Section 2A(b); Exchange Act Section 3A(b).

<sup>76</sup> See 15 U.S.C. § 78c definitions.

<sup>77</sup> *SEC v. Langford, et al.*, CV-08-B-0761-S (N.D. Ala. filed Aug. 7, 2008). (The court has jurisdiction in connection with the swap agreements because they were security based swap agreements. Security-based swap agreements are defined in Section 206B of the Gramm-Leach-Bliley Act, as amended by the Commodity Futures Modernization Act of 2000, as agreements “of which a material term is based on the price yield, value, or volatility of any security or group of securities, or any interest therein.” The terms of the swap agreements stated the County was entitled to receive floating interest rate payments from JPMorgan Chase Bank based in part on the value of the Bond Market Association’s (“BMA”) Municipal Swap Index, an index of securities used to establish the floating rate yield (the Bond Market Association is now known as the Securities Industry and Financial Markets Association). Thus, the transactions constituted security-based swap agreements because a material term in each agreement was based on “price, yield, value, or volatility of any security or any group or index of securities, or any interest therein.”)

<sup>78</sup> Brief for SIFMA as Amici Curiae Supporting Respondents, *Langford, et al.*, No. CV-08-0761-S (N.D. Ala. filed Aug. 7, 2008). (The CFMA [Commodity Futures Modernization Act] amendments to the Securities Act and the Exchange Act did provide that “security-based swap agreements,” while not securities, are nevertheless subject to the anti-fraud, anti-manipulation, insider trading and short-swing profit provisions of the Securities Act and the Exchange Act. In contrast “non security based swap agreements” are not subject to the anti-fraud, anti-manipulation, insider trading or short-swing profit provisions of these statutes. To distinguish between the two types of swap agreements, the statute defines a “security-based swap agreement” as an agreement “of which a material term is based on the price, yield, value, or volatility of any security or any group or index of securities, or any

If the swaps that Jefferson County entered into are not security-based swaps, then they are not subject to the anti-fraud rules against misleading or manipulative practices. Furthermore, such swaps may not be subject to the MSRB's rulemaking authority by-way of Exchange Act Section 15B(c)(1).<sup>79</sup> Section 15B limits the scope of MSRB rules to transactions in municipal securities—a category of transactions which would include neither security-based swaps nor non-security based swaps.

The *Langford* litigation highlights the confusion that exists over the jurisdictional status of swaps and securities-based swaps. It is for Congress to clarify that confusion. Congress should empower the MSRB to adopt, and the SEC to enforce, protective market-conduct rules that would regulate the sale of over-the-counter (OTC) derivatives to municipalities. These market conduct rules should help ensure that municipalities participating in the OTC derivatives market understand the benefits and risk of doing so.<sup>80</sup>

Even if Congress clarifies that the sale of swaps are subject to market-conduct rules, to ensure that municipalities better understand the transactions they are entering into, there still remains the problem of termination risk, which is the risk that one of the counterparties may be forced to pay a large termination fee to exit a swap that is unfavorable. When a municipality wishes to exit an unfavorable swap, it has to pay its current liability from the contract to the

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interest therein." [I]f, however, swap agreements under which payments are based on the SIFMA Swap Index are not "security-based swap agreements." First the SIFMA Swap Index is an *index of interest rates*, not an "index of securities." Second, a swap agreement under which payments are based on the SIFMA Swap Index is not based on "the price, yield, value, or volatility of any security or any group or index of securities." [T]he court should reject the SEC's erroneous attempt to assert claims involving non-security based swap agreements.)

<sup>79</sup> 15 U.S.C. § 78o-4(c)(1) (No broker, dealer, or municipal securities dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal security in contravention of any rule of the [Municipal Securities Rulemaking] Board.)

<sup>80</sup> Such business conduct rules would, among other things, require disclosure of: (i) information about the material risks and characteristics of the swap; (ii) the source and amount of any fees or other material remuneration that the swap dealer and swap advisor would directly or indirectly expect to receive in connection with the swap; and (iii) any other material incentives or conflicts of interest that the swap dealer or swap advisor may have in connection with the swap.

counterparty. If the municipality's termination fee is too expensive, it has to stick with the swap arrangement and keep paying interest rates that are disadvantageous. To preclude such a miserable situation, Congress could require municipalities to obtain insurance against financial risks that may arise when a swap is terminated.

There are at two advantages to this proposal. First, this kind of "swap termination" insurance can provide a stressed municipal issuer with the necessary funding to exit a swap agreement. Second, and more importantly, requiring this kind of insurance may prevent municipalities from entering into overly risky swaps in the first place. Lack of financial sophistication and poor negotiation on the part of municipal officials may leave a municipality exposed to considerable risk of termination payments. Requiring insurance protection would force a municipality to quantify *ex ante*, through premium payments, the risk of early termination of the swap. If the municipality cannot negotiate a swap contract that avoids a substantial risk of early termination, insurance will be prohibitively expensive and the municipality will be deterred from entering into the disadvantageous swap arrangement.<sup>81</sup>

#### E. THE CONFUSING NATURE OF THE MUNICIPAL DISCLOSURE REGIME

##### 1. Why Municipal Securities Differ from Other Securities.

Retail investors in the municipal market do not enjoy the same transparency readily available in corporate debt or securities markets. Many of the problems in the municipal financial crisis stemmed from inadequate disclosure about risks associated with products and market participants, such as liquidity problems facing municipal ARS and the ratings downgrades of municipal bond insurers. Yet the securities laws do not mandate disclosure

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<sup>81</sup> See Alexander Buchanan, *Dealing with Municipal Swap Risks*, 26 MUNICIPAL FINANCE JOURNAL 36, 43-43 (2005).

about these kinds of risk multipliers.<sup>82</sup> The regulatory framework could be amended to provide investors with better information.<sup>83</sup> One prominent market participant has described the disclosure that state and local governments provide to investors as being in the “dark ages.”<sup>84</sup>

Federal securities regulation is disclosure based, and issuers of securities are responsible for the disclosure.<sup>85</sup> Municipal securities regulation differs, however, because, unlike other issuers, municipalities have no shareholders and are not managed to produce profits. Rather, municipalities are managed for the benefit of their constituents and only incidentally to pay those investors who purchase their debt. Nonetheless, disclosure and transparency in the municipal markets are important for the protection of tax and rate payers. Poor disclosure and lack of transparency about municipal bonds result in higher debt service payments for municipal issuers, which in turn results in higher taxes and rates that are passed on to residents of the municipality. Municipal investors demand higher returns because of the elevated risks that come with lack of information due to slipshod disclosure practices.<sup>86</sup> Better disclosure removes some of the risk stemming from uncertainty, and should lower the interest rates municipalities pay on their debt.

## 2. The Limited Powers of the SEC and MSRB over Municipal Securities.

Although the SEC is authorized to take enforcement action against issuers of municipal securities that violate the antifraud provisions of the federal securities laws, it cannot require

<sup>82</sup> The securities laws focus mainly on disclosures about the issuer itself and the behavior of underwriters and broker-dealers; these laws are not geared towards disclosure of risk inherent in the structure the transaction (e.g. liquidity risk with ARS, interest rate risk with derivatives). See Jeffrey A. Nemecek, *Municipal Securities and Financial Institutions: Proposals for Reform*, 30 MUNICIPAL FINANCE JOURNAL 61, 68 (Spring 2009).

<sup>83</sup> See *Testimony Concerning Enhancing Investor Protection and Regulation of the Securities Markets: Before Senate Committee on Banking, Housing, and Urban Affairs*, 111<sup>th</sup> Cong (2009) (Statement of Mary L. Schapiro, Chairman, Securities and Exchange Commission).

<sup>84</sup> Darrell Preston, *Governments never in Default Pay More Interest Than Companies*, BLOOMBERG (Oct. 28, 2009).

<sup>85</sup> Christopher Cox, Chairman, U.S. Sec. & Exch. Comm'n, Speech by SEC Chairman: Integrity in the Municipal Market (July 18, 2007) [hereinafter Cox Speech], available at <http://www.sec.gov/news/speech/2007/spch071807cc.htm>.

<sup>86</sup> Arthur Levitt, *Taxpayers Fleeced When Leaders Tap Muni Markets: Arthur Levitt*, BLOOMBERG NEWS (Oct. 21, 2009).

affirmative disclosure from municipal issuers.<sup>87</sup> Federal regulatory forbearance in municipal securities can be attributed to an issue as old as the Republic itself: federal versus state sovereignty. To reinforce the concept of intergovernmental comity, both the SEC and MSRB are prohibited from requiring issuers of municipal securities to file registration documents before municipal securities are sold. This prohibition, codified in Exchange Act Section 15B(d), is known as the “Tower Amendment,” after Senator John Tower,<sup>88</sup> and forms the structural foundation of the municipal securities regulatory scheme. It provides as follows:

(1) Neither the [SEC] nor the [MSRB] is authorized under this title, by rule or regulation, to require any issuer of municipal securities, directly or indirectly through a purchaser or prospective purchaser of securities from the issuer [i.e. an underwriter of an offering of municipal securities], to file with the Commission or the Board prior to the sale of such securities by the issuer any application, report, or document in connection with the issuance, sale, or distribution of such securities; (2) The Board is not authorized under this title to require any issuer of municipal securities, directly or indirectly through a municipal securities dealer or otherwise, to furnish to the Board or to a purchaser or a prospective purchaser of such securities any application, report, document, or information with respect to such issuer.<sup>89</sup>

Given the strictures of the Tower Amendment, the SEC and MSRB can impose disclosure requirements only on municipal securities brokers and dealers. To the extent that municipalities can be compelled to disclose information to investors, that disclosure comes about indirectly, by means of the antifraud provisions of the securities laws, which are applicable to municipal issuers.<sup>90</sup> Although the SEC has brought enforcement actions in a number of high profile cases

<sup>87</sup> Andrew Ackerman, *Haines: SEC Can't Set Up Corporate-Style Disclosure Regime for Munis*, THE BOND BUYER (Oct. 9, 2009).

<sup>88</sup> John Goodwin Tower: Biography, Biographical Directory of the United States Congress 1774 to Present, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=T000322>.

<sup>89</sup> 15 U.S.C. § 78o-4(d)(1)-(2)

<sup>90</sup> See Ann Judith Gellis, *Municipal Securities Market: Same Problems No Solutions*, 21 DEL. J. CORP. L. 427, 433 (1996).

in recent years,<sup>91</sup> it is not currently able to address *ex ante* the disclosure problems exposed by those enforcement actions against municipal issuers.<sup>92</sup>

### 3. Indirect Disclosure

While the Tower Amendment prohibits the SEC from imposing disclosure requirements directly on municipal issuers, the Exchange Act grants the SEC regulatory authority over brokers and dealers who underwrite issuances of municipal securities or otherwise engage in municipal securities transactions. Exchange Act Section 15(c)(2) grants authority to the SEC “[t]o define and prescribe means reasonably designed to prevent” fraudulent, deceptive, or manipulative acts and practices, and fictitious quotations by brokers and dealers. Pursuant to that authority, the SEC adopted Rule 15c2-12 to improve transparency in the municipal markets.<sup>93</sup> The rule indirectly results in initial disclosure, periodic disclosure, and secondary market reporting from municipal issuers by requiring underwriters that participate in an offering of municipal securities to obtain the agreement of the issuer to make those disclosures. More specifically the rule requires participating underwriters purchasing or selling municipal securities in primary offerings to reasonably determine that an issuer will undertake to make disclosure statements available to investors. As a result, new underwriters in primary offerings must obtain, review, and distribute copies of the issuer’s Official Statement. The Official Statement is analogous to the prospectus distributed prior to corporate issuances and contains all information “material” to the bond issue. The participating underwriter must also determine that the issuer has undertaken to make certain continuing disclosures annually and on the occurrence of certain material events

<sup>91</sup> See, e.g., *In the Matter of the City of San Diego*, SEC Release No. 34-54745 (Nov. 14, 2006); *In the Matter of the City of Miami, Florida*, SEC Release No. 34-47552 (Mar. 21, 2003).

<sup>92</sup> See *Disclosure and Accounting Practices in Municipal Securities Markets*, Securities and Exchange Commission, White Paper to Congress, July 2007 (available at <http://www.sec.gov/news/press/2007/2007-148wp.pdf>).

<sup>93</sup> 17 C.F.R. 240.15c2-12.

to the MSRB's Electronic Municipal Market Access system.<sup>94</sup> Thus, the SEC is able to force disclosure from municipal issuers, albeit in a round-about way.

But these indirect measures to force transparency have failed to keep pace with the extraordinary growth and increasing complexity of the municipal bond industry. Complex debt instruments today contain new kinds of risk—risks that were not present in 1975 when the Tower Amendment was passed.<sup>95</sup> Nonetheless, the SEC and MSRB have tried to keep up with the market's added complexities. Indeed, the SEC has recognized the need to modify Rule 15c2-12 as a result of the changing municipal securities market. For instance, VRDOs are currently exempted from Rule 15c2-12's continuing disclosure requirements, notwithstanding that VRDOs accounted for 38% of municipal trading volume in 2008. The SEC has proposed amendments to the regulation that would eliminate this exemption for VRDOs.<sup>96</sup> The MSRB has also taken action that should enhance transparency in ARS and VRDOs, the hardest hit sectors of municipal finance. The MSRB has proposed amendments to Rule G-34(c) that would require ARS "Program Dealers" to disclose "ARS bidding information" for orders placed by an ARS Program Dealer.<sup>97</sup> Requiring disclosure of dealer orders will provide the market with information about how the interest rates are determined in a successful auction and the extent to which the auction's success is dependent on dealer bids. Participants in the municipal ARS markets will be able to calculate "bid-to-cover ratios," similar to Treasury auctions, that would indicate the liquidity of ARS in a particular auctions. In addition, the MSRB rule amendment would require the VRDO remarketing agent to report the identity of all liquidity providers for VRDOs. This amendment

<sup>94</sup> Cite 15c2-12 here; See Lisa M. Fairchild & Timothy W. Koch, "Municipal Securities," chapter 6 in the *Handbook of Modern Finance*, edited by Dennis Logue and James Seward, Warren, Gorham & Lamont, 2003 at A6.08[4][a].

<sup>95</sup> See Lisa M. Fairchild and Nan S. Ellis, *Rule 15c2-12: A Flawed Regulatory Framework Creates Pitfalls for Municipal Issuers*, 55 WASH. U. J. OF URBAN AND CONTEMPORARY LAW 587, 623 (1999).

<sup>96</sup> *Proposed Amendment to Municipal Securities Disclosure*, Exchange Act Release No. 34-60332 (July 15, 2009).

<sup>97</sup> "Program Dealer" is defined Rule G-34(c) as a dealer that submits an order directly to an Auction Agent for its own account, or on behalf of another account, to buy, hold, or sell ARS through the auction process.

would allow market participants to determine the extent to which the VRDO remarketing agent or liquidity provider holds a position in the VRDO at the time of the interest rate reset.<sup>98</sup>

#### 4. The Need for Mandatory Standards

Despite the SEC's and MSRB's proposed improvements to the municipal securities disclosure regime, much of the disclosure remains limited and non-standardized.<sup>99</sup> Other than the threat of litigation by the SEC or private parties for violations of the anti-fraud laws, there is no regulatory mechanism to ensure that disclosure in the official statement is adequate or timely. Beyond initial due diligence necessary under the MSRB suitability rules, underwriters have no duty to see that issuers continue to honor their contractual promises to provide continuing disclosure.<sup>100</sup> Issuers often lack the means to ensure accurate and complete disclosure in their offering documents and ongoing reports. In contrast to public companies, municipal issuers are not legally required to certify the accuracy of their financial statements in ongoing reports. Notwithstanding the size and importance of the municipal securities market, municipal issuers are not required to follow uniform accounting standards and disclosure requirements when preparing, presenting, and discussing their financial statements.<sup>101</sup> And although some municipal issuers voluntarily present detailed information about risk from interest-rate swaps or other hedging, they are not required to do so.

Disclosure in the current system is weak because the Tower Amendment prohibits the SEC and MSRB from imposing disclosure obligations directly on municipal issuers.<sup>102</sup> The SEC

<sup>98</sup> See *Request for Comment on Additional Increases in Transparency of Municipal Auction Rate Securities and Variable Rate Demand Obligations*, MSRB Notice No. 2009-43 (July, 14, 2009).

<sup>99</sup> See, e.g. Darrell Preston, *Muni Bonds Lag 13 Years Behind Corporate Disclosure*, BLOOMBERG NEWS SERVICE (June 12, 2009) (available at <http://www.bloomberg.com/apps/news?pid=20670001&sid=ajxiSUJgc7qdlU>).

<sup>100</sup> See Ann Judith Gellis, *Municipal Securities Market: Same Problems—No Solutions*, 21 DEL. J. CORP. L. 427, 473-4 (1996).

<sup>101</sup> White Paper.

<sup>102</sup> See *SEC White Paper*, *supra* note 9, at 4.

and MSRB have reached the statutory limit of their authority to provide investors in municipal securities with adequate disclosure.

Nonetheless, there are complications with applying the corporate model of full registration and regulation to state and local governments. Because municipal issuers are themselves governments, SEC review of the disclosure documents of municipal issuers could present thorny issues of intergovernmental comity.<sup>103</sup> Moreover, the SEC could be overwhelmed by such a task, owing to the sheer number of municipal issuers. The resources that would be needed for the SEC to fully review the offering statements of 55,000 municipal issuers could outweigh the benefits of such an undertaking.

A more attractive approach would be to require *standardized* official statements and continuing disclosures which could be accessed by the public from a central location. The SEC should be given authority to bring enforcement actions not only for fraud but also for the failure to make disclosure in the requisite form.<sup>104</sup> Tax and rate payers will benefit from a reduction in municipal borrowing costs resulting from increased transparency. Investors may be willing to accept lower interest rates if greater transparency reduces the perceived risk of an investment.

### CONCLUSION

Two problems, one internal and one external, coalesced to bring financial disaster to Jefferson County. At the internal level, poor governance brought about by political fragmentation fostered an environment where decision makers could not assess the long-term consequences of day-to-day decisions made for politically expedient reasons. Without the ability

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<sup>103</sup> See Theresa A. Gabaldon, *Financial Federalism and the Short Happy Life of Municipal Securities Regulation*, 34 J. CORP. L. 739, 754-5 (2009) (discussing the concept of intergovernmental comity and its role in federal regulation of municipal securities) ("Intergovernmental Comity roughly translates into 'making nice to another government.'").

<sup>104</sup> *Id.* at 766.

to set durable policy objectives, the County Commissioners were vulnerable to the other, external problem—the pitfalls inherent in the municipal finance markets. The county commission acted on bad financial advice and fell prey to the sales pitches of bankers and underwriters.

Reforming the county governance structure to facilitate effective government is an issue that should be, and can only be, addressed at the state level. But the federal government can make changes to its regulatory regime for municipal bonds that could mitigate the effect of poor governance at the local level. Imposing fiduciary standards on financial advisors to municipalities and enhancing the quality of disclosure for municipal securities are two changes that would significantly improve the state of municipal finance. Sound and impartial financial guidance will help other municipalities avoid Jefferson County’s fate. Improved disclosure in municipal securities will attract more investors to the market and lower debt burdens for municipalities and their citizens.

But reforming the municipal finance market to provide better disclosure to municipalities, taxpayers, and investors—though timely and necessary—should not be thought of as a cure all for all of the problems that manifested themselves in Jefferson County. Recognizing both the limits and dangers of government intervention, Federal securities regulation is based upon the view that if investors are given all of the necessary information, they can make wise investment decisions. But responsibility for making those wise investment decisions rests with individuals, not government. As Louis Loss, regarded by many as the intellectual father of modern securities law, so aptly put it: “Congress did not take away from the citizen his inalienable right to make a fool of himself. It simply attempted to prevent others making a fool of him.”<sup>105</sup>

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<sup>105</sup> Louis Loss, *Fundamentals of Securities Regulation* 36 (1983).

Congress can—and should—do what is necessary to ensure that the same type of disclosures that investors and issuers receive in non-municipal securities markets are also made available to participants in municipal finance markets. But the responsibility for ensuring that our local governments use that information wisely rests with local governments and the citizens whose interests they represent.

[38]

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Mr. BACHUS. But I do want to say I am not trying to simplify it. I am not trying to say that that was the sole reason, but it obviously was a contributing factor. But the county had failed to properly clean up their waste, and so I am not accusing those who brought the suit of any animus. But there were some unintended consequences of consent settlement.

And I am not saying this legislation would have solved that, but I am saying that if more people had been at the table and more time and thought had been taken, we could have avoided what was a debacle.

This concludes today's hearing. Thanks to all of our witnesses for attending.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

We now have a whole lot cleaner rivers and streams in Birmingham, Alabama too.

This hearing is adjourned.

[Whereupon, at 12:11 p.m., the Subcommittee was adjourned.]



A P P E N D I X

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MATERIAL SUBMITTED FOR THE HEARING RECORD



June 3, 2013

The Honorable Spencer Bachus  
Chairman  
Subcommittee on Regulatory Reform,  
Commercial and Antitrust Law  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20510

The Honorable Steve Cohen  
Ranking Member  
Subcommittee on Regulatory Reform,  
Commercial and Antitrust Law  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20510

Chairman Bachus and Ranking Member Cohen:

On behalf of Associated Builders and Contractors (ABC), a national trade association with 72 chapters representing nearly 22,000 members from more than 19,000 construction and industry-related firms, I am writing in regard to the Subcommittee on Regulatory Reform, Commercial and Antitrust Law hearing on *Sunshine for Regulatory Decrees and Settlements Act* (H.R. 1493) introduced by Rep. Doug Collins (R-GA).

ABC supports increased transparency and opportunities for public feedback in situations where agencies promulgate rulemakings via consent decrees and settlement agreements, and opposes regulation through litigation. The *Sunshine for Regulatory Decrees and Settlements Act* (H.R. 1493) would promote enhanced openness and transparency in the regulatory process by requiring early disclosure of proposed consent decrees and regulatory settlements.

The practice of regulation through litigation (or "sue and settle" as it is sometimes described) is used and often abused by advocacy groups in order to initiate rulemakings when they feel federal agencies are not moving quickly enough to draft and issue these policies. Organizations routinely file lawsuits against federal agencies claiming they have not satisfied particular regulatory requirements, at which point agencies can opt to settle. When settlements are agreed to, they often mandate that rulemakings go forward and frequently establish arbitrary timeframes for completion—without stakeholder review or public comment. These settlements are agreed to behind closed doors and their details kept confidential. Agencies release their rulemaking proposals for public comment after the settlement has been agreed upon, but this is often too late for adequate and meaningful feedback.

H.R. 1493 would require agencies to solicit public comment prior to entering into a consent decrees with courts, which would provide affected parties proper notice of proposed regulatory settlements, and would make it possible for affected industries to participate in the actual settlement negotiations.

Thank you for your attention on this important matter and we urge the House to pass the *Sunshine for Regulatory Decrees and Settlements Act* when it comes to the floor for a vote.

Sincerely,

Kristen Swearingen  
Senior Director, Legislative Affairs

June 3, 2013

The Honorable Doug Collins  
U.S. House of Representatives  
513 Cannon House Office Building  
Washington, DC 20515

**RE: Livestock Support for the *Sunshine for Regulatory Decrees and Settlements Act* (H.R. 1493)**

Dear Representative Collins,

Public Lands Council, the National Cattlemen's Beef Association, American Sheep Industry Association, and the Association of National Grasslands (the livestock associations) strongly support the *Sunshine for Regulatory Decrees and Settlements Act* (H.R. 1493). Our members have long suffered under the restrictions brought by "backroom" settlement agreements between radical anti-livestock groups and a number of agencies, including the Environmental Protection Agency (EPA), Bureau of Land Management, U.S. Forest Service, and U.S. Fish and Wildlife Service (FWS). Your legislation would put a stop to the rampant sidestepping of the judicial review and rulemaking processes and provide a voice for our members in cases affecting them.

The livestock associations and their affiliates collectively represent hundreds of thousands of producers across the nation. Our members pride themselves in caring for the natural resources and wildlife habitat on which their very livelihoods depend. Those same resources happen to be the subject of endless litigation that often ends in closed settlement agreements. Closed-door, court-ordered agreements that force new regulations on our members threaten to put them out of business. The end result will be the loss of open spaces provided by farm and ranch lands, as well as the loss of ranchers who manage millions of acres of federal lands in the West.

There are endless examples of settlement agreements that have harmed and continue to harm our members. Examples are easily found on federal lands, where radical environmental groups enter agreements with all-too-willing land management agencies to curtail livestock grazing. But a prime example of a settlement agreement that touches our members in every state is the 2011 WildEarth Guardians (WEG)/Center for Biological Diversity (CBD) agreement binding FWS to deadlines for decisions on over 1,000 species under the ESA. While our members stand to be severely impacted by the new land and water use restrictions that will undoubtedly result from this agreement, industry had no say in its development. Meanwhile, because of fee-shifting statutes that provide exorbitant attorneys' fees to special interest groups, the multi-million-dollar WEG and CBD had even further incentive to push their regulatory scheme through the courts: for this agreement alone, they together received almost \$300,000 in taxpayer dollars.

Recently, settlements brought under the Clean Water Act (CWA) have dealt devastating blows to industry. In a May 2010 settlement with environmentalists where industry petitioners were effectively excluded from the process, EPA agreed to promulgate a CWA information-gathering rule that would cost individual farmers and ranchers thousands (or subject them to fines of \$37,500 per day for noncompliance). The rule was eventually withdrawn, but agency activities related to this rulemaking resulted in the release of personal information of 80,000 livestock producers in February 2013. In another May 2010 settlement agreement, EPA agreed to promulgate the massive Chesapeake Bay "total maximum daily load" (TMDL) that could force agriculture out of the Chesapeake Bay altogether. The agreement also called for EPA to promulgate a Chesapeake Bay "concentrated animal feeding operation" (CAFO) rule (due out in the next few months) that increases the number of smaller livestock operations subject to CAFO regulations. The sheer cost of complying with the CAFO regulations for small operations will be too great for them to continue operation in the Chesapeake Bay.

These are only a few examples of the crippling effects the "sue and settle" scheme has had on our industry. The *Sunshine for Regulatory Decrees and Settlements Act* would put an end to this abuse, and we look forward to working with you to advance it through Congress.

Sincerely,

Public Lands Council  
National Cattlemen's Beef Association  
American Sheep Industry Association  
Association of National Grasslands



Resolution 13-2  
March 6, 2013  
Scottsdale, Arizona

As certified by  
R. Steven Brown  
Executive Director

**THE NEED FOR REFORM AND STATE PARTICIPATION  
IN EPA'S CONSENT DECREES WHICH SETTLE CITIZEN SUITS**

WHEREAS, federal environmental programs may be, and generally are, authorized or delegated to states;

WHEREAS, in addition to authorization and delegation, states are provided certain stand alone rights and responsibilities under federal environmental laws;

WHEREAS, the United States Environmental Protection Agency (U.S. EPA) may be sued in federal court by citizens over the alleged failure to perform its nondiscretionary duties, such as taking action on state environmental agency submissions, promulgating regulations, meeting statutory deadlines, or taking other regulatory actions;

WHEREAS, state environmental agencies may have information that would materially benefit the defense of a citizen suit or the reaching a settlement, and may have interests that should be considered in the evaluation of a settlement;

WHEREAS, state environmental agencies are not always notified of citizen suits that allege U.S. EPA's failure to perform its nondiscretionary duties, are often not parties to these citizen suits, and are usually not provided with an opportunity to participate in the negotiation of agreements to settle citizen suits;

WHEREAS, the agreements U.S. EPA negotiates to settle citizen suits may adversely affect states;

NOW, THEREFORE, BE IT RESOLVED THAT THE ENVIRONMENTAL COUNCIL OF THE STATES:

Affirms that states have stand alone rights and responsibilities under federal environmental laws, and that the state environmental agencies are co-regulators, co-funders and partners with U.S. EPA;

Urges the U.S. EPA to devote the resources necessary to perform its nondiscretionary duties within the timeframes specified under federal law, especially when required to take action on a state submission made under an independent right or responsibility (e.g., State Implementation Plans under the Clean Air Act).

Specifically calls on U.S. EPA to notify all affected state environmental agencies of citizen suits filed against U.S. EPA that allege a failure of the federal agency to perform its nondiscretionary duties;

Believes that providing an opportunity for state environmental agencies to participate in the negotiation of citizen suit settlement agreements will often be necessary to protect the states' role in implementing

federal environmental programs and for the administration of authorized or delegated environmental programs in the most effective and efficient manner;

Specifically calls on U.S. EPA to support the intervention of state environmental agencies in citizen suits and meaningful participation in the negotiation of citizen suit settlement agreements when the state agency has either made a submission to EPA related to the citizen suit or when the state agency either implements, or is likely to implement, the authorized or delegated environmental program at issue;

Believes that no settlement agreement should extend any power to U.S. EPA that it does not have in current law;

Believes that greater transparency of citizen suit settlement agreements is needed for the public to understand the impact of these agreements on the administration of environmental programs;

Affirms the need for the federal government to publish for public review all settlement agreements and consider public comments on any proposed settlement agreements;

Encourages EPA to respond in writing to all public comments received on proposed citizen suit settlement agreements, including consent decrees.



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REVIEW & OUTLOOK: March 10, 2013, 8:00 PM ET

## Fishing for Wildlife Lawsuits

*The Interior Department revives the game of 'sue and settle.'*

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Deal Print

The Senate last week gave a warm confirmation welcome to Sally Jewell, until recently the head of outdoor equipment company REI and now President Obama's nominee to run the Interior Department. It's a pity the Senators didn't ask what Mrs. Jewell thinks of the Obama Administration's amazing assault on private property. Its weapon is the Endangered Species Act.

The Interior Department's Fish and Wildlife Service has resurrected a Clinton-era tactic known as "sue and settle." With this strategy, outside green groups friendly to the Administration sue the government, demanding a particular regulatory action. The agency happily forswears court and sits down with the plaintiffs to reach a settlement.

The Administration then claims it was forced to take an action that it wanted all along. One more thing: Businesses and property owners most hurt by the settlement are barred from the talks; the public gets no input. Is this a great country or what?

This tactic reached a zenith in Fish and Wildlife's 2011 mega-settlement with the Center for Biological Diversity, WildEarth Guardians, and other green groups over the species act. That agreement allowed Fish and Wildlife to claim it must take action on some 750 species covered by 85 legal actions. The deal's immediate effect was to tee up 250 species for full protection, including sweeping "critical habitat" designations that will restrict commercial or other use of millions of acres of

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private property.

Among the 750 species is the lesser prairie chicken, a bird whose listing could devastate farmers and ranchers across five states. Oh, and the greater sage grouse, which could shut down oil and gas development and cattle grazing, for starters.

The Administration is also moving to hide the costs of these actions. One of the only smart parts of the species act is a requirement that regulators evaluate the economic impact of designating a critical habitat. That at least gives the public a sense of the costs for businesses and landowners.

The Administration is pushing a rule to dilute these inconvenient economic reports, by moving to what is known as the "baseline" approach. This allows regulators to assume, for purposes of the economic analysis, that the land in question is already subject to a critical habitat designation—and thus worthless for private economic activity. Fish and Wildlife can then claim the only cost of a listing is the cost to the agency itself.

Louisiana Senator David Vitter, ranking member on the Environment and Public Works Committee, has demanded that Fish and Wildlife provide details of its interactions with the suing green groups. The agency refused. Mr. Vitter is calling on Congress to cut off money for the enforcement of these settlements. That's a start.

The 40-year-old law has an undistinguished record of restoring species. Its main effect now is simply to terminate economic activity. Mrs. Jewell could make a mark at Interior by initiating a modernization of the species act, and it's a shame no one in the Senate thought the issue mattered enough to inquire about.

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Subcommittee on Regulatory Reform, Commercial and Antitrust Law  
Hearing on  
H.R. 1493, the "Sunshine for Regulatory Decrees  
and Settlements Act of 2013"  
June 5, 2013

Questions for the Record

**Question from Ranking Member Steve Cohen for John Walke**

- 1. During the hearing, Mr. Kovacs stated that limitations on standing should be sufficient to curtail the scope of H.R. 1493's intervention provision. What is your response?**

Constitutional limits on standing do not curtail the harmful scope of H.R. 1493, nor do they provide any argument for the bill becoming law. Any bill passed by Congress must of course abide by the Constitution. Congress may not alter or displace the minimum constitutional standing requirements found in Article III. As such, H.R. 1493's scope is in no way curtailed by constitutional standing requirements—and constitutional standing is not the problem with H.R. 1493.

Though it may not violate the Constitution, H.R. 1493 is based on faulty premises, purports to solve a problem that does not exist and creates harmful obstacles to enforcing federal laws. It represents deeply flawed public policy. The legislation would burden the judicial process with processes that would lengthen litigation, interfere with law enforcement, and make it more difficult and expensive for parties to enforce the law. The bill would mean that federal agencies would be held accountable less often when they fail to follow the laws written by Congress.

As an initial matter, no witness at the hearing was able to show, through either their written or oral statements, any proof of improper behavior between the government and third parties in settling lawsuits through consent decrees or settlement agreements. Moreover, it has been acknowledged that these settlements most often arise out of violations of *nondiscretionary* duties such as statutory deadlines.<sup>1</sup> If Congress does not like that particular statutes impose deadlines, it may change those deadlines. But Congress should not resort to irresponsible legislation like H.R. 1493 as a tool to prevent or impede enforcement of duly enacted laws.

Further, Mr. Kovacs, and the Chamber's recent report, have defined any lawsuit resulting in a consent decree or settlement agreement between the federal government and environmental

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<sup>1</sup> See, e.g., The Office of Majority Leader Eric Cantor, *The Imperial Presidency: Implications for Economic Growth and Job Creation*, at 23 available at <http://majorityleader.gov/theimperialpresidency/files/The-Imperial-Presidency-Majority-Leader-Eric-Cantor-%27s-Office.pdf>.

groups as evidence of “sue and settle,” painting law enforcement activities as detrimental to governance. This is not the case. Citizen suit authorities are one of the longest-standing and proudest features of modern administrative laws. They represent a “deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that [environmental laws] would be implemented and enforced.”<sup>2</sup>

H.R. 1493 would interfere with the federal government’s ability to settle cases (such as those relating to statutory deadlines) that it knows it cannot win. It would force the government to spend limited time and resources litigating a case or going through endless rounds of settlement negotiations, and it would have the effect of making litigation prohibitively expensive for many citizens groups.

The bill ignores the role of the Judiciary and upends traditional judicial processes. Courts currently police settlement agreements and consent decrees, and ensure that federal agencies do not commit to substantive outcomes nor improperly relinquish their discretion. Further, longstanding Department of Justice policy outlines the boundaries of this discretion.<sup>3</sup> The bill reflects a bias in favor of industry intervenors obstructing settlement agreements between federal agencies and third parties, ensuring protracted litigation and the continuing failure to uphold federal laws.

Lastly, it is important to remember that settlement agreements and consent decrees remedy government lawbreaking. These agreements have ensured that landmark public health rulemakings are undertaken, and have led to less smog, soot, and neurotoxic mercury and lead pollution, to name just some of the benefits. After decades of missed statutory deadlines, consent decrees and settlement agreements secure rulemakings that will save tens of thousands of lives once fully implemented. When our federal government does not enforce public health laws as written, consent decrees and settlement agreements provide a mechanism to hold government accountable. H.R. 1493 would erect serious obstacles to ensuring federal laws are upheld, leaving Americans less able to enforce laws on the books to protect our air, water, and health.

Constitutional limitations on standing do nothing to remedy the multitude of harms actively created by this legislation.

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<sup>2</sup> *Natural Res. Def. Council v. Train*, 510 F.2d 692, 700 (1974); *See also Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 263 (1975) (“Congress has opted to rely heavily on private enforcement to implement public policy”); *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 483 U.S. 711, 737 (1987) (Blackmun, J., dissenting) (noting reasonable fees provisions of environmental laws “to encourage the enforcement of federal law through lawsuits filed by private persons”).

<sup>3</sup> Memorandum from Edwin Meese III, Attorney General, to All Assistant Attorneys General and All United States Attorneys (Mar. 13, 1986).

**2. Under what circumstances does an agency typically agree to settle when it is sued for failure to issue a rule?**

Federal agencies most commonly enter into consent decrees with plaintiffs to address an agency's failure to perform a nondiscretionary (or mandatory) statutory duty under federal law. These nondiscretionary duties most frequently concern a failure to meet plain statutory deadlines set by Congress. Republican co-sponsors of H.R. 1493's companion Senate bill, S. 714, have recognized as much, noting that the settlement agreements and consent decrees targeted by their legislation "[t]ypically" arise in cases where "the defendant agency has failed to meet a mandatory statutory deadline for a new regulation or is alleged to have unreasonably delayed discretionary action."<sup>4</sup> Put another way, agencies typically settle such cases when they have no chance of winning the case because the violation (a missed statutory deadline) is so clear. In my experience, with respect to discretionary statutory provisions—which involve legal responsibilities but not ones governed by specific statutory deadlines—agencies are far more likely to litigate a case than settle it. So, H.R. 1493 would shift this landscape, either inducing agencies to "litigate and lose" cases regarding nondiscretionary duties that they have identified as unwinnable, or obstructing settlements and delaying law enforcement in lawsuits agencies believe should not be defended in court.

Nondiscretionary duties such as statutory deadlines are written into law by Congress. If Congress does not like a statutory deadline, it may change it. If Congress no longer supports a particular statute, it may amend it. But without these explicit acts of Congress, surely the Legislative Branch wants the Executive Branch to follow duly enacted laws. H.R. 1493 would interfere with enforcement of the very laws Congress has written.

**3. Citing an American Action Forum study, Mr. Kovacs says that since 2009, new regulatory requirements totaled \$488 billion in compliance costs. What is your response?**

Though I can't speak to the study in its entirety, it's instructive to look at some of the EPA rules cited by Mr. Kovacs in furtherance of this point. For example, on page 6 of his testimony, Mr. Kovacs cites EPA's Mercury and Air Toxics Standards for the premise that "Sue and Settle Agreements Create Costly Federal Rules." The first and most obvious response to this mistaken premise is that these federal standards were created by a law passed by Congress, the Clean Air Act. The consent decree that preceded the standards set deadlines for EPA actions—deadlines nearly a decade after the statute required—because EPA had failed to comply with a nondiscretionary statutory duty, established again by Congress. That consent decree was entered by a federal district court judge.

Mr. Kovacs' testimony highlighted that the standards will cost up to \$9.6 billion dollars but failed to acknowledge that the monetized benefits of the standards exceed the costs by three to nine times: EPA estimates that the health savings alone would be worth \$37 to 90 billion per

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<sup>4</sup> Press Release, Senator Chuck Grassley, "Regulatory Reform Initiative Seeks Sunshine, Accountability, and Pro-Jobs Environment," April 11, 2013, *available at* [http://www.grassley.senate.gov/news/Article.cfm?RenderForPrint=1&customcl\\_dataPageID\\_1502=45458](http://www.grassley.senate.gov/news/Article.cfm?RenderForPrint=1&customcl_dataPageID_1502=45458).

year.<sup>5</sup> Moreover, the agency acknowledges that it did not monetize a number of benefits, meaning that the benefits from the rule are likely much higher. Looking only at the cost of the standards while ignoring the benefits misrepresents what is at stake from enforcing the law to minimize the harms that pollution causes Americans.

Finally, and most disturbing of all, not only do the Chamber's claims ignore the net monetized benefits of all of the stated regulations, but they entirely ignore the very real human health benefits that make up those monetized figure. The health standards criticized by the Chamber will prevent tens of thousands of deaths *each year*. They will mean fewer heart attacks and asthma attacks, and fewer children sent to the hospital with breathing problems.<sup>6</sup> These standards will mean less mercury pollution – a dangerous neurotoxin that harms fetuses and children's developing brains. They will also reduce acid gases, cancer-causing dioxins, smog, soot, and many other pollutants. These historic clean air standards will mean cleaner, safer air for all Americans, which is why Congress directed EPA to reduce dangerous pollution to protect Americans.

**4. In his written testimony, Mr. Kovacs cites 10 examples of supposed “sue and settle” agreements that resulted in costly federal rules. Are you familiar with any of these examples? If so, what is your response to his charge that these settlements are examples of how “sue and settle” tactics have been a costly phenomenon for business?**

Mr. Kovacs' list of “sue and settle” agreements that are “costly” is found at page six of his testimony. I will speak only to the clean air standards, as that is my primary area of expertise. First, as discussed above in question three, his testimony does not mention or acknowledge the benefits of any of these standards. One cannot understand the true “costliness” of a standard without knowing its benefits and the costs that will continue to be imposed on Americans in the absence of the standard. As an initial matter, all of the clean air standards listed have monetized benefits that greatly exceed their costs.<sup>7</sup>

<sup>5</sup> U.S. EPA, “Benefits and Costs of Cleaning Up Toxic Air Pollution From Power Plants,” <http://www.epa.gov/mats/pdfs/20111221MATSImpactsfs.pdf>

<sup>6</sup> See *infra*, n. 5.

<sup>7</sup> See, e.g., n. 5; U.S. EPA, “Overview of Final Amendments to Air Regulations for the Oil and Gas Industry” <http://epa.gov/airquality/oilandgas/pdfs/20120417fs.pdf> (“The estimated revenues from selling the gas that currently goes to waste are expected to offset the costs of compliance, while significantly reducing pollution from this expanding industry. *EPA’s analysis of the rules shows a cost savings of \$11 to \$19 million when the rules are fully implemented in 2015*” (emphasis added)); U.S. EPA, “Fact Sheet: Adjustments for Major and Area Source Boilers and Certain Incinerators,” [http://www.epa.gov/airquality/combustion/docs/20121221\\_sum\\_overview\\_boiler\\_ciswi\\_fs.pdf](http://www.epa.gov/airquality/combustion/docs/20121221_sum_overview_boiler_ciswi_fs.pdf) (“Americans will receive \$13 to \$29 in health benefits for every dollar spent to meet the final standards”); U.S. EPA, “Overview of EPA’s Revisions to the Air Quality Standards for Particle Pollution (Particulate Matter),” <http://www.epa.gov/pm/2012/dccfsoverview.pdf> (“EPA estimates that meeting the annual primary fine particle standard of 12.0 µg/m<sup>3</sup> will provide health benefits worth an estimated \$4 billion to \$9.1 billion per year in 2020 -- a return of \$12 to \$171 for every dollar invested in pollution reduction. Estimated annual costs of implementing the standard are \$53 million to \$350 million.”)

Second, while Mr. Kovacs charges that all of these standards result from improprieties that he pejoratively dubs “sue and settle tactics,” several points are quite revealing. Mr. Kovacs does not—and cannot as far as I am aware—identify any evidence of collusion, wrongdoing or any impropriety whatsoever on the part of EPA or the private parties involved in any related settlements. Of the clean air standards on Mr. Kovacs’ list, all involved EPA’s failure to meet nondiscretionary statutory deadlines set by Congress. Mr. Kovacs’ testimony levels serious charges of wrongdoing with a pejorative label that has not been backed by facts or evidence in his testimony or at the June 5<sup>th</sup> hearing. EPA complied with notice-and-comment rulemaking requirements and all other procedural obligations in issuing these standards. Neither Mr. Kovacs’ testimony nor any other witness or member presented any evidence to the contrary.

As I elaborated on in my written testimony, painting any consent decree or settlement agreement as “sue and settle” wrongdoing by a federal agency is baseless and unfair. The clean air standards listed in Mr. Kovacs’ testimony are in many cases years overdue or the result of a court decision instructing EPA to rewrite standards found to be unlawful and insufficiently protective of human health. And in conclusion it bears emphasizing a response to an earlier question: these federal standards were created by a law passed by Congress, the Clean Air Act. EPA had failed to comply with statutory deadlines set by Congress and, in some instances, issued unlawful standards that needed to be re-issued pursuant to court directives.

I will briefly summarize the clean air standards in Mr. Kovacs list below:

**1. *EPA’s Mercury and Air Toxics Standards***

See pages 11-13 of my written testimony. In short, these standards were finalized pursuant to a timeline memorialized in a consent decree between EPA and health and environmental organizations after the agency had missed a statutory deadline to promulgate standards by *more than a decade*. The decree was approved by a federal district court judge, and EPA complied with the Administrative Procedure Act in adopting the standards.

**2. *Toxic Air Pollution Standards for Oil and Natural Gas***

EPA’s toxic air pollution standards for oil and gas were first issued in 1999. Sections 112(d)(6) and (f)(2) of the Clean Air Act require EPA to review and revise, as appropriate, promulgated toxic air pollution standards every eight years. Under these sections of the Act, EPA should have taken these steps by 2007. As such, EPA’s recently finalized standards were five years overdue when issued. At the same time, so-called “New Source Performance Standards” for the sector, which were also issued with the 2012 air toxics standards, are required to be revised every eight years. These were last updated in 1985. Since EPA was years overdue on both these standards, environmental groups sued the agency in 2009. In 2010 EPA entered into a judicially-approved consent decree acknowledging the agency’s duty to undertake rulemakings for both of these standards and establishing enforceable deadlines for those rulemakings. Congress set the deadlines for EPA action in the Clean Air Act.

### 3. *Regional Haze implementation Rules*

Regional haze requirements for Class I areas of pristine air quality were established in 1999. State Implementation Plans (SIPs) for this program were due in 2007. In 2009, EPA made a finding that 37 states, the Virgin Islands, and the District of Columbia failed to submit all or a portion of their SIPs. In 2011, EPA agreed to a schedule to take action on 45 of these overdue plans after states still had failed to make the required submissions. Again, these deadlines were written into the law by Congress, and in agreeing to take action on these plans, EPA is merely carrying out the overdue requirements written into the law.

### 4. *Toxic Air Pollution Standards for Industrial Boilers*

The Clean Air Act requires EPA to set toxic air pollution standards for Industrial Boilers. These facilities emit neurotoxic mercury, acid gases, hydrogen chloride, and cancer-causing dioxins. EPA first promulgated standards for this sector in 2004, but those standards were struck down in a 2007 court decision. When EPA failed to move forward with revised standards as the statute required it to do, the agency was sued and entered into a consent decree requiring action by 2011. At that point the agency was over a decade late promulgating lawful standards. EPA complied with the Administrative Procedure Act in adopting the standards.

### 5. *Revisions to National Ambient Air Quality Standards for Particulate Matter*

The Clean Air Act requires EPA to adopt national “primary” ambient air quality standards for particulate matter requisite to protect public health with an adequate margin of safety. 42 U.S.C. §7409(b)(1). The Act further requires EPA to adopt national “secondary” air quality standards requisite to protect public welfare, including vegetation and wildlife. *Id.* §7409(b)(2). EPA must review these standards every five years, and revise them as appropriate based on the latest scientific information. *Id.* §7409(d)(1).

EPA last updated the previous annual PM<sub>2.5</sub> standard in 1997, setting the standard at 15 µg/m<sup>3</sup>. The administration at that time examined the scientific literature on PM<sub>2.5</sub> during its statutory review process in 2006, but the then-EPA Administrator defied the scientific evidence and consensus views of the agency’s Clean Air Science Advisory Committee (CASAC)<sup>8</sup> and declined to update the unprotective annual PM<sub>2.5</sub> standard of 15 µg/m<sup>3</sup>. At that time, all seven of the standing members of the CASAC committee and 20 out of 22 members of CASAC’s Particulate Matter Review Panel had voted to recommend that EPA strengthen the annual PM<sub>2.5</sub> standard to between 13 and 14 µg/m<sup>3</sup>. Nonetheless, the Administrator issued final standards maintaining the annual PM<sub>2.5</sub> standard at 15 µg/m<sup>3</sup>.

Public health and environmental groups filed lawsuits challenging the 2006 Bush Administration decision to maintain the unprotective annual standard. In 2009, the U.S. Court of Appeals for the D.C. Circuit invalidated the annual PM<sub>2.5</sub> standard of 15 µg/m<sup>3</sup> and remanded the standard to EPA. The court found that EPA’s decision to maintain the annual standard at 15

<sup>8</sup> Congress established the Clean Air Science Advisory Committee (CASAC) and its critical role advising EPA on national ambient air quality standards in the Clean Air Act Amendments of 1977 (see 42 U.S.C. § 7409(d)(2)).

$\mu\text{g}/\text{m}^3$  was “contrary to law and unsupported by adequately reasoned decisionmaking.” The court directed EPA to address this and other deficiencies during the agency’s next review of  $\text{PM}_{2.5}$  standards, scheduled for 2011.

EPA failed to propose any rulemaking after the 5-year statutory deadline expired in October of 2011. At that time environmental and public health groups filed a lawsuit over the agency’s failure to meet the nondiscretionary statutory deadline. EPA subsequently entered into a consent decree that required it to propose standards no later than June 14, 2012 and finalize them on December 14, 2012. The EPA Administrator signed the final standards on December 14, 2012, after complying with the Administrative Procedure Act in adopting the standards.

#### 6. *Reconsideration of 2008 Ozone NAAQS*

As with particulate matter, the Clean Air Act requires EPA to adopt national ambient air quality standards (NAAQS) for ozone requisite to protect public health with an adequate margin of safety. 42 U.S.C. §7409(b)(1). EPA must review these standards every five years, and revise them as appropriate based on the latest scientific information. *Id.* §7409(d)(2)(B).

In 1997, EPA set the ozone NAAQS at 84 parts per billion (ppb). The ozone NAAQS were not updated again until March of 2008. Prior to that, in 2006, EPA’s Clean Air Scientific Advisory Committee (CASAC) found that the pre-existing health standard of 84 ppb, established in 1997, was far too weak and unprotective. CASAC *unanimously* recommended that EPA strengthen the standard to somewhere between 60 to 70 ppb. Specifically, CASAC recommended that “the primary 8-hr NAAQS needs to be substantially reduced to protect human health, particularly in sensitive subpopulations. Therefore, *the CASAC unanimously recommends a range of 0.060 to 0.070 ppm for the primary ozone NAAQS.*”<sup>9</sup> (emphasis in original).

On March 27, 2008, however, then-EPA Administrator Stephen Johnson disregarded the unanimous CASAC recommendations and signed a final rule revising the primary ozone standard to 75 ppb.<sup>10</sup> When the Obama Administration took office, then-EPA Administrator Lisa Jackson noted that she was going to reconsider the 2008 ozone NAAQS because they were “not legally defensible given the scientific evidence.”<sup>11</sup> During that reconsideration process, CASAC reaffirmed its scientific recommendations.<sup>12</sup> In 2011, like in 2006, the 1997 standards were in drastic need of updating.

<sup>9</sup> Letter from Dr. Rogene Henderson, Chair, CASAC, to the Hon. Stephen L. Johnson, Administrator, U.S. EPA (Oct. 24, 2006), available at <http://www.epa.gov/sab/pdf/casac-07-001.pdf>.

<sup>10</sup> 73 Fed. Reg. 16,436 (Mar. 27, 2008).

<sup>11</sup> Letter from Lisa P. Jackson, Administrator, U.S. EPA, to the Hon. Thomas R. Carper, U.S. Senator (July 13, 2011), available at [http://www.eenews.net/assets/2011/07/14/document\\_gw\\_03.pdf](http://www.eenews.net/assets/2011/07/14/document_gw_03.pdf).

<sup>12</sup> Letter from Dr. Jonathan M. Samet, Chair, CASAC, to the Hon. Lisa P. Jackson, Administrator, U.S. EPA, (Mar. 30, 2011), available at [http://yoscmic.epa.gov/sab/sabproduct.nsf/RSSRecentHappeningsCASAC/F08BEB48C1139E2A8525785E006909AC/\\$File/EPA-CASAC-11-004-unsigned+.pdf](http://yoscmic.epa.gov/sab/sabproduct.nsf/RSSRecentHappeningsCASAC/F08BEB48C1139E2A8525785E006909AC/$File/EPA-CASAC-11-004-unsigned+.pdf).

Under EPA's most recently announced schedule, a proposed ozone rulemaking could not occur until some unknown time after March 2014, following preparation of a proposal to reflect CASAC's input.

By now, Americans have been living with ozone health standards deemed unhealthy by the scientific community and legally indefensible by the EPA Administrator for over 16 years. In the absence of an enforceable consent decree to hold the agency accountable for violating its statutory deadlines, Americans have lived with unsafe ozone standards for almost two decades longer than they should have. The history of the EPA's ozone standards demonstrates the critical importance of consent decrees in securing the full protection of our environmental laws.

**5. Mr. Kovacs says that because of "sue and settle" tactics, instead "of agencies being able to use their discretion as to how best utilize their limited resources, they are forced to shift these resources away from critical duties in order to satisfy the narrow demands of outside groups." What is your response?**

Settlement agreements ensure that agencies fulfill duties that *Congress*, not advocacy groups, has deemed mandatory and enacted into federal statutes. Agencies lack discretion as a matter of law to ignore or contravene these mandatory statutory duties. It is simply false to say these Congressional choices are the "narrow demands" of outside parties, when Congress has deemed the duties "critical" enough to be the subject of nondiscretionary, mandatory statutory obligations.

Settlement agreements still provide agencies with considerable flexibility. The agreements and consent decrees contain standard language allowing the parties to modify the agreements with mutual consent and court approval, or even for the agency to modify the agreement over the plaintiffs' objection if the court approves the modification.<sup>13</sup> Agencies of course continue to maintain the full discretion afforded by law to propose and finalize rulemakings that carry out federal statutes, including consideration of alternative approaches that include the decision not to adopt any given regulation. Stated differently, settlements do not commit agencies to any particular rulemaking outcome. Finally, it is my experience that if an agency like EPA determines that it needs more time than it initially believed necessary, then deadlines in these agreements are extended.<sup>14</sup>

<sup>13</sup> See, e.g., PM<sub>2.5</sub> Consent Decree, at 4, ¶ 6 ("The Parties may extend the deadline established in Paragraph 3 by written stipulation executed by counsel for all Parties and filed with the Court on or before the date of that deadline; such extension shall take effect immediately upon filing the stipulation. In addition, EPA reserves the right to file with the Court a motion seeking to modify any deadline or other obligation imposed on EPA by Paragraphs 3, 4, 5 or 14. EPA shall give Plaintiffs at least five business days' written notice before filing such a motion. Plaintiffs reserve their rights to oppose any such motion on any applicable grounds.") available at <http://switchboard.nrdc.org/blogs/jwalke/PM2.5%20consent%20decree.pdf>.

<sup>14</sup> Agencies may determine more time is needed due to unforeseen circumstances or last-minute crunches, often leading to relatively short extensions. See, e.g., *American Nurses Assoc. v. Johnson*, No. 1:08-cv-02198 (D. D.C. Dec. 18, 2008) (consent decree modified on Oct. 24, 2011, to allow final standards no later than Dec. 16, 2011).

**6. Mr. Kovacs says that “when advocacy groups and agencies negotiate deadlines and schedules for new rules through the sue and settle process, the ensuing rulemaking is often rushed and flawed.” What is your response?**

This is an unfounded concern. And it is revealing that Mr. Kovacs’ testimony does not bear out this charge with actual facts. First and most obviously, agencies only consent to decrees and agree to settlements when the agency believes in good faith that it can meet the specified deadlines and is prepared to commit to that publicly and before a federal judge. Presenting settlements and decrees to judges for approval means an agency is making a representation to the court that it can satisfy the terms of the document. As with the absence of any proof of collusion entering into settlements, I have seen no evidence that agencies agreeing to deadlines in settlements are acting in bad faith or making misrepresentations to courts. Nor would it be in their interest to do so.

Second, as noted above, settlement agreements and consent decrees can be modified with mutual consent and court approval or even over the plaintiffs’ objection if the court approves the modification. Again, in my experience, if the agency determines that it needs more time then deadlines in these agreements are extended.

Finally, EPA has addressed this issue directly and corrected the misunderstanding that settlement deadlines pressure agencies. Republican Senators recently submitted questions to EPA Administrator nominee Gina McCarthy and asked whether “deadlines in settlements sometimes put extreme pressure on the EPA to act.”<sup>15</sup> To the contrary, EPA responded: “Where EPA settles a mandatory duty lawsuit based on the Agency’s failure to meet a statutory rulemaking deadline, the settlement agreement or consent decree *acts to relieve pressure on EPA* resulting from missed statutory deadlines by establishing extended time periods for agency action.”<sup>16</sup>

**7. Mr. Kovacs says that advocacy groups get agencies to issue substantive requirements that are not required by law through sue and settle tactics. What is your response?**

Substantive regulatory requirements are *not* established through settlement agreements. And Mr. Kovacs has presented no evidence or examples to back this charge. The majority of consent decrees address an agency’s failure to perform a nondiscretionary (or mandatory) statutory duty under federal law. These nondiscretionary duties most frequently concern failure

<sup>15</sup> Senator Vitter, Questions for the Record, Gina McCarthy Confirmation Hearing, Environment and Public Works Committee, May 6, 2013, at p. 23 *available at* [http://www.cpw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=9a1465d3-1490-4788-95d0-7d178b3dc320](http://www.cpw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=9a1465d3-1490-4788-95d0-7d178b3dc320) (“Senator Vitter Questions”).

<sup>16</sup> *Id.* (emphasis added).

to meet one or more plain statutory deadlines.<sup>17</sup> The consent decrees merely establish a new deadline for the agencies to perform these nondiscretionary duties; the substance of the actual regulation is not decided by a consent decree or a settlement agreement. That comes later through a process involving the public, in a rulemaking conducted pursuant to notice-and-comment under the Administrative Procedure Act. Moreover, a decree could not commit an agency to a particular statutory outcome. In fact, any such effort to dictate the substantive outcome of a rulemaking process would be subject to invalidation in the courts. Courts police these decrees for precisely this reason, and the practice that Mr. Kovacs claims to fear is already prohibited.

**8. Mr. Kovacs says that notice and comment rulemaking is insufficient to give the public the opportunity to comment on rules that result from sue and settle agreements. What is your response?**

This is incorrect. Regulations that result from settlement agreements go through the same notice-and-comment procedures as all other regulations, with no shortchanging of the public's opportunity to comment on rulemakings. Agencies may not subvert the procedures required by the Administrative Procedure Act through a consent decree or settlement. Neither Mr. Kovacs nor any other witness or member identified any rulemaking that followed a settlement and provided the public with any less opportunity to comment during that rulemaking than under any other rulemaking conducted in accordance with the Administrative Procedure Act.

**9. Mr. Easterly suggests that a lack of notice about citizen lawsuits against agencies can lead to consent decrees and settlement agreements that impose onerous requirements on states. What is your response?**

I believe that to be incorrect. As an initial matter, it bears repeating that consent decrees and settlements do not impose requirements on any non-agency parties, including states. And none of the provisions in agreements commit federal agencies to substantive outcomes that impose requirements on states. Any requirements that follow settlements may be created only pursuant to notice-and-comment rulemakings where states enjoy full participation opportunities like other members of the public. States remain free to object to perceived onerous requirements in public comments on proposed rulemakings. States have the right to file lawsuits challenging perceived onerous requirements that they believe to be contrary to federal law or arbitrary and

<sup>17</sup> See, e.g., *American Lung Association et al. v. U.S. EPA*, No. 1:12-cv-00243, at 2 (D. D.C. Sept. 4, 2012) (consent decree in a "suit[] against EPA alleging that the Agency has failed to perform a nondiscretionary duty required by the Clean Air Act") ("PM2.5 Consent Decree") available at <http://switchboard.nrdc.org/blogs/jwalke/PM2.5%20consent%20decree.pdf>; *American Nurses Assoc. v. Johnson*, No. 1:08-cv-02198 (D. D.C. Dec. 18, 2008) (consent decree requiring action by EPA to issue final regulations relating to toxic air pollution from power plants); Press Release, Senator Chuck Grassley, "Regulatory Reform Initiative Seeks Sunshine, Accountability, and Pro-Jobs Environment," April 11, 2013, available at [http://www.grassley.senate.gov/news/Article.cfm?RenderForPrint=1&customel\\_dataPageID\\_1502=45458](http://www.grassley.senate.gov/news/Article.cfm?RenderForPrint=1&customel_dataPageID_1502=45458) ("The sue-and-settle problem has occurred primarily in litigation against regulatory agencies over allegations that agency action has been lawfully withheld or unreasonably delayed. Typically, the defendant agency has failed to meet a mandatory statutory deadline for a new regulation or is alleged to have unreasonably delayed discretionary action.").

capricious. That right exists in rulemakings preceded by settlements and rulemakings that are not preceded by settlements.

**10. Mr. Easterly contends that EPA does not engage in the necessary dialogue with states on how best to implement environmental statutes. What is your response?**

That contention is contrary to my own experience as a public interest attorney and my prior experience as an EPA attorney. It has been my experience that EPA officials in the EPA regions and EPA headquarters meet and talk regularly with state and local officials to discuss how best to implement environmental laws. EPA officials also meet on a regular basis with the various associations that represent state and local agencies. Notably, under the current administration, the former EPA Administrator, Lisa Jackson, the current acting Administrator, Bob Perciasepe, the current Assistant Administrator for Air, Gina McCarthy, and Deputy Assistant Administrator for Air, Janet McCabe, all have worked as state or local environmental officials prior to their tenure at EPA. (Indeed, Ms. McCabe worked for the same state agency as Mr. Easterly, the Indiana Department of Environmental Management.) It is my experience that these officials and other EPA officials take very seriously the need to engage and the value from engaging with states on how best to implement environmental statutes. The Clean Air Act could not function without the vital work that state and local agencies do to meet their statutory obligations under the Act. This federal-state partnership founded on the principle of “cooperative federalism” is an important component of what has made the 40-year history of the Clean Air Act so successful at cleaning up air pollution.