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EXAMINING 'SUE AND SETTLE' AGREEMENTS: PART I

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON
THE INTERIOR, ENERGY, AND ENVIRONMENT

AND THE

SUBCOMMITTEE ON
INTERGOVERNMENTAL AFFAIRS

OF THE

COMMITTEE ON OVERSIGHT
AND GOVERNMENT REFORM
HOUSE OF REPRESENTATIVES

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EXAMINING 'SUE AND SETTLE' AGREEMENTS: PART I

Wednesday, May 24, 2017

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE INTERIOR, ENERGY, AND ENVIRONMENT JOINT WITH THE SUBCOMMITTEE ON INTERGOVERNMENTAL AFFAIRS
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, D.C.

The subcommittees met, pursuant to call, at 2:08 p.m., in Room 2154, Rayburn Office Building, Hon. Hon. Blake Farenthold [chairman of the Subcommittee on Interior, Energy, and Environment], presiding.

Present from the Subcommittee on Interior, Energy and Environment: Representatives Farenthold, Plaskett.

Present from the Subcommittee on Intergovernmental Affairs: Representatives Palmer, Grothman, Demings, DeSaulnier.

Also Present: Representative Smith

Mr. FARENTHOLD. The Subcommittee on the Interior, Energy, and the Environment and the Subcommittee on Intergovernmental Affairs will come to order.

Without objection, the chair is authorized to declare a recess at any time.

You all will have to excuse me. I am a little hoarse today.

VOICE. [Off audio.]

Mr. FARENTHOLD. Oh, I am good. Thank you.

Today our subcommittee will begin to examine the consequences of sue and settle agreements, which have become increasingly common in recent years. Sue and settle agreements occur behind closed doors, outside the regulatory framework set out by the Administrative Procedures Act, a/k/a, the APA, with very little transparency, and often appear to thwart congressional intent and review.

Today, we will begin the discussion on sue and settle agreements, their impact, and potential solutions to what I consider to be an unacceptable and possibly unconstitutional expansion of both judicial and executive regulatory power. We need a solution that returns legislative authority to Congress, and, equally importantly, lets the American people see and have input into the process.

Specifically, today we will examine sue and settle agreements that impact environmental policy through the Endangered Species Act, the Clean Air Act, and the Clean Water Act.

The APA has long ensured transparency and public engagement in the Federal rulemaking process. Federal agencies have enacted countless environmental rules and regulations using this frame-

work. However, the sue and settle process short circuits this long-used and congressionally-created rulemaking process.

Many of our Nation's most famous environmental statutes, such as the Clean Air Act or the Endangered Species Act, allow for citizen suits, which ensure that the government is held accountable to these laws. However, through sue and settle, citizens and environmental interest groups have found a way to exploit these provisions by suing Federal agencies for failing to complete specific actions by a certain date and time, and then coming to a favorable friendly settlement with the government regulators. These agreements are quietly negotiated away from the public eye and finalized by the court.

While one may argue the merits of the system, it unfortunately is susceptible to manipulation and abuse. This tactic results in the agency agreeing to prioritize the plaintiff's agenda, not Congress' or the American people's. In an effort to comply, the agency can inadvertently be forced to divert large quantities of their time, money, and other resources to filling just one of these consent decrees.

A prime example of this kind of manipulation was when WildEarth Guardians and the Center for Biological Diversity proposed that the U.S. Fish and Wildlife Service, or the FWS, expand the Endangered Species Act to include more than 720 additional species. When FWS failed to accomplish this daunting task during the necessary time, the two groups sued. The negotiated agreement allowed WildEarth Guardians and the Center for Biological Diversity to virtually dictate the Agency's priorities moving forward, which ultimately cost 75 percent of FWS' funds that were allocated to the Endangered Species Listing and Critical Habitat designation.

The sue and settle process creates an unfair system. The winners are the small few who manage to manipulate the Federal government into doing their bidding. The losers are the taxpayers whose hard-earned money goes to pay for attorneys for both sides of the case, and focuses agency resources on the plaintiff's priority for listing and enforcement, as opposed to the other responsibilities of the agency, Congress, and the American people.

Recently, Congressman Doug Collins introduced the Sunshine for Regulation and Regulatory Decrees and Settlement Act of 2017 to increase transparency and public engagement by ensuring there is notice and input for public comment. I think this is a good first step, and I thank Congressman Collins for introducing this bill, and I look forward to exploring additional suggestions, solutions, and issues with our panel today.

I would now like to recognize our ranking member, Ms. Plaskett, for her opening statement.

Ms. PLASKETT. Thank you, Mr. Chairman, and thank our other committee members for being here. And, Chairman Palmer, thank you for your work as well.

Thank you for calling today's hearing and bringing attention to the issues regarding sue and settle practices. As members of Congress, it is our duty to ensure the safety and rights of the American people. It is important that our citizens are able to bring suit against the government. It is one of the essential factors in our rulemaking process. We must hold our government agencies ac-

countable, and this is exactly what this committee and citizen suits are designed to do.

The concept of sue and settle in environmental litigation to bypass requirements and normal statutory process is simply not as stated by many here in this hearing. Agencies must comply with the law as written by Congress, including the requirements for notice and comment provided in the Administrative Procedures Act. While agencies can commit to a schedule for performing their mandatory duties, agencies cannot settle litigation by making commitments concerning the substance of final regulations they will issue.

There already are long-established procedures that prevent Federal agencies from entering into consent decrees and settlement agreements that circumvent these rulemaking procedures. These safeguards include standing requirements that require concrete adverseness among litigants, the need to obtain judicial approval of settlements, and requirements of the Administrative Procedure Act that preclude agencies from making commitments concerning the substance of future rules.

The GAO report on the so-called sue and settle phenomenon in 2014 largely put to rest many of the claims of impropriety in the process. Under President Trump's Administration, private companies will benefit substantially if there is, in fact, a concept of sue and settle. Private companies will be able to use the concept of sue and settle in order to roll back agency regulations protecting our environment. However, we do not believe that sue and settle, in fact, occurs, and that the rulemaking process must, in fact, be there.

President Trump and his Administration has made it clear with his budget proposal that protecting our environment is not a priority. President Trump proposed to cut EPA by 31.4 percent, the main focus of taking care of the oil and chemical industries. We should not further burden Federal courts and agencies with new obstacles to settlements that will result in more protracted litigation.

I look forward to discussing this topic in more depth, and thank you again, Mr. Chairman, for bringing this subject to our attention.

Mr. FARENTHOLD. Thank you. I will now recognize Mr. Palmer, the chairman of the Subcommittee on Intergovernmental Affairs, for his opening statement.

Mr. PALMER. Thank you, Mr. Chairman. As noted, today we are examining sue and settle agreements between environmental advocacy groups and Federal agencies. And I would first like to thank our witnesses for appearing, and look forward to your testimony and your answers to our questions.

The sue and settle phenomenon refers to a process where outside activist groups will sue the Federal agency for violating a provision of Federal law. It is not just Federal agencies. It is State and local governments as well. It has been going on for quite a while. It first came to my attention around 2004 when Senator Lamar Alexander of Tennessee introduced the Federal Consent Decree Fairness Act.

What happens in these lawsuits I think the witnesses will know, but I will go ahead and explain that. The parties will often choose to settle by entering into a consent decree rather than facing a trial. In many of these cases, it is apparent that the agencies col-

laborate beforehand with the groups to set up the terms of the decree without public notice or third-party input. These are legally binding agreements that are approved by a judge, and they are enforceable by contempt, and can only be modified by court order, which takes them completely outside of the legislative process and the administrative process.

These agreements can last for decades and end up costing more than if the parties had gone to trial. There are numerous examples of this, and they are broad in their application, whether it is education consent decrees, consent decrees involving environmental issues. We have had them in Alabama. As a matter of fact, the largest bankruptcy in the history of North America is Jefferson County in Alabama that all started with a consent decree involving our storm sewer system.

These agreements have consent provisions that extend beyond the scope of the original law violated, and I want to emphasize that. Because it is a consent decree, and whether or not the defendant is ever in compliance is controlled by a control group or a special master, these things can extend beyond the original complaint. They are an effective tool for advocacy groups to unilaterally dictate the priorities of an agency's agenda or a local county commission, or city council, or a State for that matter.

They are also done outside the Administrative Procedures Act. In a February 2017 report, the GAO, the Government Accountability Office, found that two environmental groups, the Center for Biological Diversity and WildEarth Guardians, filed more than half of the Endangered Species Act deadline suits between 2005 and 2015. According to GAO, these suits resulted in more than 1,600 actions affecting 1,441 species in just a 10-year period.

Comparatively, the GAO found that only 76 species have been delisted since the enactment of the Endangered Species Act. Even in these cases, 19 of these species were delisted because of data errors in the original listing, and only 47 occurred as a result of recovery efforts. This indicates that the structure of the Endangered Species Act is not conducive to its purported goal.

These actions place an enormous burden on States, local governments, industry stakeholders, and taxpayers who are shut out of the negotiations, but are left to foot the bill. Moreover, interest groups can petition the government to cover their attorney's fees through the Department of Treasury's Judgment Fund, which is a permanent, indefinite appropriation of taxpayer money for payments of certain final judgments. Consequently, American taxpayers are paying the legal costs for groups that are suing them.

This does not even account for the funds that are expended by the Department of Justice to provide representation for Federal agencies entering into these lawsuits. The public is kept largely in the dark throughout the process, and few resources are available to inform them of what is happening and who is responsible. I daresay the vast majority of the residents of Jefferson County had no idea that this all began with a consent decree.

Because of the incomplete data and lack of proper categorization, we are unable to fully evaluate the total amount taxpayers pay out as a result of settlement agreements. For example, in my previous experience, you know, leading an Alabama think tank, I was un-

able to obtain a complete list of all Federal consent decrees that apply to the State from the Department of Justice because of inadequate record keeping. This lack of transparency limits our constitutional duty to conduct oversight of management of taxpayer resources.

I have heard too many stories from State and local officials where special interest attorneys dictated critical actions ranging from pipe sizes to bridge infrastructure instead of engineers and administrators with specific expertise or private citizens whose homes and livelihoods were compromised. I have heard too many stories where State and local governments and their citizens were forced to reprioritize billions of dollars in resources by those in Washington who claim to be serving the public's greater interest. In cases where settlement agreements failed to accomplish their stated goal but their terms remain in effect, there is absolutely no accountability.

It is time for the Federal government to move away from emphasizing its role as prosecutor or political monitor and return to serving as the American people's partner in setting priorities that best represent their interests. I am encouraged that the committee is highlighting the important aspect of sue and settle.

I look forward to today's hearing as an important first step in examining these practices, and I yield back.

Mr. FARENTHOLD. Thank you very much. I will now recognize Ms. Demings, ranking member of the Subcommittee on Intergovernmental Affairs, for her opening statement.

Ms. DEMINGS. Thank you so much, Mr. Chairman, and thank you so much to our witnesses for joining us today.

While this is the first hearing on sue and settle agreements in the 115th Congress, it is the fourth hearing that departs from the false premise that Federal regulations only harm economic development and America's spirit of enterprise. If you begin with that false premise, every environmental protection regulation is harmful.

The chemical industry would have us believe that the Obama Administration and EPA scientists colluded—colluded— with environmental groups to issue regulations intended to harm industry. This is a notion that the Government Accountability Office has rejected time and again.

In the last hearing the committee held on legal settlements of environmental lawsuits, a 2011 Government Accountability Office report found no discernible trend that would indicate collaboration or collusion in lawsuits against the EPA. A December 2014 GAO report confirmed this assessment, and found that from May 2008 to June 2013, EPA only issued nine rules resulting from settlements for rules that were between 10 months and 23 years delinquent under the mandatory statute deadlines. Each of these was subject to robust public comment before the final rule was issued.

Let me be clear. Congress passes a law, and Federal agencies issue a rule or regulation. If the EPA or any other Federal agency fails to perform a mandatory duty under that law, they are susceptible to a legal challenge for violating the law that Congress passed. The 2014 GAO report found that the majority, if not all, EPA settlements were under the decades-old law, the Clean Air Act.

Another false premise is the inaccurate notion that environmental groups are behind most of the litigation against the government. In fact, industry trade associations and private companies initiated nearly half of all cases filed against the EPA between 1995 and 2010. I have not heard my Republican colleagues demonstrate equal concern about these industry lawsuits.

For a successful vibrant and modern economy, economic development must go hand-in-hand with environmental protection and conservation. We certainly know that in Florida, my State, where more than 70 percent of the 75 million foreign and domestic visitors enjoy Florida's natural resources, including the beaches, springs, and hiking trails while in the Sunshine State. When the government is in violation of the law, settlement agreements can prevent prolonged trials and staggering legal expenses, particularly at agencies already struggling to carry out their mission.

I thank you today, witnesses, for sharing your testimony, and I look forward to continuing this very important discussion.

Thank you, Mr. Chairman, and I yield back.

Mr. FARENTHOLD. Thank you. I will hold the record open for 5 legislative days for members who would like to submit a written opening statement.

Mr. FARENTHOLD. I would also now like to recognize our panel of witnesses. I am pleased to welcome Mr. William Kovacs, senior vice president of environment, technology, and regulatory affairs with the U.S. Chamber of Commerce. We have also got Ms. Darcy Helmick. She is with Simplot Livestock Company in Grand View, Idaho. Mr. Kent Holsinger. Is that how you say it?

Mr. HOLSINGER. Holsinger.

Mr. FARENTHOLD. Holsinger Law Firm, LLC in Denver, Colorado. And we have Mr. Justin Pidot. Is that correct? He is the associate professor of law at the Denver Sturm College of Law in Denver, Colorado.

Welcome to all of you.

Pursuant to committee rules, all witnesses will be sworn before they testify. Would you please rise and raise your right hands?

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

[Chorus of ayes.]

Mr. FARENTHOLD. Let the record reflect that all witnesses answered in the affirmative. You may be seated.

In order to allow time for discussion, we would appreciate it if you would limit your oral testimony to 5 minutes. Your entire written statement will be made part of the record.

You will find in front of you you have a timer that will count down. As you are getting near the end, the light will go from green to yellow and then eventually to red. If you would wrap it up then, we would appreciate it. I am sure all the members of the panel would definitely like to ask you guys some questions.

So, we will start with Mr. Kovacs. You are recognized for 5 minutes. Sir, bring the microphone nice and close. We are budget conscious here, so we bought the inexpensive mics that you got to get real close to your mouth.

WITNESS STATEMENTS

STATEMENT OF WILLIAM KOVACS

Mr. KOVACS. Thank you, Chairman Farenthold, and Chairman Palmer, Ranking Members Plaskett and Demings, for inviting me to discuss examining the sue and settle agreements.

As many of you have said, sue and settle occurs when an agency agrees to the demands of an interest group by voluntarily entering into an approved consent decree. And it's the consent decree that really changes a little bit of what is going on because it's not a settlement agreement. We can get into that later. But it binds the agency to future actions, and sometimes it binds future Administrations.

Here's how the problem starts. An Agency like EPA, and we'll just start with that, they miss somewhere between 84 percent and 96 percent of its deadlines, and once a deadline is missed, the interest group can sue the Agency. And since EPA misses virtually all of its deadlines, the interest group can go in and select which rules out of hundreds of rules it wants to advance. It's through this selection process that the interest groups establish the priorities of the Agency. Moreover, by using a consent decree, the only parties that can enforce the consent decree is the interest group, the agency, or the court. The public is completely out of the process.

Democrat and Republican Administrations have for years used the sue and settle process. At times it may be needed as a tool. We're not against the entire process. However, its use in the last several years has dramatically increased, both in the number of consent decrees filed, but also in the types of actions covered. For example, by using sue and settle tactics, groups have been able to expand their influence over agency priorities from prioritizing the issuance of regulations to the imposition of Federal implementation plans instead of State plans, and to the imposition of permanent conditions on private parties.

When the Chamber first looked at the sue and settle process and these consent decrees, we were told by EPA and Justice that they did not maintain a unified database for such lawsuits, and we were assured that there were very few. We undertook research, which culminated in the first report, Sue and Settle: Regulating Behind Closed Doors, which lists well over a hundred new regulations from these consent decrees between the years 2009 and 2012. Our most recent report, Damage Done 2013 to 2016, found that there were actually more Clean Air Act sue and settle agreements filed between 2013 and 2016 than between 2009 and 2012. It's about 77 to 60.

We recognize that Administrator Pruitt has stated he's going to end the process of sue and settle. However, it's still a very important issue, and legislation is needed because the practice is something that can be repetitive in the future.

While there are several ways to address this issue, the simplest approach is found in H.R. 469, the Sunshine for Regulations and Regulatory Decrees Settlement Act, which focuses on transparency and public participation. This is really crucial. We are not trying to change any of the law in terms of how the process goes or the

discretion of the agencies. What we're trying to do under 469 is to bring transparency to the process.

And H.R. 469 does three things. One, it provides a 60-day notice to the public so that the public can provide comments to the agency on the consent decree. Second, it's requiring the agency to provide a summary of the public's comments to the court so the court can review the comments before it signs off on the consent decree. And finally, it allows interested parties the right to intervene if they can establish that their rights are not being adequately protected by the defending party.

The bottom line is that transparency and public participation should apply when agencies are making public policy decisions, regardless of who is in the White House or who controls the agencies.

Thank you very much, and I look forward to answering questions.

[Prepared statement of Mr. Kovacs follows:]

Statement of the U.S. Chamber of Commerce

ON: Hearing on Examining "Sue and Settle" Agreements: Part I.

TO: U.S. House Committee on Oversight and Government Reform, Subcommittee on the Interior, Energy and Environment and Subcommittee on Intergovernmental Affairs

DATE: May 24, 2017

1615 H Street NW | Washington, DC | 20062

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. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

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.

BEFORE THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM OF THE U.S. HOUSE, SUBCOMMITTEE ON THE INTERIOR, ENERGY AND ENVIRONMENT AND SUBCOMMITTEE ON INTERGOVERNMENTAL AFFAIRS

Hearing on Examining "Sue and Settle" Agreements: Part I

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

May 24, 2017

Good afternoon, Chairmen Farenthold and Palmer, Ranking Members Plaskett and Demings, and distinguished Members of the Subcommittees. 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 details the Chamber's strong support for H.R. 469, the "Sunshine for Regulatory Decrees and Settlements Act of 2017." By requiring agencies to be more transparent, responsive and accountable to the public, the bill helps to ensure that the regulatory process is open and fair to all.

A. Background

Over the past decade, the business community has expressed growing concern about interest groups using lawsuits against federal agencies and subsequent consent decrees approved by a court as a "short cut" technique to influence agencies' regulatory agendas. These sue and settle agreements occur when an agency chooses not to defend lawsuits brought by activist groups, and the agency agrees to legally-binding, court-approved settlements negotiated behind closed doors – with no participation by other affected parties or the public.[1]

The Chamber appreciates the decision by new Environmental Protection Agency ("EPA") Administrator Scott Pruitt to end the practice of sue and settle. The Administrator stated that "[r]egulation through litigation is simply wrong."[2] While Administrator Pruitt's new policy is a much-welcomed and needed step in the right direction, it is important to note the history of sue and settle agreements to ensure that practice does not occur again and to examine the future trends in environmental lawsuits.

In 2011, the U.S. Chamber set out to determine how often sue and settle agreements actually happen and to identify major sue and settle cases.

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[1] 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).

[2] Kimberly A. Strassel, "Scott Pruitt's Back-to-Basics Agenda for the EPA," *The Wall Street Journal* (Feb. 17, 2017) *available at* https://www.wsj.com/articles/scott-pruitts-back-to-basics-agenda-for-the-epa-1487375872.

The Chamber's July 2012 report, ***EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs***,[3] illustrated how the U.S. Environmental Protection Agency has used sue and settle agreements with activist groups to override state decisions—and force more costly and burdensome regional haze requirements on the states.

Subsequently, the Chamber's May 2013 report, ***Sue and Settle: Regulating Behind Closed Doors***,[4] catalogued scores of sue and settle agreements that imposed major new regulatory burdens. In total, the report found that between 2009 and 2012, a total of 71 lawsuits against EPA and other federal agencies were settled under circumstances that categorize them as sue and settle cases. These agreements resulted in over 100 regulatory actions, with some of these actions imposing $1 billion or more in annual costs and burdens on businesses, consumers, and local communities.[5] The report discussed the public policy implications of having the priorities of a federal agency determined by consent decrees.

The Chamber's most recent report, ***Sue and Settle Updated: Damage Done 2013-2016*** (which is included as Attachment A to this testimony), updates our 2013 report and catalogues the sue and settle agreements made under the Clean Air Act for that time period.

Together these reports demonstrate how sue and settle agreements distort the regulatory process and undercut the public's role in rulemaking that Congress required through the Administrative Procedure Act.[6] As a result of the sue and settle process, the agency intentionally gives up its discretion to perform its duties in a manner that it believes serves the public interest best, and agrees to bind itself to the terms of settlement agreements. In doing so, the agency agrees to prioritize the demands of activist groups over and above competing interests—including committing congressionally-appropriated funds. 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 developed through the imposition of a court-approved consent decree 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. 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.

B. <u>Sue and Settle Developments Since 2013</u>

The Chamber's updated analysis of sue and settle agreements since 2013 found that EPA's practice of agreeing to the tactic had not diminished-- and had actually expanded under

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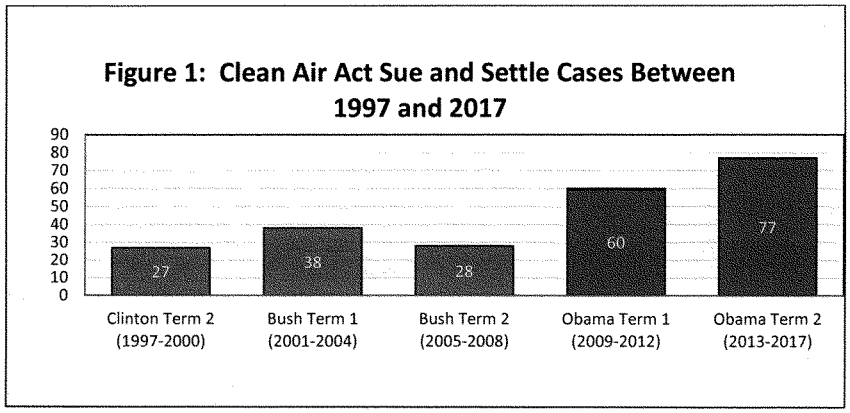
[3] U.S. Chamber of Commerce, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs* (July 2012) *available at* https://www.uschamber.com/sites/default/files/documents/files/1207_ETRA_HazeReport_lr_0.pdf.
[4] U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors* (May 2013) *available at* https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf.
[5] *Id.* at 15-20.
[6] 5 U.S.C. §§ 500 *et seq.*

the previous administration. Based on *Federal Register* notices of draft consent decrees in cases where the EPA was sued under the Clean Air Act, our May 2013 study found that the agency negotiated a total of **60** Clean Air Act ("CAA") sue and settle agreements between 2009 and 2012.[7]

From 2013 to 2016, advocacy groups have used these tactics even more frequently. As shown in Figure 1, between January 2013 and January 2017, EPA agreed to an additional 77 CAA consent decrees. Thus, over the last 8 years EPA welcomed substantially more CAA settlements (139) than previous administrations did over the preceding 12-year period (93).



Source: EPA, *Federal Register*

The economic impact of these settlements is often profound and widespread:

Sue and Settle Agreements Result In Costly New Regulatory Burdens

- Chesapeake Bay Clean Water Act rules - up to **$6 billion** cost for states to comply.[8]
- 2013 Revision to the PM2.5 NAAQS - up to **$350 million** annual costs.[9]
- 2015 Clean Power Plan – between **$5.1 billion and $8.4 billion** annual costs.[10]
- 2015 Startup, Shutdown & Malfunction (SSM) rule – nearly **$ 12 million** annual costs.[11]

[7] U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors* (May 2013) *available at* https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf at 14.

[8] Chesapeake Bay Program, *Funding and Financing*, "State Funding" (2012), *see* www.chesapeakebay.net/about/how/funding (the six states and the District of Columbia anticipated combined expenditures of $2.4 billion in their 2011 milestone, or as much as $6 billion over a decade).

[9] EPA, "Overview of EPA's Revisions to the Air Quality Standards for Particulate Matter" (2012).

[10] EPA, Regulatory Impact Analysis, Clean Power Plan Final Rule, Exec. Summary (October 23, 2015) at ES-9. Currently the Clean Power Plan is under a stay order which was handed down by the United States Supreme Court on February 9, 2016.

[11] North Carolina Department of Environmental Quality, Division of Air Quality, *Fiscal and Regulatory Analysis for Amendments Concerning SSM* Operations (May 12, 2016) available at https://ncdenr.s3.amazonaws.com/s3fs-public/Environmental Management Commission/EMC Meetings/2016/May2016/Attachments/AttachmentB_to16-20_SSM_SIP_Call.pdf. EPA did not conduct a regulatory impact analysis for the Startup, Shutdown & Malfunction (SSM) SIP Call, saying it could not estimate how each state will act to revise its SIP. However, North Carolina estimated that the SIP Call

- 2011-2016 Regional Haze rules - more than **$5 billion** additional cost to comply.[12]
- 2016 OSM Stream Protection rule – **$3-$6 billion** in lost state tax revenues on coal.[13]

Moreover, many of the major sue and settle agreements entered into since 2009 are only now having impacts that can be felt. For example, in December 2010, EPA entered into a sue and settle agreement that obligated the agency to issue a rule limiting greenhouse gas (GHG) emissions from electric utilities.[14] The GHG rules ultimately finalized by EPA in 2015 under the Clean Power Plan will, under EPA's ***own*** economic analysis, impose between **$5.1 billion and $8.4 billion** in annual compliance costs on businesses, communities, and states.[15] Enforcement of the rules was stayed by the United States Supreme Court on February 9, 2016 pending judicial review.[16]

Likewise, in March 2010, the Department of the Interior's Office of Surface Mining ("OSM") entered into a settlement with advocacy groups to revise its Stream Protection Rule affecting coal mining operations near streams. OSM published the final Stream Protection Rule on December 20, 2016.[17] The National Mining Association had estimated that the Stream Protection Rule would potentially cost between 112,757 and 280,809 mining-related jobs in coal-producing states. Equally important, the rule was anticipated to result in a loss of between **$3.1 billion and $6.4 billion in tax revenues for governments**, including already hard-hit state and local governments in states like Kentucky and West Virginia.[18] These effects were never fully realized because the President signed a Congressional Review Act resolution of disapproval eliminating the rule on February 16, 2017.[19]

Similarly, as the result of a lawsuit filed by activist groups, EPA agreed in May 2010 to impose costly new requirements on the six states and the District of Columbia that contribute most of the runoff to the Chesapeake Bay.[20] The Chesapeake Bay Program has estimated the total cost for the states to comply with new federal requirements to be as much as **$6 billion**.[21] The Bay states must impose more stringent operating requirements on farmers, businesses and

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revisions would cost the state air agency and affected facilities $337,700 annually to comply. Assuming that North Carolina is representative of the affected states, assigning North Carolina's costs to the 35 affected states gives an annual cost of the SSM SIP Call of about $12 million.

[12] U.S. Chamber of Commerce, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs* (July 2012); Testimony of William Yeatman before the House Committee on Science, Space and Technology, Subcommittee on Environment (March 29, 2016), *available at*: https://cei.org/content/testimony-william-yeatman-%E2%80%9Cepa%E2%80%99s-regional-haze-program%E2%80%9D-subcommittee-environment-committee.

[13] National Mining Association, *Economic Analysis of Proposed Stream Buffer Protection Rule* (October 2015) http://www.ourenergypolicy.org/wp-content/uploads/2015/10/Final-SPR-Economic-Impact-Report-NMA.pdf. The Stream Buffer Protection Rule was later vitiated by enactment of a Congressional Review Act resolution of disapproval signed by President Trump on February 16, 2017.

[14] EPA, Notice of Proposed Settlement Agreement, 75 Fed. Reg. 82,392 (Dec. 30, 2010).

[15] EPA, Regulatory Impact Analysis, Clean Power Plan Final Rule, Executive Summary at ES-9 (October 23, 2015).

[16] Order in Pending Case, *Chamber of Commerce, et al. v. EPA, et al.*(Feb. 9, 2016) *available at* https://www.supremecourt.gov/orders/courtorders/020916zr3_hf5m.pdf

[17] 81 Fed. Reg. 93,066 (December 20, 2016).

[18] National Mining Association, *Economic Analysis of Proposed Stream Buffer Protection Rule* (October 2015) http://www.ourenergypolicy.org/wp-content/uploads/2015/10/Final-SPR-Economic-Impact-Report-NMA.pdf

[19] *See* Pub. Law No. 115-5.

[20] *Fowler v. EPA*, No. 10-00005 (settled May 10, 2010).

[21] Chesapeake Bay Program, *Funding and Financing*, "State Funding" (2012), *see* www.chesapeakebay.net/about/how/funding (the six states and the District of Columbia anticipated combined expenditures of $2.4 billion in their 2011 milestone, or as much as $6 billion over a decade).

other sources within the watershed. For example, Pennsylvania has to "implement over 22,000 acres of additional forest and grass buffers" to meet federal pollutant load requirements.[22] In other words, the state must place land use limits on 22,000 acres to satisfy new federal requirements the state was prevented from having any role in crafting.

C. Special Interest Groups and EPA Increasingly Used Sue and Settle between 2013 and 2016 to Exert Direct Control over the States

Between the years 2013 and 2016, EPA and advocacy groups increasingly used sue and settle agreements to exert direct control over **state** decision making, including petitions for EPA to object to a state's issuance or renewal of an individual facility's clean air operating permit. EPA agrees to grant or deny the petition within a specified date—and most often subsequently requires the state to modify the permit to satisfy the advocacy group(s). These agreements gave EPA and special interest group a way to rewrite facility permits, thereby exerting direct control over the states.

Other recent sue and settle agreements involve EPA pressuring the states to prioritize specific actions on State Implementation Plans (SIPs), regardless of existing state priorities. As was the case with **federal** agency resource priorities and agendas, special interests now increasingly use "sue and settle" as a way to reprogram **state** resources and policy agendas. For example rules resulting from sue and settle agreement like the Clean Power Plan and the Startup, Shutdown, and Malfunction rule have necessitated states to amend their own implementation plans.[23]

Among the most egregious of direct federal actions imposed upon the states via "sue and settle" has been the imposition by EPA of **Federal Implementation Plans (FIPs)**. Under the Clean Air Act, the FIP is designed as a "last-ditch" federal backstop to be used only where a state is unwilling or is unable to develop a required SIP. As noted in our 2012 report *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs*, however, EPA is choosing to impose FIPs on states in order to compel specific policy outcomes. Our 2012 report focused on Regional Haze FIPs that EPA imposed on the states of Arizona, Minnesota, Montana Nebraska, New Mexico, North Dakota, Oklahoma, and Wyoming.[24] These FIPs allowed EPA to federalize actions that Congress intended to be decided by the states.[25]

Since 2013, EPA has turned to the FIP as an everyday tool, increasingly relying on it as a means to take direct control of state- and local-level environmental decision making. As Figure 2 clearly shows, the Obama Administration imposed vastly more FIPs on states than all administrations combined since 1989.

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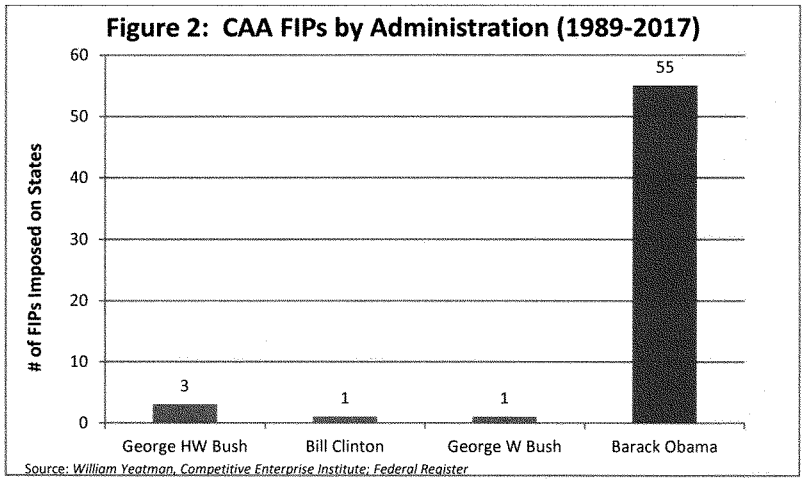
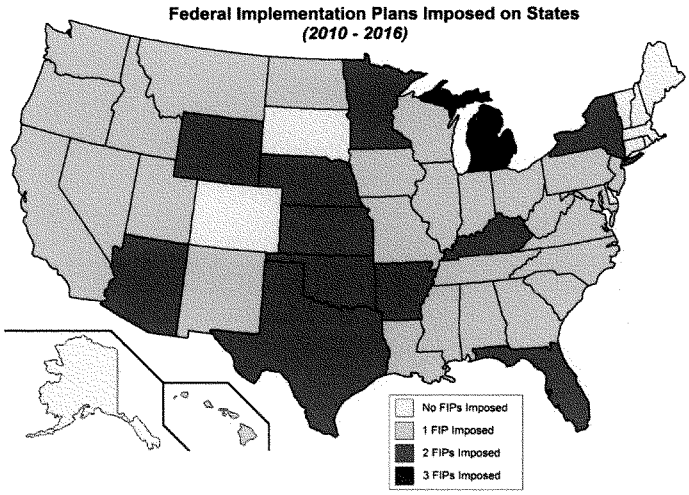
[22] *See* EPA, Interim Evaluation of Pennsylvania's 2014-2915 Milestones and WIP [Watershed Improvement Program] Progress (June 10, 2015) *available at* https://www.epa.gov/sites/production/files/2015-07/documents/pennsylvania2014-2015interimmilestoneevaluation_61015.pdf at 3.
[23] Letter from Gary C. Rickard, Executive Director, Mississippi Department of Environmental Quality, to Senator James M. Inhofe, Chairman, Senate Committee on Environment and Public Works (Feb. 8, 2016) *available at* http://www.epw.senate.gov/public/_cache/files/b8c2fe2a-b564-4bfb-aa42-555c0a70612f/mississippi.pdf.
[24] U.S. Chamber of Commerce, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs* (July 2012).
[25] *Id.* at 5.



These include **17** FIPs dealing with regional haze (all in the wake of sue and settle agreements), **9** FIPs relating to greenhouse gas permitting programs, **28** FIPs for the cross-state air pollution rule, and **1** FIP for oil and gas activities in Indian Country (land located within the boundaries of federally-recognized Indian reservations).

As the U.S. map below clearly illustrates, EPA has not only imposed a very large number of FIPs since 2010, the agency has also imposed FIPs across a wide geographic swath, literally from coast to coast. **Forty of the 50 states** have been hit with at least one FIP since 2010.



Source: Federal Register

To make matters worse, since January 2013, based on a list of Notices of Intent to sue made publicly available by EPA, activist groups have notified EPA of their intent to file **more than 180** lawsuits under the Clean Air Act or the Clean Water Act, with more than **125** under the CAA.[26] While not all of these Notices of Intent will become lawsuits that, in turn, become sue and settle agreements, experience shows that many will.

D. EPA's Failure to Meet Statutory Deadlines Drives Most Sue and Settle Cases

Under several of the major environmental laws, such as the CAA, and the Clean Water Act, EPA is required to take actions within specific statutory deadlines. The EPA overwhelmingly fails to meet those deadlines, however. For example, according to a 2014 *Harvard Journal of Law & Public Policy* article, "[i]n 1991, the EPA met only **14%** of the hundreds of congressional deadlines" imposed upon it.[27]

Another study by the Competitive Enterprise Institute examined the EPA's timeliness to promulgate regulations or review standards under three programs administered through the

[26] *See* EPA, "Notices of Intent to Sue the U.S. Environmental Protection Agency Documents," *available at* https://www.epa.gov/noi.

[27] Henry N. Butler and Nathaniel J. Harris, *Sue, Settle, and Shut Out the States: Destroying Environmental Benefits of Cooperative Federalism*, HARVARD JOURNAL OF LAW & PUBLIC POLICY, Vol. 37, No. 2 at 599 (2014) (available at http://www.harvard-jlpp.com/wp-content/uploads/2014/05/37_2_579_Butler-Harris.pdf) (citing Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law* 54 LAW & CONTEMP. PROBS. 311, 323 (1991) (available at http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1158&context=facpub). According to Lazarus, "the 14% compliance rate refers to all environmental statutory deadlines, 86% of which apply to EPA." *Id.* at 324.

CAA: the National Ambient Air Quality Standards, the National Emissions Standards for Hazardous Air Pollutants, and the New Source Performance Standards.[28] The 2013 CEI study concluded that since 1993, "**98 percent of EPA regulations (196 out of 200) pursuant to these programs were promulgated late, by an average of 2,072 days after their respective statutorily defined deadlines.**"[29]

EPA has consistently failed to meet the vast majority of its action deadlines, even in past years when the agency has enjoyed staffing and budget levels well above current levels.[30] Given the thicket of interrelated statutory deadlines—some dependent on the completion of others—and the procedural requirements that are a prerequisite to agency action, it is essentially impossible for EPA to meet its continuous deadlines.

When EPA misses deadlines—as it almost always does—advocacy groups can sue the agency via the citizen suit provision in the CAA[31] for failure to promulgate the subject regulation or to review the standard at issue. Because EPA is out of compliance with the CAA's statutory deadlines virtually all of the time, advocacy groups are free to pick and choose the rules they believe should be a priority. This gives third party interests a way to dictate EPA priorities and budgetary agendas, particularly when the agency is receptive to settlements. Instead of being able to use its discretion as to how best utilize limited resources, the agency agrees to shift these resources away from critical duties in order to satisfy the narrow demands of outside groups.

E. "Sue and Settle" Goes Far Beyond Simply Enforcing Statutory Deadlines

Activist groups often argue that these lawsuits are really just about deadlines, and that the settlements are only about **when** the agency must fulfill its nondiscretionary duty.[32] This argument ignores several critical facts, however. First, 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 priorities 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. Congress has the authority to control EPA's budget and resource priorities through appropriations, and Congress should not allow advocacy groups to use sue and settle agreements

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[28] "EPA's Woeful Deadline Performance Raises Questions about Agency Competence, Climate Change Regulations, "Sue and Settle" by William Yeatman, July 10, 2013 (*emphasis added*)(available at https://cei.org/web-memo/epas-woeful-deadline-performance-raises-questions-about-agency-competence-climate-change-re).

[29] *Id.*

[30] According to EPA, its largest budget ($10.3 billion) was in FY2010, while its biggest staff roster (18,110) was in FY1999. In FY2016, EPA's budget was $8.1 billion, with 15,376 employees. See https://www.epa.gov/planandbudget/budget.

[31] 42 USC § 7604.

[32] Advocacy groups point to a December 2014 Government Accountability Office (GAO) report that evaluated seven consent agreements that EPA entered into between May 31, 2008 and June 1, 2013 that resolved deadline suits. The report concluded that these settlement agreements had little or no impact on EPA or its rulemakings because they did not require EPA to modify its discretion, take an otherwise discretionary action, or prescribe a specific substantive rulemaking outcome. The GAO report suffers from several fatal flaws, however, including the fact that GAO relied exclusively on information provided by EPA and DOJ, the report only considered 7 settlement agreements out of more than 60 such settlements identified in the *Federal Register*, the report itself acknowledges that agencies cannot meet compliance obligations under previous settlement agreements, let alone new ones, and the settlement agreements have forced EPA to redirect its resources into meeting agreed-upon deadlines, to the detriment of all other scheduled regulatory actions, which themselves are overdue.

to circumvent the appropriations process.

Second, when advocacy groups and agencies negotiate deadlines and schedules for new rules through the sue and settle process, the ensuing rulemakings are often rushed and flawed. These hurried rulemakings typically require correction through technical corrections, subsequent reconsiderations or court-ordered remands to the agency. It can take months or years for courts to correct these defective rules. One such example is the Mercury Air Toxics ("MATS" or "Utility MACT") Rule which was rooted in a settlement agreement agreed to during the Obama Administration by the EPA.[33] Even though affected industries were allowed to intervene in the case, EPA and the suing advocacy group 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 negations, the court still approved the decree in the lawsuit.[34] In the final year of President Obama's first term, EPA released in the *Federal Register* the extremely expensive Utility MACT Rule, which EPA was not previously required to issue, which was estimated to cost $9.6 billion annually by 2015.[35] In 2015, the Supreme Court reversed and remanded the MATS Rule because of EPA's failure to consider costs in determining the appropriateness of regulating mercury emissions from power plants.[36] Unfortunately, in the three years between the release of the MATS rule and the Court's decision on the merits, the economic damage had been done to the economy via already-invested compliance costs and power plant closures.

Third, 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. Setting an unreasonable deadline for one rule draws resources from other agency rulemakings that are also under deadlines.[37]

Fourth, advocacy groups can also significantly affect the regulatory environment by compelling an agency to issue substantive requirements that are not required by law.[38] 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.[39] One

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[33] *American Nurses Ass'n,* Defendants Notice of Lodging of Proposed Consent Decree (Oct. 22, 2009).

[34] *American Nurses Ass'n v. Jackson*, No. 1:08-cv-02198 (RMC), 2010 WL 1506913 (D.D.C Apr. 15, 2010).

[35] "National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units," 77 *Federal Register* (Feb. 16, 2012): 9304, 9306; *see also* Letter form President Barack Obama to Speak John Boehner (August 30, 2011), Appendix "Proposed Regulations from Executive Agencies with Cost Estimates of $1 Billion or More."

[36] http://www.supremecourt.gov/opinions/14pdf/14-46_10n2.pdf

[37] This is illustrated clearly by 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.[37] 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 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.[37] In other words, sue and settle cases and other lawsuits are now driving the regulatory agenda of the Endangered Species Act program at FWS.

[38] For example, EPA's imposition of a timetable and enhanced substantive TMDLs and stormwater requirements on the Chesapeake Bay was not mandated by federal law.

[39] Agreed deadlines commit an agency to make one specific rulemaking a priority, ahead of all other rules. According to the director of the Fish and Wildlife Service ("FWS"), in Fiscal Year 2011, the FWS was allocated $20.9 million for endangered

such example is the timetables and enhanced total maximum daily loads ("TMDL") established by EPA for the Chesapeake Bay which resulted from a sue and settle agreement.[40] Some lawmakers even expressed concern that EPA's actions concerning to the Chesapeake Bay were not authorized by federal law.[41]

Finally, one of the primary reasons that advocacy groups seek 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.

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.

F. 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.[42]

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.[43] Rather than hearing from a range of interested parties and designing the rule with 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.

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species listing and critical habitat designation; the agency spent more than 75% of this allocation ($15.8 million) taking substantive actions or court orders or settlement agreements resulting from litigation.

[40] *Fowler v. EPA*, Settlement Agreement (May 19, 2010).

[41] 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 Session, January 20, 2012. The date of the letter is based on http://votesmart.org/public-statement/663407/letter-to-lisa-jacksonadministrator-of-environmental-protection-agency-epa.#.WRsQZPnyuUk.

[42] In proposed settlement agreements the Chamber has commented on, such as for the revised $PM_{2.5}$ 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.

[43] 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.

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.

G. Citizen Lawsuits Remain a Threat to Growth in a Post-"Sue and Settle" World

Although Administrator Pruitt has declared that EPA will no longer engage in the practice of "sue and settle," citizen lawsuits remain a threat to economic growth. Realizing that they have less influence in the current administration than the previous one, some activist organizations have called on the activist community to sue private parties under citizen suit provisions of environmental statutes.[44]

In 1970, Congress enacted the first citizen suit provision,[45] which was contained within the Clean Air Act.[46] A citizen suit allows a private citizen to sue any person (including the government) for violating a mandatory requirement of a statute. Further, the private citizen can sue the federal government for failure to take nondiscretionary acts or duties that are required by a statute.[47] Citizen suits are also often used to challenge other matters such as the issuance of a permit.

Citizen suits are not supposed to enrich the plaintiffs, but to serve the interests of the public.[48] Therefore, as "private attorneys general," plaintiffs are not awarded damages, but they may receive injunctive relief to secure the desired action and may be entitled to litigation costs, including attorney and expert witness fees, when a court deems it is appropriate.[49] The awarding of costs to plaintiffs may incentive activists groups to file lawsuits that may otherwise not have been brought due to cost considerations.

Some environmental statutes like the Clean Water Act require that a citizen filing a lawsuit send a notice of intent to sue to the Administrator of the EPA sixty days before submitting a complaint in federal court.[50] The Chamber submitted Freedom of Information Act ("FOIA") requests to the EPA seeking data on notices of intent to sue and found that between 2005 and 2015, ***3,096*** notices of intent to sue were submitted to the EPA against private parties under the Clean Water Act. Figure 3 below shows the year-by-year breakdown of notices of intent to sue.

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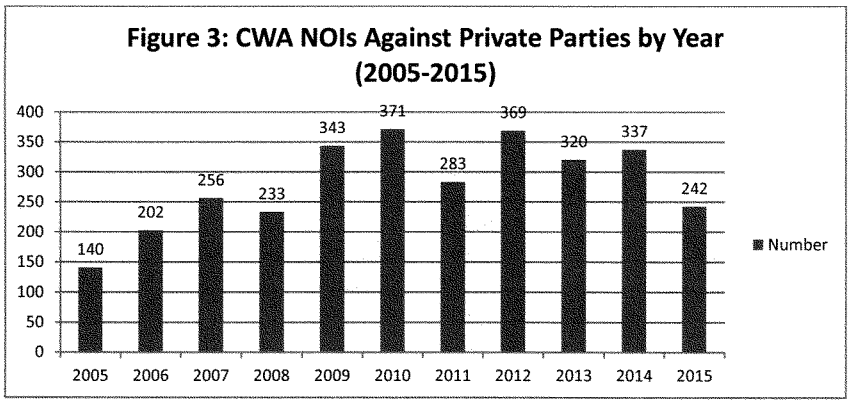
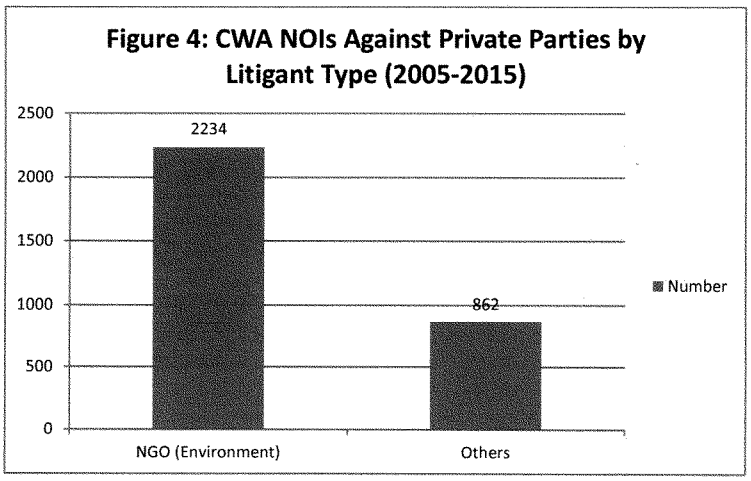
[44] Pete Harrison, "When Government Won't Stop Illegal Pollution, We the People Can (For Now)," Waterkeeper Alliance (Mar 10, 2017) *available at* http://waterkeeper.org/when-government-wont-stop-illegal-pollution-we-the-people-can-for-now/.
[45] *See e.g.* Barton H. Thompson, Jr., Symposium: Innovations in Environmental Policy: *The Continuing Innovation of Citizen Enforcement*, 2000 U. Ill. L. Rev. 185 (2000).
[46] Clean Air Amendments of 1970, Pub. L. No. 91-604 (1970).
[47] *See e.g.* 42 U.S.C. § 7604. For a brief discussion of these two types of citizen suit lawsuits, see e.g. Daniel P. Selmi, *Jurisdiction to Review Agency Inaction Under Federal Environmental Law*, 72 Ind. L.J. 65 (1996) at 72-73.
[48] *See supra* note 12 at 198; *See also* Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983).
[49] *See e.g.* 42 U.S.C. § 7604.
[50] 33 U.S.C. § 1365(b).



Most importantly, environmentalist groups submitted ***2,234 or 72.2 percent*** of all notice of intent to sue filings as seen in Figure 4.



Even if the activists who submitted notices of intent to sue do not actually take a case to federal court, the vast number of threatened lawsuits can have a chilling effect on businesses seeking to expand operations or deploy additional infrastructure.

The Lack of Congressional Oversight of Citizen Suits

The prevalence of citizen suits in our regulatory system raises several critical issues that need to be regularly considered by the Congress, including questions of judicial resources and workloads. In the 1970's, Congress enacted citizen suit provisions in twenty environmental statutes. These provisions allow any citizen the right to mandate that agencies implement and enforce the environmental statutes and to challenge private actions alleged to be in violation of statutes. It also authorized the payment of attorneys' fees to citizens that prevail or partially prevail in the litigation. These provisions are found in titles 15, 16, 30, 33, and 42 of the U. S. Code. Figure 5 below demonstrates the lack of congressional oversight of these citizen suit provisions.

Figure 5
Statutes and Citizen Suit provisions, including whether the original bill creating the citizen suit provision was heard by the Senate or House Judiciary Committee.

Statute	Provision	Was the original bill creating the citizen suit provision heard by the Senate or House Judiciary Committee? Yes	No
Act to Prevent Pollution from Ships	33 USC § 1910		☑
Clean Air Act	42 USC § 7604		☑
Clean Water Act	33 USC § 1365		☑
Superfund Act	42 USC § 9659		☑
Deepwater Port Act	33 USC § 1515		☑
Deep Seabed Hard Mineral Resources Act	30 USC § 1427		☑
Emergency Planning and Community Right-to-Know Act	42 USC § 11046		☑
Endangered Species Act	16 USC § 1540(g)		☑
Energy Conservation Program for Consumer Products	42 USC § 6305		☑
Marine Protection, Research and Sanctuary Act	33 USC § 1415(g)		☑
National Forests, Columbia River Gorge National Scenic Area	16 USC § 544m(b)		☑
Natural Gas Pipeline Safety Act	49 USC § 60121		☑
Noise Control Act	42 USC § 4911		☑
Ocean Thermal Energy Conservation Act	42 USC § 9124		☑
Outer Continental Shelf Lands Act	43 USC § 1349(a)		☑
Powerplant and Industrial Fuel Use Act	42 USC § 8435		☑
Resource Conservation and Recovery Act	42 USC § 6972		☑
Safe Drinking Water Act	42 USC 300j-8		☑
Surface Mining Control and Reclamation Act	30 USC § 1270		☑
Toxic Substances Control Act	15 USC § 2619		☑

The Judiciary Committees of Congress nevertheless have never conducted any specific oversight over the numerous citizen suit provisions in environmental statutes. This is significant because the inclusion of a citizen suit provision in the Clean Air Act was far from certain when the bill was being considered in 1970. The House version of the bill did not include a citizen suit provision.[51]

Because citizen suits are inherently a legal matter and some of the most important legal questions are brought up as a result of these suits, the expertise of the Judiciary Committees is needed to adequately oversee them.

H. Recommendations

- ***Congress Should Enact the Sunshine for Regulatory Decrees and Settlements Act (H.R. 469/S. 119).***
  This legislation 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, (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, and (4) provide the court with a copy of the public comments at least 30 days prior to the filing of the decree or settlement. The legislation would also require agencies to do a better job of showing that a proposed agreement is consistent with the law and in the public interest.

- ***The Judiciary Committees should assume a more formalized role in overseeing deadline suits.*** The provisions in various environmental statutes that allow for deadline suits to be filed against EPA and other agencies should be recodified into Title 28 of the U.S. Code. This simple step would provide the House and Senate Judiciary Committees direct jurisdiction and thus would better enable Congress to properly oversee the effect these suits are having on the judiciary system.

- ***Congress should extend/stagger the deadlines contained in the CAA and the Clean Water Act.*** As discussed above, EPA has chronically missed statutory deadlines since Congress wrote the major environmental laws in the 1970s. The modern-day impact of nondiscretionary deadlines established in major environmental statutes written decades ago is critically important, because it is the fuel that drives the sue and settle approach to policymaking. Accordingly, Congress should either extend or stagger the numerous action deadlines it wrote into statutes in the 1970s so as to give EPA a reasonable chance to comply. Congress should also provide EPA with an affirmative defense to deadline suits, under which a plaintiff must show the agency acted in bad faith in missing a deadline.

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[51] *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.

Mr. FARENTHOLD. Thank you very much.

Ms. Helmick, you are up next for 5 minutes.

STATEMENT OF DARCY HELMICK

Ms. HELMICK. Chairman Farenthold, Chairman Palmer, Ranking Member Plaskett, Ranking Member Demings, and members of the subcommittees, thank you for inviting me to appear before you today.

My name is Darcy Helmick. I'm a 4th generation rancher from Idaho. I ranch with my parents and my brother, and my grandparents and extended family also ranch in Idaho where they have done so for more than a hundred years. I'm following along in those footsteps. I recently bought 30 of my own cows, and I'm working with my brother on transitioning into more responsibility on my family's operation.

Professionally, I'm the land manager for Simplot Land & Livestock based in Grand View, Idaho. In that capacity, I oversee grazing permits in four States: Idaho, Oregon, Nevada, and Utah. In my experience dealing with the Federal grazing system and western land use in general, offensive litigation tactics by outside activist groups have served to totally derail business operations.

The legal process is a crucially important part of owning a Federal lands grazing permit. While it is critical that we maintain the right of citizens to litigate when necessary, reform is needed to prevent that right from being abused or exploited. Federal agencies must be able to perform job activities that maintain protection of multiple use, and ensure the intent of Congress during and in the wake of offensive litigation. It is also critical that permitted public land users have a role in any settlement agreements, and that Federal employees at a local level have input.

Unreasonable timelines have become the norm, and, once imposed during settlement, are rarely reached. The repercussions of those missed timelines heavily impact permitted public land users, and result in a level of uncertainty that is prohibitive in any business environment. Ultimately, this is often the goal of these litigants.

I have two brief examples of this. The first one is the Jarbidge litigation case based just outside of Twin Falls, Idaho. There was a permit renewal process where a special interest group litigated over the permit renewals. That resulted in an injunction against livestock grazing on 28 grazing allotments. We were able to enter into a stipulated settlement agreement with all parties, requiring the Agency to complete some tasks before a deadline of February 28th, 2011.

Subsequent litigation from the same environmental group as well as some wildfires prevented the BLM from completing that task, which resulted in the injunction coming back, and livestock having to be removed from all 28 of all those allotments while further litigation was completed, which allowed us to return to the grazing allotments just over 80 days later.

A second example is with the Endangered Species Act, which was mentioned earlier, that had to do with bull trout habitat on grazing allotments. Although the Forest Service was already in the process of re-initiating informal consultation, an outside interest group liti-

gated against it. We as the permit holders joined with the Forest Service and were successful in the litigation.

However, because of the time that was obligated to litigation, the Forest Service and Fish and Wildlife Service were not able to complete informal consultation before the existing consultation expired. Therefore, before our turnout date in 2017, which was May 8th, the Forest Service called me and told me I wasn't authorized to turn cattle out until that consultation was completed. Those cows are still at the gate waiting to be turned out as we sit here today.

The chilling effects of these sue and settle tactics are felt throughout our communities. Not only is litigation expensive, the cost to the communities go far beyond legal costs. While litigation directly or indirectly forces a removal or reduction of cattle, families are forced to make decisions that impact their bottom line and potential ability to continue operations.

These tactics also serve to limit young producers from entering the industry, which will inevitably lead to further erosion of the footprint of ranching in the West as well as open space. As a 4th generation cattle producer, it is in my blood to continue with my family business. My experience dealing with litigation and public lands gives me pause when considering these options.

It is critical that we as Americans maintain the ability to sue our government agencies when warranted, and it is also critical that impacted stakeholders have a seat at the table when other parties litigate to ensure our investments are protected and we have some kind of certainty moving forward. But above all, we must ensure the integrity of the entire system by preventing abuse and manipulation by motivated activist groups.

The issue of sue and settle litigation abuse is one that simply must be addressed if family ranching operations and rural economies are going to survive another generation. Thank you.

[Prepared statement of Ms. Helmick follows:]

Testimony of
Darcy Helmick
On behalf of the Public Lands Council

May 24, 2017
House Committee on Oversight and Government Reform, Subcommittee on Intergovernmental Affairs and Subcommittee on the Interior, Energy, and Environment

Chairman Farenthold, Chairman Palmer, Ranking Member Plaskett, Ranking Member Demings, and members of the subcommittees; thank you for inviting me to appear before you today. My name is Darcy Helmick, I'm a Fourth Generation rancher from Mayfield, Idaho. My family owns a cow/calf and farm operation which utilizes a mix of Bureau of Land Management and Forest Service grazing permits as well as state grazing leases and private lands. My grandparents and extended family also ranch in Idaho, and have for over 100 years. Continuing that tradition, I recently purchased 30 of my own cows, and am working with my brother towards transitioning into ownership of our parents operation.

Professionally, I am the Land Manager for Simplot Land & Livestock based in Grand View, Idaho. In that capacity, I oversee approximately 4 million acres of federal grazing permits in Idaho, Nevada, Oregon, and Utah. It is my responsibility to manage all public land activities for Simplot entities. I work with ranch managers and public land management agencies to manage grazing on public lands. I review, participate and comment on land planning documents impacting Simplot Land & Livestock. I attend meetings and collaborate with agencies to protect and enhance wildlife and special status species habitat while maintaining viable ranching operations on public lands. I am involved in 5 different Rangeland Fire Protection Associations,

am the public lands chair for the Idaho Cattle Association, Idaho Delegate for the Public Lands Council, and a graduate of Leadership Idaho Agriculture.

Prior to Simplot, I worked seasonally for Bureau of Land Management in Boise for 7 years as wildland fire fighter, and for the fuels program and operations outside of fire season. I then worked as a range specialist for the Idaho Department of Lands for 1.5 years, and then moved to the private sector as a rangeland monitoring specialist for Simplot for 4 years before moving into the Land Manager position here in April, 2014.

In my extensive experience dealing with the federal grazing system and western land use in general – offensive litigation tactics by outside activist groups have served to totally derail business operations. In the relatively short amount of time I have worked for Simplot, I have been exposed to multiple legal cases, sometimes being directly impacted and filing as interveners, and in other cases just in review. The legal process is a crucially important part of owning a federal lands grazing permit. While it is critical that we maintain the right of citizens to litigate when necessary, reform is needed to prevent that right from being abused or exploited. Federal agencies must be able to perform job activities that maintain protection of multiple use and ensure the intent of Congress during and in the wake of offensive litigation. It is also critical that permitted public lands users have a role in any settlement agreements, and that federal employees at a local level have input. Unreasonable timelines have become the norm and, once imposed during settlements, are rarely reached. The repercussions of those missed timelines heavily impact the permitted public lands users and result in a level of uncertainty that is

prohibitive in any business environment. Unfortunately this is often the goal of these litigants. Below are two specific examples where missed timelines have impacted our ranching operations.

Example 1 – Jarbidge Litigation Case 1:04-cv-00181-BLW: (specifics taken from Document 505, filed 7/22/11 – memorandum decision and order).

A special interest group litigated the permit renewal process in the Jarbidge Field Office in 2005. Although an injunction against livestock grazing on 28 allotments within the JFO was issued by the judge, a Stipulated Settlement Agreement was signed by all parties to allow for the continuation of grazing under Interim Grazing Management Plans (IGMPS). In the SSA, the BLM agreed to prepare a revised Jarbidge Resource Area Resource Management Plan and supporting Environmental Impact Statement. They further agreed to conduct site-specific NEPA reviews and issue ten-year grazing permits for all JRA allotments (not just the 28 allotments covered by the SSA). The BLM estimated completion of this process by September 30, 2009, but the parties agreed to extend the completion date to September 30, 2010. That meant the IGMPs would be in effect until the end of the grazing year in 2010, or Feb 28, 2011.

During the Land Use Planning process, the field office experienced a massive wildfire (the "Murphy Complex" fire) and subsequent litigation from the same special interest group. The motion filed by the litigants sought to strike down the SSA, enjoin grazing once again on those 28 allotments, and enjoin all grazing on an additional 36 allotments. Although the court denied striking the SSA, and a trial resulted in the Court denying the injunction of the other 36 allotments, valuable time was spent by BLM employees and staff preparing for that litigation. Needless to say, the agency failed to meet the deadline issued by the Stipulated Settlement

Agreement, and the parties were not able to come to agreement in 2010, therefor the injunction banning all grazing on the 28 allotments came back into place as the IGMPs expired.

The ranchers/interveners responded by filing a motion to modify the injunction under Rule 60(b)(5). While the litigation was being settled, livestock had to be completely removed from the allotments named in the litigation. Because this deadline occurred February 28, we were able to receive an extension to provide for the health and safety of the cattle as to not be moving them in muddy conditions and when baby calves were in the process of being born. We were however, forced to remove the cattle completely on May 1. Cattle remained off of the allotments until an order was issued by the Judge, July 22, 2011.

While cattle were only off the allotments some 80+ days, the impacts to our operations were astronomical. The relocation costs alone hindered business operations. (Livestock numbers are from Document 431). Over 2000 pairs of Simplot owned cattle were displaced – that does not take into consideration other operators numbers. These cattle were relocated onto private lands during the time the injunction was imposed. Increased cost in feed, and increased health and sickness issues occurred during this time. As a larger operator, we consider ourselves lucky that we had enough private land to relocate the cattle for the amount of time they were required to be off. When confronted with a similar situation, most family ranches simply do not have the resources to survive such a blow. Even in an organization like Simplot, a negative result in court would have meant livestock would have been sold, and employees would have been let go. Every one of our ranches employees multiple individuals – most of whom have families and raise their children on the operations.

Example 2 – ESA litigation in Oregon Case 1:15-cv-00895-CL:

In May of 2015 special interest groups filed a complaint seeking injunctive relief against the U.S. Forest Service and U.S Fish & Wildlife Service over certain grazing allotments within the Fremont-Winema National Forest claiming impacts of continued livestock grazing on bull trout critical habitat was arbitrary, capricious and otherwise not in accordance with the ESA, in violation of the Administrative Procedure Act. The claim included multiple Simplot Allotments.

The Forest and FWS had previously issued a Biological Assessment (BA) and Letter of Concurrence (LOC) for grazing within the allotments in 2007 and again in 2010 when critical habitat was defined. The Forest Service noted in their Motion for Summary Judgement, dated February 26, 2016 that they were in the process of reinitiating informal consultation.

While the permittees intervened, and with the Forest Service was successful in the legal case, time that should have been spent completing new consultation was used to prepare for litigation. The result was consultation not being completed in adequate time to turn cattle out as permitted and billed in the spring of 2017.

The Forest Service recognized in its Motion for Summary Judgement that one of the goals of the National Forest grazing permit program is to provide stability to local ranch operations. The controlling Fremont Forest Plan states that grazing "will remain an important use" of the Forest. The Plan goes on to state grazing "contributes to the economic viability and stability of local communities in the Summer Lake basin" and that "Many local ranch operations could not stay in business without the seasonal spring-summer-fall range provided on the Forest."

While the litigation was not directly tied to the FS and FWS not completing consultation prior to the 2017 turn out, the time obligated to the litigation certainly impacted the federal

agencies ability to perform their jobs at a direct impact to our operations, which is inconsistent with the above mentioned Forest Plan.

The chilling effects of these "sue and settle" tactics are felt throughout our communities. Not only is litigation expensive, the costs to the communities go beyond legal costs. When litigation directly or indirectly forces the removal or reduction of cattle, families are forced to make decisions that impact their bottom line, and the potential ability to continue operations. Scrambling to relocate cattle onto alternative leased pastures (often at a much higher rate) not only impacts the business's ability to prosper, it also has impacts to cattle health and well-being. A majority of the west is owned by "the public." Businesses and ranches have developed in the area depending on the use of public lands. As the ability to utilize those lands diminishes the value of business operations and the rural economies they support also suffers.

These tactics also serve to limit young producers from entering the industry, which will inevitably lead to further erosion of the footprint of ranching in the West. As a fourth generation cattle producer it is in my blood to continue with my family business. As my parents age and need more help, my brother and I are working with financial advisors on how to transition the business. My experience dealing with litigation and public lands grazing gives me pause when considering the options. Not only do they impact the financial side of the considerations –how does one budget for litigation, how does one calculate the expense of the stress and time used to work through litigation – how does one put a value on an AUM when it is not certain anymore if that AUM will even be available tomorrow? These questions make an already difficult process overwhelming to even begin working on.

It is critical that we as Americans maintain the ability to sue our government agencies when warranted. It is also critical that impacted stakeholders have a seat at the table when other parties litigate to insure our investments are protected, and we have some kind of certainty moving forward. But above all, we must ensure the integrity of the entire system by preventing abuse and manipulation by motivated activist groups.

I thank the Chairmen and Ranking Members for allowing me to speak today. The issue of sue and settle litigation abuse is one that simply must be addressed if family ranching operations and rural economies are going to survive another generation.

Mr. FARENTHOLD. Thank you.

Mr. Pidot, you are up for 5.

STATEMENT OF JUSTIN PIDOT

Mr. PIDOT. Thank you, Mr. Chairman.

Mr. FARENTHOLD. We can barely hear you there. Bring that microphone in real close.

Mr. PIDOT. Thank you, Mr. Chairman, Chairman Palmer, Ranking Member Plaskett, Ranking Member Demings. I appreciate the time to talk with you today.

My name is Justin Pidot. I'm an associate professor at the University of Denver Sturm College of Law, where I teach and write about issues of environmental law, natural resources, and administrative law. I also served as a deputy solicitor at the Department of Interior during the Obama Administration, and was an appellate lawyer at the Environment and Natural Resources Division of DOJ at the Bush Administration and beginning of the Obama Administration.

The subject of this hearing today, the so-called sue and settle phenomenon, to my mind, respectfully to my colleagues on the panel, isn't really a phenomenon at all. I'm not denying that the United States enters into settlements. Of course the United States enters into settlements. It enters into lots of settlements, and it enters into settlements across all contexts.

Settlements have become a core component of the American justice system. All we need to do is look at the docket of the Federal courts to see one reason this is so. They have a backlog of historic proportions when it comes to civil litigation. So, in all contexts, parties look for other means of resolving disputes. And every lawyer knows that our clients' best interests often lie with negotiating rather than litigating.

Now, I say that there's no sue and settle phenomenon also because environmental settlements are simply the result of hard-working civil servants at the Department of Justice and at the client agencies whom they represent, doing their best to advance the interests of the United States. There's nothing nefarious, inappropriate, or even surprising about environmental settlements.

In fact, in my experience, lawyers for the United States, both at the Department of Justice and at the Department of Interior, consider precisely the same factors when they think about settlements that private lawyers think about. They think about litigation risk. They think about the cost that continuing to litigate will impose. And they think about whether or not that risk and those costs justify making a particular concession to the party that has brought the suit.

Now, in some ways government lawyers are different because government lawyers also think long and hard about whether the terms in a settlement circumvent administrative law constraints or public participation requirements. This is the result of both the institutional role that the Department of Justice plays. Every settlement, every consent decree is signed off on at the Department of Justice by a lawyer who is not sitting in the client agency by a lawyer who's thinking about the rule of law, who's thinking about the long-term institutional credibility of the United States. And indeed,

settlements and consent decrees must be signed off on at a relatively high level at the Department of Justice.

The Department of Justice also has specific policies that constrain the kinds of settlements and consent decrees that the government can enter into, and specifically disallows settlements that would make substantive commitments that should occur through notice and comment rulemaking. And despite what Administrator Pruitt says, I can't imagine the new Administration will do anything different. When a lawyer is faced with a case where the risk of success is very low, where the cost of litigation is very high, and where you can make a deal that is workable for your agency, there really is no other path to pursue to provide competent representation.

Now instead, most of the concerns that we've heard today, to my ears at least, sound less like concerns about settlements and more like concerns about environmental law broadly. For example, in the written testimony, concerns were raised about the requirement that Fish and Wildlife Service respond to petitions asking it to list species on the Endangered Species List. The Section 4 process is not an issue of settlement. It's an issue of what substantive law enacted by Congress requires.

The same thing in the Clean Air Act. The Clean Air Act creates a particular relationship between Federal agencies and State agencies where the Federal government has oversight over State agencies. And so, there, too, once again, we had the pure application of the Clean Air Act.

Now, impeding these efforts, impeding the Federal government from doing its job as a matter of satisfying its substantive obligations in the guise of attacking process and litigation tactics upsets out Nation's commitment to the rule of law, because when citizen groups or other groups bring a lawsuit and they are going to succeed, that means the Federal government is acting illegally. And in that circumstance, preventing that lawsuit from occurring suggests that the government does not need to be held accountable.

And if Congress wants to debate those substantive environmental law issues, then that's the debate that we should be having, not sort of a debate about whether or not a particular settlement was somehow collusive in a way that has never been evidenced.

Thank you.

[Prepared statement of Mr. Pidot follows:]

TESTIMONY OF JUSTIN PIDOT

ASSOCIATE PROFESSOR, UNIVERSITY OF DENVER STURM COLLEGE OF LAW

BEFORE THE SUBCOMMITTEE ON THE INTERIOR, ENERGY, AND ENVIRONMENT AND THE SUBCOMMITTEE ON INTERGOVERMENTAL AFFAIRS OF THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ENTITLED "EXAMINING 'SUE AND SETTLE' AGREEMENTS: PART I"

MAY 24, 2017

INTRODUCTION

Mr. Chairman and Members of the Subcommittees, thank you for giving me the opportunity to testify before you today about environmental litigation and, in particular, about settlements entered into by the government to resolve such litigation.

I am an associate professor at the University of Denver Sturm College of Law and my primary expertise is environmental law, natural resources law, and administrative law. Before joining the faculty at the University of Denver, I was an appellate attorney in the Environment and Natural Resources Division of the U.S. Department of Justice during parts of the Administrations of President George W. Bush and President Barak Obama, and I also served as a deputy solicitor at the U.S. Department of Interior during the last six months of the Obama Administration.

The accusation implicit in the phrase "sue and settle," which is the subject of this hearing and has increasingly been used by certain conservative organizations, is that there is something unseemly or inappropriate about environmental settlements. The accusation is sometimes made that such settlements are collusive. In my experience, this could not be further from the truth. The lawyers who represent the United States, both within Justice and agencies, are among the most dedicated civil servants I have known. As I will discuss, settlements occur because they are conserve federal resources and provide the United States with an opportunity to ameliorate the effects of a likely litigation loss when legal risk is high. Those are the factors that lawyers for the United States consider, and those are the factors that must be demonstrated for a settlement to be approved.

In my testimony today, I will begin by discussing the importance of environmental litigation to achieving the goals that Congress has established in federal environmental laws. Litigation has always been integral to enforcing environmental law and administrative law more generally. Congress created a cause of action to challenge agency decisions—and the failure of agencies to make decisions—when it enacted the Administrative Procedure Act in 1946 (commonly called the APA). And even before that time, courts had permitted lawsuits against agencies as a matter of common law. In many environmental statutes, Congress created more specialized provisions to govern judicial review, which are more suited to a particular legal context.

The ability of the public to hold federal agencies to account is a crucial component to the rule of law. Litigation keeps agencies honest and accountable to the mandates that Congress has established and ensures that agencies both fulfill their affirmative obligations and do not engage in illegal actions. Environmental litigation itself does not negatively affect the economy, states, or local communities. Litigation merely enforces the legal rules that Congress has established by statute, or implementing agencies have established by regulation. Litigation that holds federal agencies accountable is appropriately encouraged by existing provisions that require the federal government in certain circumstances to pay the legal fees of a party that successfully sues the federal government.

The second portion of my testimony will focus on settlements and consent decrees that the federal government enters into to reach a negotiated resolution to environmental litigation. I will refer to both settlements and consent decree in environmental cases simply as environmental settlements.

All the evidence shows that environmental settlements are a good thing. In all areas of law, settlements dominate the American legal landscape. They are favored by courts, attorneys, and parties because they reduce legal costs and allow the parties, where possible, to negotiate a resolution that eliminates the uncertainty about the outcome of a case and allows the parties, rather than a judge or jury, to find a resolution that all sides can live with.

I. THE IMPORTANCE OF ENVIRONMENTAL LITIGATION

In the 1970s and early 1980s, Congress systematically enacted modern environmental law.[1] Almost every modern environmental law includes a provision that allows citizens to file lawsuits against either private parties or the federal government for violating the provisions of those laws.[2] Where environmental laws lack specific citizen suit provisions, the APA authorizes lawsuits challenging many actions taken by the federal government.[3] It is lawsuits brought against the federal government—either pursuant to the specialized provisions that Congress created in specific environmental statues, or pursuant to the general judicial review provisions of the APA—that are the focus of my testimony today.

Congress's innovations, first in the APA and later through environmental citizen suit provisions, promote core American values. These include buttressing the rule of law, enforcing the separation of powers, and promoting fairness.

First and foremost, environmental litigation promotes the rule of law. Lawsuits brought under the APA or citizen suit provide an avenue by which the people can haul government

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[1] *See* Barton H. Thompson, Jr. *The Continuing Innovation of Citizen Enforcement*, 2000 UNIVERSITY OF ILLINOIS LAW REVIEW, 185 (2000). For a detailed discussion of the history of U.S. environmental law, *see* RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW (2004).
[2] *See generally* Thompson, *supra* note 1.
[3] *See* 5 U.S.C. 704. The APA authorizes judicial review of "final agency action for which there is no adequate remedy in a court." *Id.* Where an environmental statute contains specific judicial review provisions, those provisions will govern rather than the APA.

agencies before the courts when those agencies have acted in an unlawful manner.[4] The principle that no one, not even the President, is above the law, is a core tenant of American's democracy. In our constitutional system, the legislative power of the federal government is vested in Congress.[5] The President, through the executive branch, is charged with the obligation to "take Care that the Laws be faithfully executed."[6] Environmental litigation is one avenue by which citizens can ensure that the executive branch fulfills the obligations that Congress has established.

Second, environmental lawsuits enforce the separation of powers by simultaneously enforcing Congress's legislative judgments, while providing for only deferential review of executive branch actions taken within the scope of authority delegated by statute. Citizen suits do not authorize citizens or courts to substitute their judgment for the judgment of Congress or federal agencies. To be successful, environmental litigation must be anchored to the legal obligations established by Congress through legislation or by agencies through regulations promulgated pursuant to a statutory delegation of authority. Moreover, the standard of review applied by courts is very deferential to the executive branch.[7] As a former federal lawyer, I witnessed and benefitted from this deference on a consistent basis. So long as a federal agency has a decent argument that its actions conformed to the will of Congress and also accorded with the regulations established by the agency itself, the federal agencies is very likely to prevail. In other words, while aggrieved parties have many opportunities to sue the federal government, to prevail they must overcome a substantial thumb on the scale in favor of the government.

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[4] *See* Thompson, *supra* note 1, at 188.
[5] *See* U.S. CONST. Art. I, § 8.
[6] *Id.* Art. 2, § 3.
[7] *See* 5 U.S.C. § 706(2).

Third, citizen suits promote fairness. The causes of action created by the APA and environmental citizen suit provisions allow anyone injured by a federal agency, from the most powerful and sophisticated business, to a solitary citizen, to seek a court order directing the executive branch to comply with its legal obligations. This right to turn to the courts for redress is not, of course, unlimited. Under Article III of Constitution, courts will only hear cases brought by parties with concrete and particularized interests at stake.

Evidence suggests that all manner of individuals and entities, with all manner of interests and political viewpoints, have used citizen suits and the APA to protect their interests and enforce federal law against federal agencies. In a 2011 report, the Government Accountability Office found that Environmental Protection Agency (EPA) faced approximately 150 cases a year. About half of those cases were filed by private companies or trade associations and about 30 percent were filed by either local or national environmental organizations.[8] In other words, the tools that allow environmental litigation should not be seen as ideological.

Before I turn to environmental settlements, let me briefly address an additional aspect of environmental litigation. Fee shifting provisions are a crucial tool to enable such litigation to promote the core American values I have discussed—the rule of law, separation of powers, and fairness. In the absence of such provisions, small businesses, non-profit organizations, and concerned citizens would face substantial economic barriers to bringing lawsuits, even in circumstances where the federal government acted in clear violation of the law.[9] Such a situation would cause an imbalance in the legal landscape because private businesses and trade groups,

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[8] U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-11-650, ENVIRONMENTAL LITIGATION: CASES AGAINST EPA AND ASSOCIATED COSTS OVER TIME 13 (2011) (hereinafter "2011 GAO REPORT").

[9] 28 U.S.C. § 2412 (d)(2)(B). EAJA applies to individuals with a net worth of less than $2 million, businesses with a net worth of less than $7 million and that employee less than 500 individuals, and all 501(c)(3) non-profit orgnizations. *Id.*

who already file half of lawsuits against EPA, would often have the financial resources to pay for lawsuits that advance their viewpoint in the absence of fee shifting provisions.[10] In other words, if fee shifting provisions didn't exist, environmental litigation would be transformed from even handed to deeply skewed in favor of the wealthy and powerful.

Some environmental statutes, like the Endangered Species Act,[11] contain their own fee-shifting provisions. Otherwise, the Equal Access to Justice Act (or EAJA) allows a court to award attorneys fees to the prevailing party so long as the position of the United States is not "substantially justified."[12] While fee-shifting provisions have come under attack in recent years,[13] available information suggests that, overall, attorneys fees in environmental litigation impose a relatively slight burden to the taxpayer. In its 2011 report, the Government Accountability Office study found that between 1995 and 2010, EPA paid approximately $1.8 million a year in attorneys fees,[14] which is just over two hundredths of a percent of EPA's budget. Moreover, fee-shifting provisions do not create incentives for frivolous litigation. A party only receives a fee award if that party prevails in the litigation, and if the party seeks fees under EAJA they must further demonstrate that the government's position was not "substantially justified."[15]

II. ENVIRONMENTAL SETTLEMENTS COMPLY WITH THE LAW AND ARE SOUND POLICY

Some environmental lawsuits end in settlements between the federal government and the plaintiff. In recent years, such environmental settlements have been termed the "sue and settle"

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[10] Trade groups incorporated under 501(c)(3) may themselves recover EAJA fees.
[11] 16 U.S.C. § 1540(g)(4).
[12] 28 U.S.C. § 2412(d)(1)(A).
[13] *See, e.g.*, The Government Litigation Savings Act, H.R. 3037, 113th Congress.
[14] 2011 GAO REPORT, *supra* note 4, at 19.
[15] *See* Brian Korpics, et al, *Shifting the Debate: In Defense of the Equal Access to Justice Act*, 43 ENVIRONMENTAL LAW REPORTER 10,985, 10,991 (2013).

phenomenon and have generated substantial criticism from certain sectors. This so-called phenomenon was first instigated when the U.S. Chamber of Commerce released a report criticizing the practice in 2013, and has been the focus of numerous hearings like this one.[16] Settlements are, however, central to the American justice system and are ubiquitous. As a result, those that seek to curb or cabin settlement opportunities in this single context should have to demonstrate that environmental settlements involve decidedly different considerations than other types of litigation. And, as I will explain, that case has not been made.

A. *Settlements Are a Central Feature of the American Legal System*

The vast majority of lawsuits in the American justice system settle—by some estimates, between eighty and ninety-two percent of all cases.[17] Moreover, this is widely viewed as a good thing. Settlements preserve judicial resources and allow the parties to reach an agreement, rather than have a resolution imposed by a judge or jury.[18] Given the frequency of settlements, and the strong public policy favoring settlement, it should come as no surprise that the federal government, like any party in civil litigation, sometimes reaches a settlement. The so-called "sue and settle" phenomenon, then, is simply the ordinary course of litigation in the American legal system.

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[16] *See* WILLIAM L. KOVACS ET AL., U.S. CHAMBER OF COMMERCE, A REPORT ON SUE AND SETTLE: REGULATING BEHIND CLOSED DOORS (2013) (hereinafter "CHAMBER OF COMMERCE REPORT"). Shortly after the Chamber of Commerce released its report, the American Legislative Exchange Council and the Center for Regulatory solutions released their own criticisms of environmental settlements. CENTER FOR REGULATORY SOLUTIONS, SUE-AND-SETTLE: REGULATION WITHOUT REPRESENTATION (2014); WILLIAM YEATMAN, AMERICAN LEGISLATIVE EXCHANGE COUNCIL, THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S ASSAULT ON STATE SOVEREIGNTY (2013) (hereinafter "ALEC REPORT").

[17] *See* Jonathan D. Glater, *Study Finds Settling Is Better Thank Going to Trial*, NEW YORK TIMES, Aug. 7, 2008 (citing the author of an empirical study on settlement for the proposition that "[t]he vast majority of cases do settle – from 80 to 92 percent by some estimates").

[18] *See, e.g.*, In re Deepwater Horizon, 739 F.3d 790, 807 (5th Cir. 2014) (rejecting a rule that "would thwart the 'overriding public interest in favor of settlement' that we have recognized"); Bradley v. Sebelius, 621 F.3d 1330, 1339 (11th Cir. 2010) ("Historically, there is a strong public interest in expeditious resolution of lawsuits through settlement.").

B. The Typical Environmental Settlement

Unsurprisingly, most environmental settlements fall into a category of litigation that is generally particularly likely to settle: Circumstances where a defendant has essentially no defense to liability. The circumstance I am referring to is the deadline lawsuit, including deadline lawsuits under the Endangered Species Act and the Clean Air Act, which have stirred some controversy. Of the settlements criticized in the Chamber of Commerce report, more than 80 percent involved deadline lawsuits.[19]

Deadline lawsuits involve the following situation: Congress imposes a strict deadline on a particular agency decision. For example, under the Clean Air Act, EPA has one year to approve a state implementation plan to achieve National Ambient Air Quality Standards,[20] and under the Endangered Species Act, the Fish and Wildlife Service has one year to render a decision on a petition to list a species under the act if that petition includes substantial information indicating that a listing may be warranted.[21] An agency charged with acting within such a strict statutory deadline fails to meet its legal obligations. Someone then files a lawsuit challenging the agency's failure to act.[22]

A lawyer for the government in such a situation—where an agency has violated a clear deadline by which the agency must act—has no good defense to liability.[23] When these lawsuits

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[19] *See* Courtney R. McVean & Justin R. Pidot, *Environmental Settlements and Administrative Law*, HARVARD ENVIRONMENTAL LAW REVIEW 192, 217 (2015); Stephen M. Johnson, *Sue and Settle: Demonizing the Environmental Citizen Suit*, 37 SEATTLE UNIVERSITY LAW REVIEW 891, 913 (2014).
[20] *See* 42 U.S.C. § 7410(k)(2).
[21] *See* 16 U.S.C. 1533(3)(B).
[22] *See, e.g.*, 5 U.S.C. § 706(1) (authoring courts to "compel agency action unlawfully withheld or unreasonably delayed"); 16 U.S.C. § 1540(g)(1)(C) (authoring citizen suits under the Endangered Species Act "where there is alleged a failure of the Secretary to perform any act or duty . . . which is not discretionary with the Secretary").
[23] *See* McVean & Pidot, *supra* note 14, at 202-03; *see also* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO 15-803T, INFORMATION ON CASES AGAINST EPA AND FWS AND DEADLINE SUITS ON EPA RULEMAKING, at 5 (2015) (hereinafter "2015 GAO REPORT").

don't settle, the government loses them.[24] A judge will then be in a position to impose on the agency a timeline for the agency to meet its legal obligations. And because the government lacks a substantially justified defense, the government will often be obligated to pay the attorneys fees of the party bringing the lawsuit.[25]

I provide this overview of the legal backdrop to the typical environmental settlement because it highlights how ordinary these settlements truly are. Notwithstanding theories that the federal government is engaging in some form of collusion with plaintiffs,[26] in my view the most significant determinant of whether an environmental lawsuit ends in a settlement is a simple one: Do the lawyers representing the federal government believe that the federal government can prevail? Where those lawyers believe that a loss is virtually inevitable, attempting to settle the case is a no brainer.

C. Benefits of Environmental Settlements

Environmental settlements offer numerous benefits, and these benefits are ones that should be embraced by people across the political spectrum. First, such settlements enhance—rather than limit—agency' discretion. In the face of a deadline lawsuit the agency is certain to lose, an agency faces the following choice: Either it can negotiate with the opposing party to establish a mutually agreed upon timeline for the agency's action, or it can wait for judgment and have a judge impose such a deadline.[27] The agency maintains more control over its agenda by

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[24] *See* Biodiversity Legal Foundation v. Badgley, 309 F.3d 1166 (9th Cir. 2001); Daniel J. Rohlf, *Section 4 of the Endangered Species Act: Top Ten Issues for the Next Thirty Years*, 34 ENVIRONMENTAL LAW 493, 495 (2004).
[25] *See* 28 U.S.C. § 2412(d)(1)(A).
[26] *See* CHAMBER OF COMMERCE REPORT, *supra* note 11, at 3. The Chamber of Commerce Report implies that evidence of such collusion can be found in the fact that in some circumstances a settlement or consent decree is filed alongside the complaint initiating suit against the agency. *See id.* at 11. This is, however, entirely unsurprising because environmental citizen suit provisions require a party intending to file a lawsuit to provide notice of that lawsuit sixty days before filing. *See* Johnson, *supra* note 14, at 912. In other words, by the time the complaint is filed, the federal government has been on notice of the impending lawsuit for two months and negotiations can occur during that period.
[27] *See* McVean & Pidot, *supra* note 14, at 231-32.

entering into settlement negotiations, rather than allowing a judge to enter an injunction compelling the agency to act within a certain timeframe.[28] This rule—that agencies increase their discretion by settling, rather than litigating—holds true in most cases where an agency is likely to lose. Agencies simply have more control over the terms of settlements than over the terms of a judge's order. Put another way, settlements limit the role of judges in setting federal policy—something which those that oppose "activist" judges should celebrate.

Second, settlements save government resources. These resources largely take the form of staff time at both the Department of Justice, which represents environmental agencies in federal court, and the agency being sued.[29] This savings will be particularly significant where a settlement can be reached early in the life of a lawsuit, and in appropriate circumstances, settlement negotiations can begin even before the filing of a complaint because parties suing the federal government under most environmental statutes must provide notice of their intent to file a lawsuit sixty days before filing a complaint.[30] Conserving the resources of EPA and the Department of Justice is more even more important today, than it has been in recent years, as the agencies face the potential for considerable funding reductions.

Third, settlements save taxpayer dollars by reducing the amount of attorneys fees the federal government has to pay. This savings occurs because, just as settlements reduce the amount of time required by government attorneys, they also reduce the amount of time required by plaintiffs' attorneys. The fewer hours plaintiffs' attorneys spend on a case, the lower the amount of attorneys fees they can demand.

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[28] *See* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-15-34, ENVIRONMENTAL LITIGATION: IMPACT OF DEADLINE SUITS ON EPA'S RULEMAKING IS LIMITED, at 7 (hereinafter "2014 GAO REPORT") ("[O]fficials [at EPA and Justice] may believe that negotiating a settlement is the course of action most likely to create sufficient time for EPA to complete the rulemaking if it is required to issue a rule.").
[29] *See* Johnson, *supra* note 14, at 934.
[30] 42 U.S.C. § 7604(b) (Clean Air Act sixty day notice requirement); 16 U.S.C. § 1540 (g)(2)(C) (Endangered Species Act sixty day notice requirement); 33 U.S.C. § 1365(b) (Clean Water Act sixty day notice requirement).

Fourth, settlements conserve judicial resources by resolving cases without a judge having to rule on liability and craft a remedy. This frees judges to spend time on matters with unsettled legal questions where the parties cannot reach a resolution between themselves. The importance of this factor too has only increased over time as the federal courts face an increasing backlog of civil litigation.[31]

D. Existing Constraints on Environmental Settlements

In reaching environmental settlements, the government secures the benefits I have discussed, but it does not have carte blanche to do so. There are three sources of safeguards that apply to environmental settlements that I will discuss, and to my mind, these safeguards address any concern that settlements could be used to circumvent agency procedural obligations or allow agencies to take illegal actions.

First, the agencies sued in environmental lawsuits do not themselves possess authority to enter into a settlement. Rather, only appointed and confirmed officials within the Department of Justice can approve settlements.[32] This independent review by lawyers charged with representing the United States as a whole, rather than implementing particular statutes, limits an agency's ability to enter into settlements. An agency has to not only want to enter a settlement, but the agency has to convince lawyers at the Department of Justice that settlement is both appropriate and desirable. Because Department of Justice lawyers will not be driven by the agency's mission, but rather by legal considerations, vesting settlement authority at the Department of Justice significantly limits agencies ability to enter into collusive settlements.

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[31] *See* Joe Palazzolo, *In Federal Courts, the Civil Cases Pile Up*, THE WALL STREET JOURNAL, Apr. 6, 2015.
[32] *See* 28 C.F.R. § 0.160(d); *see also* McVean & Pidot, *supra* note 14, at 202. Settlements must either be approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or an Assistant Attorney General. All of these positions are subject to Senate confirmation.

Moreover, that settlements must be approved by an Assistant Attorney General, the Associate Attorney General, or the Deputy Attorney General,[33] and at times require consultation with and the consent of the Solicitor General,[34] provide a further check on settlements. Whenever an environmental agency wants to enter a settlement, it must convince these senior officials, and typically the career staff that report to them, that the settlement is in the interests of the United States. These senior Department of Justice officials are highly unlikely to compromise their view of what the law requires because a client agency has a particular agenda it wants to pursue through a settlement.

My experience both as a lawyer at the Department of Justice and at the Department of Interior convinces me that the role the Department of Justice is a very significant factor in the development of settlements. In each case of which I am aware, settlement terms have been subject to considerable scrutiny, both by career lawyers and political leadership, and must be justified based on litigation risk, costs avoided, and the appropriateness of settlement terms.[35]

Second, the Department of Justice has written internal rules that place limitations on the terms that can be contained within settlements. A 1999 memorandum produced by Randolph D. Moss, the Acting Assistant Attorney General overseeing the Office of Legal Counsel, currently guides settlement policy, and that memorandum acknowledges that the Administrative Procedure Act, and other limits on agency decisionmaking processes, constrain the types of commitments

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[33] 28 C.F.R. § 0.160 identifies settlements that can be approved by an Assistant Attorney General and those that require approval by the Associate Attorney General or Deputy Attorney General.

[34] The Solicitor General's involvement is necessary if that office has authorized the appeal of an adverse district court ruling before a settlement is developed or if a settlement is inconsistent with an litigation position previously authorized by the Solicitor General.

[35] In 2015, the Government Accountability Office reported that EPA and Justice official described similar factors as governing settlement consideration in the deadline suit context, including "(1) the cost of litigation, (2) the likelihood that EPA will win the case if it goes to trial, and (3) whether EPA and Justice believe they can negotiate a settlement that will provide EPA with sufficient time to complete a final rule if required to do so." *See* 2015 GAO REPORT, *supra* note 21, at 5

that the United States can make through settlements; settlements cannot include terms that circumvent "restrictions on the manner in which the executive branch may adopt and revise regulatory rules and procedures."[36] Moreover, any settlement involving a substantive commitment to take a discretionary decision requires a specific exception granted by the Deputy Attorney General or Associate Attorney General, and in 2015 the Government Accountability Office identified only one such exception as having been granted to EPA.[37]

Third, courts must approve and enforce settlements, and can hear collateral challenges to settlements brought by third parties in some circumstances, and courts have demonstrated their willingness to intervene when a settlement oversteps legal bounds. Judicial intervention can take two forms. First, a court can simply refuse to approve a settlement. For example, in *Conservation Northwest v. Sherman*, the Ninth Circuit refused to allow a consent decree that the court found substantively modified the terms of a Forest Plan.[38] Such modification, the court reasoned, required the agency to proceed through the ordinary administrative process for Forest Plan amendments. Second, after a settlement has been entered, a later court can vacate the settlement in litigation challenging the settlement's terms. For example, in *Minard Run Oil Co. v. U.S. Forest Service*, the Third Circuit vacated a settlement under which the Forest Service had agreed to perform environmental review before allowing certain activities within a national forest.[39] The court again found that the decision to perform such review, which departed significantly from past practices, needed to be made through a notice-and-comment rulemaking.

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[36] Memorandum from Randolph D. Moss, Acting Assistant Attorney Gen., Office of Legal Counsel." *See* 2015 GAO REPORT, *supra* note 21, at 5.
to Raymond C. Fischer, Assoc. Attorney Gen., 23 OPINIONS OF THE OFFICE OF LEGAL COUNSEL 126, 128 (June 15, 1999); *see also* McVean & Pidot, *supra* note 14, at 208.
[37] 2015 GAO REPORT, *supra* note 21, at 6-7. That exception was granted to authorize a settlement under which EPA agreed to undertake two studies of water-borne pathogens not expressly required by the Clean Water Act and it was entered into only after EPA had lost before the district court. *Id.*
[38] Conservation Northwest v. Sherman, 715 F.3d 1181 (9th Cir. 2013).
[39] Minard Run Oil Co. v. U.S. Forest Serv., 670 F.3d 236 (3d Cir. 2011).

E. Misplaced Criticism of Environmental Settlements

Environmental settlements provide significant benefits and there already exist numerous safeguards to prevent agencies from misusing this litigation device. Nonetheless, some argue for new and aggressive limits on the government's ability to enter environmental settlements. Such limits will surely increase the cost to taxpayers because they will prolong litigation and result in higher fee awards. Moreover, I believe the concerns are misplaced. I'd like to explain why the two most common arguments against environmental settlements are not cause for concern.

First, the most potentially significant argument against environmental settlements, to my mind, is the claim that such settlements allow agencies to make decisions in secret without soliciting public input. If environmental settlements truly allowed circumvention of administrative law, this would be a concern. However, as I will explain, environmental settlements almost always involve decisions that would not be subject to public participation even if the decision was made outside of a settlement.[40] And where agencies do make decisions in environmental settlements that evade requirements for public participation, courts can, and do, intervene.[41]

The vast majority of environmental settlements involve decisions that agencies may freely make without engaging in any public process.[42] Most environmental settlements resolve deadline litigation, and through the settlement, the agency commits to making a decision—one that Congress has already mandated that the agency make—but does not commit to a particular outcome when it makes its decision by the agreed upon deadline. Such settlements essentially involve an agency deciding to allocate resources to complete a specified decisionmaking process.

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[40] *See* McVean & Pidot, *supra* note 14, at 230-38.
[41] *See id.* at 236.
[42] *See id.* at 230-33.

Agency decisions to allocate resources and set priorities do not require public participation. Indeed, courts refer to resource allocation decisions as a quintessential matter of agency discretion.[43] As a result, an agency making such a decision through a settlement evades no public participation requirement, and, indeed under certain environmental laws, settlements processes involve public participation that would not otherwise be available because opportunities for public comment are incorporated into certain settlements processes.[44]

The same is true for other, rarer categories of settlements. On occasion, agencies enter settlements that commit to engaging in a particular procedure in making a decision.[45] For example, in *California Resource Agency v. U.S. Department of Agriculture*, a state agency and environmental groups filed a lawsuit alleging that the Forest Service had violated its procedural obligations in finalizing a forest plan.[46] After the district court ruled that the Forest Service had violated the law, the federal government entered into a settlement with the plaintiffs agreeing to engage in certain procedures as it reconsidered its forest plan. The Forest Service could always have decided to provide for additional process without soliciting public input, with or without a settlement. The APA explicitly exempts rules of agency procedure from public participation requirements,[47] and decisions about what procedures to use in making a specific decision are generally a preliminary aspect to an agency's decisionmaking process that is not independently

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[43] *See, e.g.*, Oil, Chemical & Atomic Workers Union v. Occupational Safety & Health Administration, 145 F.3d 120, 123 (3d Cir. 1998).
[44] *See* McVean & Pidot, *supra* note 14, at 206-07; 2014 GAO REPORT, *supra* note 26, at 12. Moreover, as the Government Accountability Office found in a 2014 report examining settlements of deadline lawsuits brought under the Clean Air Act, those settlements include explicit and express language that "nothing in the settlement can be construed to limit or modify any discretion accorded EPA by the Clean Air Act or by general principles of administrative law." *See* 2014 GAO REPORT, *supra* note 26, at 9.
[45] *See* McVean & Pidot, *supra* note 14, at 233-35.
[46] California Resources Agency v. U.S. Department of Agriculture, Nos. 08-1185, 08-3884, 2009 W.L. 6006102 (N.D. Cal. Sept. 29, 2009).
[47] 5 U.S.C. § 553(b)(A).

subject to judicial review.[48] Moreover, as the *Minard Run* case demonstrates,[49] where an agency makes a procedural decision that a court believes should have been subjected to notice-and-comment rulemaking procedures, courts have ample authority to override the terms of the settlement.

Finally, agencies occasionally enter settlements that involve a commitment to a substantive position.[50] Often, these commitments regard preliminary matters that will become part of an agency decision subject to notice and comment rulemaking and eventually judicial review. In such a case, a reviewing court would consider the propriety and legality of the settlement at the time that the agency reaches a final decision.[51] If, for examples, a court finds that the terms of a settlement prejudged the outcome of an agency's decision, the court is likely to find the ultimate decision legally infirm. In rare situations an agency may attempt to enter a settlement that makes a final substantive decision that will not become part of another decisionmaking process.[52] Where the substantive decision involved in the settlement require public participation, the *Conservation Northwest* court demonstrates that courts are already well-equipped to detect and address the problem.

Because most settlements do not evade any public participation requirement and because courts already have ample authority to intervene in the rare circumstance where such evasion occurs, this critique of environmental settlements is unfounded.

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[48] *See, e.g.*, 5 U.S.C. 704 (authorizing judicial review of "final agency action").
[49] Minard Run Oil Co. v. U.S. Forest Serv., 670 F.3d 236 (3d Cir. 2011).
[50] *See* McVean & Pidot, *supra* note 14, at 235-38.
[51] The multi-species settlements between the Fish and Wildlife Service and the Center for Biological Diversity and Wildearth Guardians contained such a commitment. In those settlements, the agency agreed not to conclude that a listing of the species at issue was warranted by precluded by other priorities. *See* James J. Tutchton, *Getting Species on Board the Ark One Lawsuit at a Time: How the Failure to List Deserving Species Has Undercut the Effectiveness of the Endangered Species Act*, 20 ANIMAL LAW 401 426
[52] *See* McVean & Pidot, *supra* note 14, at 238.

A second argument critics make is that environmental settlements allow environmental groups to set the agenda for federal agencies.[53] This criticism also fails for the simple reason that it is Congress, not environmental groups, that have established the priorities that are being enforced through settlements. Congress has written environmental law to compel agencies to take action, and when agencies fail to take actions so required, litigation—from whatever the source—simply holds agencies accountable to their statutory mandates. Moreover, as discussed, settlements enhance, rather than reduce, the discretion of agencies in contrast to litigating a case to an unsuccessful conclusion that would result in the entry of injunctive relief against the agency. Finally, the resources required for agencies to satisfy their obligations under a settlement will have little impact on an agency's ability to pursue other priorities.[54]

CONCLUSION

Environmental settlements make good litigation sense. They make good policy sense. And they do not empower agencies to evade their legal responsibilities. Criticisms of environmental settlements, in my view, are simply criticism of the underlying substantive environmental statutes masquerading as concerns about litigation tactics. For example, complaints about the Fish and Wildlife Service's settlement of deadline litigation involving the listing of endangered species are not truly complaints about such settlements, but rather, a covert attempt to undermine the Endangered Species Act and prevent the Fish and Wildlife Service from carrying out its statutory obligation to list species as threatened or endangered where scientific evidence demonstrates that a listing is warranted. Similarly, complaints about the EPA's settlement of Clean Air Act litigation are not at core complaints about the settlement, but rather objections by certain interest groups to the terms of the Clean Air Act.

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[53] *See* ALEC REPORT, *supra* note 11, at 5.
[54] *See* 2014 GAO REPORT, *supra* note 26, at 16-17.

In other words, there is nothing broken about environmental settlements. There is no problem with settlement practices for Congress to fix. There is no record to substantiate claims that settlements are collusive. And if collusion were commonplace, as is sometimes suggested, surely information about those practices would have been leaked to the media. There is no record to substantiate claims that they enable agencies to avoid public participation. There is no record to substantiate claims that they enable private parties—environmental groups or industrial groups—to take over agencies.

The Department of Justice and the federal environmental agencies should retain discretion to settle litigation brought against the federal government, in just the way that any other party in civil litigation can settle a case if settlement is a better option than litigation. If Congress believes that the substance of environmental law needs to be adjusted, that is a debate that should occur in full daylight. Environmental litigation and environmental settlements should not be used as an underhanded attempt to remake the substance of environmental law.

Mr. FARENTHOLD. Thank you.

Mr. Holsinger, you are recognized for 5 minutes, sir.

STATEMENT OF KENT HOLSINGER

Mr. HOLSINGER. Thank you, Mr. Chairman, Mr. Chairman, Ranking Members, members of the subcommittees. My name is Kent Holsinger. I'm the managing partner of Holsinger Law, LLC. We're a small natural resources law firm based in Denver, Colorado. We represent clients on matters related to lands, wildlife, and water law, and in that capacity, we've seen firsthand the effectS of sue and settle.

It's an honor to testify on this important matter.

I think one of the most significant challenges in this regard is that we have a small number of radical environmental groups that are gaming the system at the taxpayers' expense. And as a result, we're wasting our scarce resources that could be spent on real on-the-ground conservation efforts, and that needs to change.

Ironically, many of these groups are creating their own problems. As an example, the Center for Biological Diversity and WildEarth Guardians have been very adept at using Section 4 under the Endangered Species Act. It provides that any person can petition to list a species. But these groups and others over the past 10 years or so have started to petition to list hundreds of species at a time, and that's just not possible for the agencies to handle, the Fish and Wildlife Service, NOAA Fisheries.

As a result, they miss deadlines, and these same environmental groups that petition then sue over the logjam that they've created. They settle often over a deadline, rinse and repeat again and again and again. I'll spend a lot of my remarks on statistics from groups like these.

As an example, 2000 to 2009, CBD, 409 lawsuits. WildEarth Guardians, 180. 2009 to 2012, the same groups, CBD, 117 lawsuits, WildEarth Guardians, 55. From mid-March of 2017, the Center for Biological Diversity has been a party to, filed, or co-filed over 16 lawsuits. Now, that number might be wrong. I didn't look Monday, or Tuesday, or today. It could be higher.

We've reviewed Federal court records for these groups specifically since electronic records were first kept beginning back in 1990. These two groups—now WildEarth Guardians used to be Forest Guardians Incentive Group—have been party to over 1,500 lawsuits, most of which against the Departments of Interior and Agriculture, most of which citing the Endangered Species Act as a claim.

Ironically, these groups are also collecting grants from the government. WildEarth Guardians in 2016, $800,000 in Federal grants. 2015, $500,000 in Federal grants. NRDC, another litigious group, collected $6.5 million from EPA over the past several years.

According to the GAO, some three organizations are getting about 40 percent, 41 percent of all the attorney fees on sue and settle agreements. In one particularly egregious case, NRDC spent about 6 years litigating in its case against the Interior Department, winning a pyrrhic victory and remand of a biological opinion and collecting nearly $2 million in taxpayer-funded attorney fees.

The regulatory costs, as other witnesses have mentioned, are astronomic. We don't know for certain what they might be because no one keeps those records. That's one of the reasons that the Sunshine Act that other folks have talked about I urge the subcommittees to support. But these regulatory costs are enormous as a result of the litigation, and reforms are long overdue.

Transparency is sorely needed. There need to be records kept about who's filing suit, what sort of settlements they're collecting, who's earning fees and how. These groups are also abusing the opportunity to earn fees under the Equal Access to Justice Act with hourly rates that I've personally seen over $500 per hour. And these groups, many of them, their budgets dwarf those of the clients that we typically represent, even those in the oil and gas trade associations.

So, I again appreciate very much the opportunity to testify today. I urge support to remove the perverse incentives for litigation in environmental laws, the Equal Access to Justice, the Endangered Species Act, and other Federal laws.

Thank you.

[Prepared statement of Mr. Holsinger follows:]

Kent Holsinger
Manager, Holsinger Law, LLC
Testimony on "Examining 'Sue and Settle' Agreements: Part 1"
Committee on Oversight and Government Reform
Subcommittee on the Interior, Energy, and Environment
Subcommittee on Intergovernmental Affairs
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, DC 20515
May 24, 2017

Thank you for the opportunity to testify. Holsinger Law, LLC is a small, Denver-based law firm that specializes in lands, wildlife and water law. I am testifying as the manager of Holsinger Law, LLC. In that capacity, I can attest to the damaging impacts sue-and-settle litigation has had on landowners, agricultural entities, water providers, and energy producers.

I. Drowning in Petitions and Flooding with Lawsuits

a. Burdensome Petitions

Between 2005 and 2015, FWS received 1701 petitions to list a staggering 1,446 species under the Endangered Species Act ("ESA") according to a 2017 Government Accountability Office report, "Environmental Litigation: Information on Endangered Species Act Deadline Suits" ("GAO Report")[1] at 11.

Over the past several years, a small cadre of environmental groups has buried the U.S. Fish and Wildlife Service ("FWS") with listing petitions under the ESA. WildEarth Guardians ("WEG"), the Center for Biological Diversity ("CBD") and their like have a long history of filing both numerous and onerous listing petitions with FWS. For example, in 2007 WEG submitted a single petition seeking to list 475 Southwestern species, while another petition submitted the same year sought to list 206 species in the Mountain-Prairie Region (collectively "2007 WEG Petitions"). A 2013 petition sought to list 81 marine species. In a single 2010 petition, CBD petitioned to list 404 species.

These "mega-petitions" (so termed in the GAO Report) serve only to increase FWS's workload—and by extension, the time needed to review and subsequently make determinations on petitions. FWS has already struggled to carry out Section 4 directives "in part because of a high volume of litigation and petitions seeking to add a large number of species to the threatened and endangered species lists." *Id.* Environmental

[1] https://www.gao.gov/assets/690/683058.pdf.

activist groups see this ensuing delay—brought about in part because of the unreasonably extensive petitions they themselves have submitted—as an opportunity to litigate. For example, in 2009 WEG sued FWS for allegedly failing to make 90-day findings on its own mega-petitions (674 species). It is not surprising that, when FWS must review and make determinations on such a large number of species at one time—in addition any other petitions submitted to the agency—delays and missed deadlines will occur.

While the GAO Report primarily analyzed the actions brought against FWS by environmental activist groups as a result of delays in implementing Section 4 directives (e.g., petition review, listing determinations, critical habitat designations—all of which are subject to statutory deadlines), these "deadline suits" can be seen as a microcosm of the larger world of ESA lawsuits. The GAO Report found that between 2005 and 2015, "a variety of plaintiffs" filed 141 deadline suits against both FWS and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service ("NMFS"). GAO Report at 13. CBD and WEG filed 73 of these 141 suits. *Id.* at 17. A majority (101 suits) were settled. *Id.* at 19, 20.

b. Sue-and-Settle Litigation

Federal lawsuits filed by environmental groups surged in recent years. In fact, sue-and-settle agreements almost quintupled during President Obama's administration when compared to the number of occurrences during previous administrations.[2] CBD and WEG alone filed 117 and 55 lawsuits respectively between 2009 to 2012.[3] Collectively, these two groups filed roughly 1,500 lawsuits since 1990.

Sue-and-settle litigation is staggeringly expensive. In a June 19, 2012 press release, the U.S. House Committee on Natural Resources reported that the federal government "defended more than 570 . . . [ESA-related] lawsuits," which cost taxpayers "more than $15 million in attorney fees" between 2008 and 2012.[4] Unfortunately, the true cost of sue-and-settle is impossible to ascertain as neither the agencies nor the Department of Justice seem to keep track.

In 2013, the U.S. Chamber of Commerce published an analysis of the Sue-and-Settle Process, as well as its effects on government policy ("COC Report").[5] The COC Report found that between 2009 and 2012, a total of 71 lawsuits (including one notice of intent to sue) were settled under circumstances such as sue-and-settle. COC Report at 12. These lawsuits pertained to the Clean Air Act, the Clean Water Act, and the ESA. The Report further notes that "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." *Id.*

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[2] https://www.alec.org/article/sue-and-settle-once-again-rears-its-ugly-head/.
[3] House Committee on Natural Resources, available at: http://naturalresources.house.gov/newsroom/documentsingle.aspx?DocumentID=299899.
[4] *Id.*
[5] https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf.

By filing such suits, these groups circumvent the normal rulemaking process and effect immediate regulatory action with the consent of the agencies. *Id.*

In the majority of sue-and-settle cases, environmental groups are awarded litigation costs, including attorneys' fees, at the taxpayers' expense. "Recent investigations . . . show that more than $49 million was quietly funneled to environmental groups through these scams [sue-and-settle litigation] since President Obama assumed office." [6] "According to a 2011 GAO Report, three organizations were awarded with 41% of this entire sue-and-settle payback between 1995 and 2010...."[7] Legislation has been repeatedly introduced (but never enacted) that would curb sue-and-settle.

According to the Chamber, "a review of a portion of their database revealed attorney's fees 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." COC Report at Footnote 14.

In addition to the attorney fees, environmental groups like WEG and CBD often receive extensive funding from the federal government. WEG's 2016 income totaled at $3,789,258, of which $800,104 was from government grants. This is an increase of $315, 368 from the organization's 2015 government grant income of $523,038.[8] NRDC received at least $6.5 million in grants from the EPA since 2000.

i. Examples of recent CBD and WEG Litigation

Since the inauguration of President Trump, CBD, WEG, and other environmental activist groups have ramped up their litigious efforts.

CBD has filed or co-filed approximately 16 lawsuits[9] against the federal government since mid-March 2017 alone. Many of these lawsuits have challenged executive orders or memoranda issued by President Trump in addition to Congressional Review Act ("CRA") bills signed by the president.

> 5/11/2017 – *CBD et al v. USDA*. Suit against APHIS Wildlife Services regarding predator control in Idaho.
> http://www.biologicaldiversity.org/news/press_releases/2017/wildlife-services-05-11-2017.php

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[6] http://www.newsmax.com/LarryBell/epa-lawsuits/2016/10/31/id/756165/.
[7] *Id.*
[8] WEG's annual reports documenting the organization's financials are available at: http://www.wildearthguardians.org/site/PageServer?pagename=publications_annual_reports#.WR4EAdxumCo.
[9] CBD's "Trump Lawsuit Tracker" webpage, which lists all of the current lawsuits CBD has filed against the Trump administration, can be accessed here: http://www.biologicaldiversity.org/campaigns/trump_lawsuits/index.html.

5/3/2017 – *CBD, NRDC, Sierra Club, et al v. President Trump, DOI Secretary Ryan Zinke, and Wilbur Ross.* Suit over the executive order lifting a ban on new offshore oil and gas drilling in the Arctic and Atlantic Oceans.
http://www.biologicaldiversity.org/news/press_releases/2017/offshore-drilling-05-03-2017.php

5/3/2017 – *CBD v. EPA*. Suit claiming that the agency failed to comply with a FOIA request for documents relating to Administrator Scott Pruitt's "close ties" to oil companies and "other polluting industries."
http://www.biologicaldiversity.org/news/press_releases/2017/scott-pruitt-05-03-2017.php

5/3/2017 – *CBD et al v. Scott Pruitt*. Suit regarding his "failure to finalize deadlines by which D.C. and Philadelphia must meet 2008 clear-air standards" re controlling smog.
http://www.biologicaldiversity.org/news/press_releases/2017/clean-air-05-03-2017.php

5/2/2017 – *CBD et al v. USFS and BLM.* Suit regarding oil and gas in Ohio's Wayne National Forest.
http://www.biologicaldiversity.org/news/press_releases/2017/wayne-national-forest-05-02-2017.php

4/20/2017 – *CBD v. Zinke*. Suit challenging the constitutionality of the Congressional Review Act to overturn an Obama administration rule prohibiting predator control efforts.
http://www.biologicaldiversity.org/news/press_releases/2017/wildlife-services-04-12-2017.php

5/18/2017 – *CBD v. U.S. Department of State*. Suit demanding information on the route of the Keystone KL Pipeline, as well as contracts and correspondence with private consultants involved.
http://www.biologicaldiversity.org/news/press_releases/2017/keystone-xl-pipeline-05-18-2017.php

Other lawsuits filed by CBD (and its allies) during this same period challenged: the approval of the Keystone XL Pipeline; coal leasing on public lands; a land exchange for a copper mine in Minnesota; efforts to secure the nation's border; and Colorado's predator control program.

c. Equal Access to Justice Act

The Equal Access to Justice Act ("EAJA") is another favored tool for environmental litigants. While it was intended to protect individual citizens and businesses from the long arm of government regulation, environmental groups have co-opted it to recover exorbitant legal fees.

The first major problem with the EAJA is transparency. Although it originally required a public report of amounts paid out, Congress repealed that requirement in 1995. As a result, large environmental groups make sizable profits suing federal agencies with no public disclosure regarding the cost to taxpayers. Net-worth caps (that serve to limit recovery) do not apply to 501(c)(3)s—allowing wealthy environmental groups to game the system. Moreover, environmental attorneys have been able to bypass the $125/hour statutory cap on attorneys' rates. Finally, the courts have interpreted the term "prevailing party" with great leniency. In *Natural Resources Defense Council v. Salazar*, No. 1:05-cv-01207-OWW-GSA (E.D. Cal. 2011), the plaintiffs kept the agency in court for more than six years and won only a single order relative to a biological opinion. Nonetheless, NRDC received a $1,906,500 payout.[10]

d. Holsinger Law, LLC Litigation

I have been involved in approximately one dozen federal cases over the past 13 years on behalf of agriculture, counties, oil and gas, trade associations and other clients. Many of these were actions to intervene in litigation filed by environmental groups. Others were Freedom of Information Act ("FOIA") cases where agencies refused to divulge information that should have already been public. Recently, Holsinger Law, LLC represented four Colorado counties in challenging Obama Administration land use plan amendments on greater sage-grouse. Among other things, the counties allege state and local plans and conservation efforts were ignored in favor of eleventh-hour mandates from Washington, D.C.

e. Financial Impacts of Sue-and-Settle Litigation

Listings and litigation are unlikely to go away. According to the Western Legacy Alliance, from 2000 to 2009 the Center for Biological Diversity (CBD) filed 409 lawsuits; followed by 180 lawsuits filed by WildEarth Guardians (WEG) and 91 filed by Western Watersheds Project, among many others.

CBD and WEG entered into settlement agreements with DOI In May and July of 2011 over petitions to list over 775 species under the ESA through a myriad of lawsuits and petitions. These groups collected over $125,000 in taxpayer-funded attorney fees on these actions alone. Currently, there are 1,620[11] domestic species listed under the ESA. How can the FWS possibly process these voluminous petitions with the "best available science" standard under the ESA?

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[10] *See also* Lowell E. Baier, *Inside the Equal Access to Justice Act: Environmental Litigation and the Crippling Battle over America's Lands, Endangered Species, and Critical Habitats* (Rowman & Littlefield 2015).

[11] http://www.nmfs.noaa.gov/pr/species/esa/.

Western Energy Alliance discovered that, subsequent to CBD and WEG's massive settlements in 2011, WEG and CBD filed 38 of 53 petitions to the FWS encompassing 113 of 129 species.[12]

Regulations implemented through sue-and-settle have staggering economic costs. According to the Heritage Foundation, the ten most costly regulations from sue-and-settle agreements cost in excess of $100 billion annually.[13]

IV. Sue-and-Settle Litigation Stifles Conservation

Sue-and-settle litigation benefits only litigious environmental groups. It burdens local, state and federal governments and inhibits real, on-the-ground conservation work. When just a single listing could have dramatic impacts to agriculture, water, utilities, industry and others—the effects of listing hundreds of new species would be devastating.

For listed species, activities that require federal permits, licenses or authorizations require consultation with the FWS under Section 7 of the ESA. This can result in significant delays and costly project modifications. For example, surveys may be required for some listed species that are not present for significant months out of the year. And existing federal permits, licenses or authorizations could be subject to reinitiation of consultation upon new listings or information. Finally, some actions on public or private lands could be construed to "take" listed species or their habitat under Section 9 of the ESA. Violations of the ESA are subject to substantial civil and criminal penalties.

Incredibly, agencies like the BLM are requiring permitting and red-tape even for projects that improve or enhance habitat. National Environmental Policy Act (NEPA) compliance, along with the ESA, is stifling true conservation work.

V. Litigation Reform

With a few major exceptions, the EAJA is the federal statute that provides environmental plaintiffs with a cause of action for attorneys' fee awards. It is a powerful tool often exploited by environmentalists to fund their unending stream of lawsuits. There are a number of aspects of the EAJA warranting legislative reform due to enabling excessive and abusive environmental litigation.

There is no reason that non-profits should be immune from the net-worth cap – especially when they hold hundreds of millions of dollars in assets. Another potential reform measure for the EAJA would be to add provisions limiting the amount of attorneys' fees recoverable under the Act. Environmental plaintiffs use the EAJA repeatedly and routinely recover attorneys' fees at a rate that far exceeds the statutory maximum. A final necessary reform for the EAJA is to reinstitute transparency through tracking EAJA

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[12] *See also* https://www.westernenergyalliance.org/knowledge-center/legal/sue-and-settle.

[13] http://www.heritage.org/crime-and-justice/report/regulation-through-sham-litigation-the-sue-and-settle-phenomenon.

payments. In regard to sue-and-settle more generally, litigation cost awards received by environmental groups must be limited and must be made public.

VI. Conclusion

It is high time to end the strong-arm litigation tactics of these radical environmental litigants. Congress and the Administration should be working to reduce frivolous litigation, streamline permitting to promote on-the-ground conservation efforts, alleviate economic burdens and promote jobs. Scarce resources are being wasted on litigation driven by a handful of activist groups with little or no real conservation benefits. Reforms such as those proposed in the Sunshine for Regulatory Decrees and Settlements Act of 2017 ("SRDSA") are long overdue. Among other things, SRDSA would require notice of such lawsuits and settlement agreements in order to allow the public to comment on the proposed action. It would also require transparency in accounting for the cost of such agreements. I urge the Subcommittees to help enact the SRDSA and to work to remove the perverse statutory incentives to litigate such as those in the EAJA and the ESA. Thank you again for the opportunity to testify.

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Kent Holsinger is the managing partner of Holsinger Law, LLC. Kent has been recognized for his work on ESA issues by the Wall Street Journal, the Washington Times and CNN.com, among many others. He currently represents a broad array of clients in complex ESA, NEPA, water and land use issues.

Mr. FARENTHOLD. Thank you, and I will recognize myself now for 5 minutes of questioning.

First of all, Ms. Helmick, I got to know what happens to the cattle that are sitting out at the gate waiting to get in to graze. My understanding is, you know, once you have grazed a pasture to a certain level, it is time to move the cattle on or start feeding. What do you end up doing with these cattle that you cannot get on to fresh pasture?

Ms. HELMICK. Correct, thank you for the question. The first example that I mentioned is a very unique example because the deadline expired at the end of the grazing year, which is February 28th. What we have going on on February 28th is that is when baby calves are being born. It is also a time of year when usually the weather is not the best.

We were able to get a small extension until May 1 to allow those baby calves to get a little bigger, but then what we had to do was find property elsewhere to take those cattle, take trucks out to the location, gather the cattle, which incurs additional stress and health issues to the cattle, and then hauled them to some private lands.

Now, we feel blessed that we are large enough that we had enough private property, and the injunction only lasted 80 days, which allowed us to have adequate excess feed to provide for them. But in other cases, you are absolutely right. They would have to be moved to a location where they would be fed hay or some other means of forage.

Mr. FARENTHOLD. All right. Thank you. Mr. Pidot, you testified that you felt like this was a perfectly legitimate way to do this because the agencies were not getting the job done in a timely fashion following the statute. That is kind of my summary of it. But does not defending these lawsuits and focusing the resources, as the consent decrees and settlement agreements dictate, actually make it more difficult for them to go on about business as usual that they should be doing under the statute as opposed to having to deal with all the litigation and results of that litigation?

Mr. PIDOT. Thank you for the question, Mr. Chairman. Respectfully, I do not think so. Once an agency has been sued, if it is facing, as is often the case, an almost sure loss. I mean, in these deadlines lawsuits, any litigator will tell you the United States is going to lose the lawsuit. What is going to happen if they lose the lawsuit? The district court judge is going to enter an injunction, and that injunction is going to impose deadlines and procedures on the agency for reaching a decision on the timeline that the district court judge wants. If ——

Mr. FARENTHOLD. All right. So, they have already missed the deadline Congress has put on them.

Mr. PIDOT. Yep, and a district court judge will look at that and be, let us say, displeased that the agency has missed the congressional deadline, and may well impose a very short deadline.

Mr. FARENTHOLD. And you say the agencies, you know, let me back up. I am a lawyer, and when you go to court, you traditionally have sides with very adverse interests. I mean, to the point, you know, you sometimes have to hold them off from getting into fisticuffs on the courthouse steps. But both these activist groups and

whatever agency, how are their interests dissimilar enough that you have a true case or conflict there?

This is what concerns me is they both want to get the job done with protecting the environment, let us say, since we are focusing on environment, though this goes for a variety of issues. Where is the conflict?

Mr. PIDOT. Well, Mr. Chairman, I think if you represent the United States, you might personally feel like you would like to protect the environment. But concretely in your job, your job is to take the obligations that Congress has imposed on the agency through various statutes, and to the best of your ability ensure that the agency is pursuing those objectives in a way that is legally sound.

Now, outside groups, and that is true whether or not you have an oil and gas company coming and seeking a permit or CBD coming and making a petition. So, the adversity is that in both cases you have an outside group, oil and gas companies seeking a permit, CBD seeking a listing, which simply want the substantive end result.

Mr. FARENTHOLD. I am running out of time. I would like to get Mr. Holsinger's take on that. Do you think there is enough there? I noticed, Ms. Helmick, when that litigation came, she joined the suit, her company probably at her expense. But I would be interested in your take on whether there is a true controversy there and enough difference of opinion that you end up with an arm's length settlement.

Mr. HOLSINGER. Mr. Chairman, one of the things that has boggled my mind for some time goes to the example you cited in your opening statement, the 2011 settlement agreement between WildEarth Guardians and Center for Biological Diversity. Section 4 of the ESA governs listing and delisting. It provides that you can petition to list a species. Why the Agency did not say that is it, that is all you get, WildEarth Guardians, Center for Biological Diversity, has always been beyond me.

So, I have long wondered if that is a circumstance where maybe the Agency folks, some of the Agency folks, did not like the idea of having to commit to list an additional 700 and some species where there is only 1,600 or so to start with.

Mr. FARENTHOLD. All right. Well, I see I am out of time. If we have time to do a second round, I will ask some more questions. We will go to Ms. Plaskett now for her 5 minutes.

Ms. PLASKETT. Thank you, Mr. Chairman. And I just wanted to take that discussion a little further that the chairman brought up in this notion of an arm's length litigation. You know, the purpose of the EPA is to make our environment cleaner, protect human health, and protect wildlife, we are automatically assuming that that is very much squarely within radical environmental groups. I do not know if that is necessarily the case.

I live in a jurisdiction which has had major friction with EPA, particularly over listings of wildlife because it in some way impedes our development when they have listings of coral that allow us not to do dredging or to create hotels or resorts in the area. And we are competing with the rest of the Caribbean, which does not have EPA and does not have the restrictions that we have. That creates conflict.

But I want to know in a new Administration, such as the new EPA director, Director Pruitt, if an oil or chemical company were to bring a suit against EPA, are we saying now because of the teachings or the philosophy of President Trump to restrict environmental, you know, Mr. Pidot, would you say that that was an arm's length lawsuit if they were to bring a lawsuit in that matter, or Mr. Holsinger, would you say that that would be then an inappropriate person, or would that be for a judge to determine if they were proper litigants in a matter?

Mr. PIDOT. Well, if you do not mind me answering the first quickly. I think that the history of the Department of Justice has been one of incredible integrity, committed civil servants who keep their eye on the rule of law to my mind. And I would expect that people at the Department of Justice would maintain that tradition moving forward, and that settlement practices would continue to be the kind of practices that civil servants can be proud of when the interests of the United States are being represented zealously by lawyers.

Now, I guess that could change, but I would need to see a pretty robust factual record to suggest that something fundamental had changed about the way the Federal government went about its business. And I have not seen evidence of that to date.

Mr. HOLSINGER. Madam Ranking Member, what we have not seen, what I have not seen, is a history of the abuse of these provisions of the environmental laws on the side of industry as we have on the side of these environmental groups. And I named two in particular that over 1,500 times have litigated these issues. I know of no corollary anywhere, so clearly this is an example of these folks, a very small number of folks, that are simply gaming the system.

Ms. PLASKETT. By that, we are making the assumption that the lawsuits can actually change policy of the EPA. Are we saying that in the lawsuits that the settlements allow EPA to actually change the policy, or is it related simply to what you have stated, which was, in fact, the timing by which they make the reviews?

Mr. HOLSINGER. Well, in these cases that I cited, it is mostly against the Departments of Agriculture and Interior, and many of them on deadline issues.

Ms. PLASKETT. So, those cases were not EPA specifically.

Mr. HOLSINGER. That is correct.

Ms. PLASKETT. Okay.

Mr. HOLSINGER. Most of them were not.

Ms. PLASKETT. All right. So, GAO rejects the notion of sue and settle, and has stated time and time again, and here is a quote, a 2011 GAO report regarding an environmental case's status, "No trend was discernible in the number of environmental cases brought by EPA as the number of cases filed in Federal court varied over time." The Government Accountability Office even confirms that these settlements almost never impact the ultimate outcome of how an agency acts. In a December 2014 report, GAO stated, "EPA issued 32 major rules from May 2008 through June of 2013. According to EPA officials, the agency issued nine of these rules following settlements in deadline suits."

Mr. Pidot—"T" is silent, right? Very French. Were you aware that GAO concluded that settlements almost never impact the final rule in agency issues?

Mr. PIDOT. I was aware, Madam Ranking Member, and it does comport with my experience while working for the Federal government.

Ms. PLASKETT. And were you aware that the GAO concluded that the effect of these settlements is to require an agency to make a decision, yes or no, up or down?

Mr. PIDOT. Yes, that was my experience as well, and I was aware that GAO had made that conclusion.

Ms. PLASKETT. You know, and one of the things we have not discussed in the sue and settle, the supposed phenomenon, and the issue of these deadlines and EPA not meeting it, is it true that EPA is unable to complete these reviews on time, and that they are consistently underfunded and under resourced? I do not know if any of you have a question with regard to that or a response.

Mr. PIDOT. Well, if the question for me, I mean, I think, Madam Ranking Member, you are correct that one of the challenges facing EPA and the Fish and Wildlife Service is consistent underfunding, such that the enormous number of obligations that have been imposed on the agencies by Congress often are not met. But that to me has nothing to do with lawsuits or settlements. It is about congressional objectives established in statutes, and in agencies that have not been given enough capacity to meet those objectives.

Ms. PLASKETT. Thank you very much. Mr. Chairman, thank you for your indulgence.

Mr. FARENTHOLD. No problem. Mr. Palmer, you are now recognized for 5 minutes.

Mr. PALMER. Thank you, Mr. Chairman. Mr. Holsinger, listening to the testimony and listening to the questions and responses, I want to get this back what I think is the real problem. I understand there is a legitimate role for consent decrees and private suits, you know, outside the public realm, and I understand there is at times a legitimate role, forum involving government. But I think we are currently in a situation where we are outside what would be acceptable.

So, my question is do you believe that consent decrees that impose rules or do lawmaking and appropriate taxpayer funds outside of the elected government—Congress, State legislatures, county commissions, city councils—bless you.

Ms. PLASKETT. Thank you.

Mr. PALMER. We will strike that from the record.

Ms. PLASKETT. Do not strike that. I need that blessing.

Mr. PALMER. Okay. Reclaiming my time. Let me restate this, that where lawmaking and appropriating is taking place outside of elected government, whether that is Congress, State legislatures, county commissions, city councils, that it could deny people their right to representative government.

Mr. HOLSINGER. Yes. Thank you, Mr. Chairman. I agree wholeheartedly, and, in fact, a couple of examples come to mind. We have been in the natural resources field in the West for a little over a decade now, and in that time we have been involved in about a dozen Federal court cases, give or take. Several of those were cases

brought by environmental groups in which we intervened to try to have a seat at the table in litigation.

And in many of those instances, the Administration, in settlement negotiations with the plaintiff only, cut a deal to do something as a result of the litigation, which even we as litigants in the case had no knowledge of, no opportunity to participate in, let alone the public. And back to the example of the 2011 settlement with U.S. Fish and Wildlife Service. That completely changed the direction of the Agency, their priorities, and what they spent a huge amount of their time and resources on.

So, those are great examples of instances where sue and settle led to real regulatory impacts that the rest of had no opportunity to participate in.

Mr. PALMER. So, the bottom line is, and I have seen this played out numerous times, is that you have got government agencies, whether at the Federal, State, or local level, that are being run by attorneys and judges rather than mayors, and governors, and elected representatives. And, you know, I have a high regard for the folks that work at the Department of Justice, but with all due respect, Mr. Pidot, they do not have legislative appropriated power. That is reserved to the elected representatives of the people.

That is the big issue here. It is really not about regulations and environmental law. It is about who makes the law. It is about who enforces the law, who appropriates the money. The Department of Justice's responsibility is to enforce the law. It is not to make law. It is not to enter into a private agreement with outside groups outside the legislative process.

And I think what we are really focused on here is how do we restore representative government to the people at every level. That is a huge problem because, as I say, you have got these lawyers and judges, and some of these decrees have gone on for decades. And most of the people, they have gone on so long that the voters do not even know they exist.

So, I would like to ask you, Mr. Pidot, would you support date certain sunset dates for consent decrees?

Mr. PIDOT. Would you repeat the question? I am sorry, Chairman Palmer.

Mr. PALMER. Do you support date certain sunset dates for consent decrees? That is a yes or no. Okay.

Mr. PIDOT. Yes, in some circumstances. I mean, I think it really depends on ——

Mr. PALMER. Well, why would you not in any circumstance? If there is a specific remedy to achieve the objectives of the litigation, why could we not have a date certain? I mean, why would we, for instance, in a State have a governor get elected to office that inherits a consent decree with on opportunity whatsoever to get a remedy to that so they get out from under that?

Mr. PIDOT. Well, Mr. Chairman, can I give you an example of where I would uncomfortable with a date certain? I think maybe in contrast it will illuminate my thoughts.

Mr. PALMER. May I extend my time, Mr. Chairman?

Mr. FARENTHOLD. Without objection.

Mr. PALMER. Go ahead.

Mr. FARENTHOLD. I will give you another minute.

Mr. PIDOT. So, for example, there was a consent decree entered against Reserve Mining Company in Minnesota dealing with a discharge of asbestos into the waters of Lake Michigan, I believe. It was not a date certain consent decree because what was agreed to in the consent decree is that the company going into the future would never discharge asbestos in this particular way again. And so, in a circumstance like that, how do ——

Mr. PALMER. But that does not mitigate against having a date certain for this because the issue here is whether or they are not they are in compliance. If they are not in compliance, they are still outside the law, and our agencies have the ability to enforce that law. Let me ask you this. Do you support defining compliance language so specifically that it is clear that a decree requirement has been fulfilled, because that would apply to your example.

Mr. PIDOT. I have not seen compliance language that is so specific in any settlement with the United States ——

Mr. PALMER. That is the problem. You do not define it, and it goes on and on and on, and the taxpayers are on the hook for it and do not even know it. I thank you for your indulgence, Mr. Chairman.

Mr. FARENTHOLD. Thank you. We will now recognize Ms. Demings for her 5 minutes of questioning.

Ms. DEMINGS. Thank you so much, Mr. Chairman. Mr. Holsinger, in your testimony here today, I believe that you said that many of the advocacy groups that bring suits against the Federal government also collect hundreds of thousands of dollars in grants. Do you believe that groups who bring suits because they feel the Federal government has violated the law in some way should not be entitled to receive Federal grants?

Mr. HOLSINGER. Not necessarily, Ranking Member. But what I do believe is we have certain groups that are absolutely ——

Ms. DEMINGS. I just want to understand your reason for making that statement today in this hearing.

Mr. HOLSINGER. Right. So, these two particular groups that I mentioned, Center for Biological Diversity and WildEarth Guardians, are the most litigious environmental groups that I have ever seen in any context whatsoever with 1,500 lawsuits over the past few decades. I have a hard time grappling with the notion that they should be receiving government grants while they are in an endless cycle of litigation against the Federal government.

Ms. DEMINGS. You also said that 41 percent of all attorney fees are collected, about 41 percent, in the cases. As a practicing attorney, have you ever claimed or recovered attorney fees under a Federal statute that provides for a market-based recovery of reasonable attorney fees?

Mr. HOLSINGER. Ranking Member, the statistic was that 41 percent of all the attorney fees collected under the Equal Access to Justice Act were to select, I think, three environmental groups. So, again, these are folks that are suing over and over again.

Ms. DEMINGS. As a practicing attorney, have you ever claimed or recovered attorney fees under a Federal statute that provides for market-based recovery of reasonable attorney fees?

Mr. HOLSINGER. Yes, we have. We filed suit under the Freedom of Information Act when agencies failed to divulge information that

they were already required to make public. And we did have settlements agreements in regards to two of those cases.

Ms. DEMINGS. Are your attorney rates above or under the attorney cap or fee cap you are advocating for today?

Mr. HOLSINGER. My rates are far below what I have seen environmental groups collect, but they are above the fee cap, and we did not use the Equal Access to Justice Act.

Ms. DEMINGS. Please give your answer again.

Mr. HOLSINGER. Yes, our rates are far below what I have seen environmental groups collect under the Equal Access for Justice Act, and in our particular circumstance, we negotiated agreements over fees. I cannot talk about the terms pursuant to the court orders, but I can tell you that they were for a fraction of the time and expense that we spent on the cases.

Ms. DEMINGS. Mr. Pidot, is it not a fact that most litigation today is brought by corporations and not environmental groups?

Mr. PIDOT. The evidence that I am aware of supports that, Ranking Member.

Ms. DEMINGS. Mr. Holsinger, when private companies sue the EPA, will you maintain that the EPA should not settle these cases?

Mr. HOLSINGER. No, not necessarily. What I have an issue with is groups that are suing thousands of times over meaningless deadlines.

Ms. DEMINGS. Mr. Pidot, litigants often settle their disputes out of court rather than engage in litigation. Is that correct?

Mr. PIDOT. Yes, ma'am.

Ms. DEMINGS. They do this to save time and money in addition to avoiding, I believe, avoiding the risk of adverse rulings. Would you say that is probably correct as well?

Mr. PIDOT. Yes.

Ms. DEMINGS. For example, in the context of the ESA, settlements have allowed the Fish and Wildlife Service to focus on species recovery work as opposed to spending time in court.

Mr. PIDOT. I think that is exactly right and exactly the purpose of the settlements that have been discussed.

Ms. DEMINGS. Do you think that this is a good practice for the Federal government to save taxpayers money by settling cases that would otherwise result in additional litigation costs?

Mr. PIDOT. Absolutely, and furthermore, the Endangered Species Act is concerned with every species. And the fact that there are thousands of species that need protection under the Endangered Species Act is not an indicator that is what is broken is the fact that people are filing suit. What is broken is that we have not been able to adequately conserve these species such that they do not need listing.

So, I see the problem, I think, backwards from my colleague, and see this as really a failure on the part of the Federal government. And these are interest groups trying to hold the agency accountable to what Congress directed it to do.

Ms. DEMINGS. Thank you so much, Mr. Chairman. I yield back.

Mr. FARENTHOLD. Thank you, and I will recognize the gentleman from Wisconsin from 5 minutes.

Mr. GROTHMAN. Yeah, could either Mr. Kovacs or Mr. Holsinger give me examples of some of these suits, how they affected a pri-

vate property owner, like Ms. Helmick? Give me a couple of examples.

Mr. HOLSINGER. Yes, as an example, the 2011 settlement agreement with the Fish and Wildlife Service that radically altered the Agency's priorities, its budgets, its listing program, led to decisions and very short timelines to list or not list species, one of which was the Gunnison sage grouse that was listed in Colorado on this incredibly abbreviated timeline dictated by the settlement agreement itself, which I think is absolutely contrary to the statutory mandate that these decisions be made by the best available science.

As a result, private landowners in the range of Gunnison sage grouse now have cuts in how they can graze, when they can graze, where they can graze. There are restrictions on where people can travel, and how they can travel, and at what time of year. So, there are drastic impacts on the ground as a direct result from this excessive litigation.

Mr. GROTHMAN. I would think our forefathers would wonder if the result of that lawsuit, which unquestionably reduces the value of somebody's property, would be considered a taking. Do you want to comment on that? Should it be?

Mr. HOLSINGER. Well, there is no question that it increases the burdens both from a regulatory standpoint and an economic standpoint. It is making harder to make a living. And let us face it, one of the overriding concerns that we have these days is that the regulatory red tape is just strangling our country, and really impeding us from not only good things economically, but doing good conservation work. We even get tied up in litigation and process and red tape when we are trying to do good things on the ground, and that is just ——

Mr. GROTHMAN. Do you think maybe whenever, and I am not sure which organization there Mr. Pidot worked for, or did you just work for Justice I guess?

Mr. PIDOT. And the Department of Interior.

Mr. GROTHMAN. Oh, and Department of Interior. Do you think if there was some requirement, let us say, on this endangered species stuff, and I dealt with some of it in Wisconsin with a complete lack of common sense with our local Department of Natural Resources. If the Federal government had to pay out, if it affected what you could on your property, do you think that would maybe cause a little bit of cost benefit analysis to go on? I am asking Mr. Holsinger. I will come to you again, Mr. Pidot, in a second, or Mr. Kovacs for that matter.

Mr. HOLSINGER. You know, it is a complicated area of the law, but I do not think there is any question that the extent of the regulations, many of which result from these sue and settle agreements, are harming people and that they should have some recourse.

Mr. GROTHMAN. Do the private property owners become a party to those sort of things?

Mr. HOLSINGER. It is very difficult for them to do so. First of all, they are busy. They are trying to earn a living. They are grazing cattle. They are irrigating. They are ——

Mr. GROTHMAN. Under normal circumstances on one of these sue and settle agreements, do the property owners who maybe have a huge financial loss because of the actions of Interior or whatever,

do they get involved legally, or do they just have to watch the world go by and their property value dissipate?

Mr. HOLSINGER. We have represented property owners in some cases just like this. And even when they can come together and participate in the litigation, as I mentioned, the plaintiffs and the Federal defendants cut a deal, and they have no say in it.

Mr. GROTHMAN. They do not have to sign off. In other words, the government can just ——

Mr. HOLSINGER. Exactly.

Mr. GROTHMAN.—sign them down the river, take away their property, and there is nothing they can do. Okay. Do you want to comment on that, too, Mr. Kovacs?

Mr. KOVACS. Sure. I think one of the issues here is, no, they do not participate. Even when they have been granted intervention, the court will not recognize them if there is a consent decree. So, of the several hundred cases that we looked at, there were only two in which they were allowed to participate. In both instances, the court decided not to allow them into the discussions and, therefore, just signed the consent decree.

One other point I have got if I can take 20 seconds?

Mr. GROTHMAN. Sure, take 20 seconds.

Mr. KOVACS. If you are looking for a large impact on landowners, look at the Chesapeake Bay, which takes several States into account. There was a question as to whether or not the EPA even had authority to regulate what goes into the water along certain banks. In other words, the TMDLs, what is the quality of the water. In that particular instance, there was not even legal authority, but there was a lawsuit and there was a sue and settle. And now you have all of the States that border the Bay are now regulated.

Mr. GROTHMAN. Okay. Mr. Farenthold, I have one more question.

Mr. FARENTHOLD. Without objection, we will extend your time another 90 seconds.

Mr. GROTHMAN. Okay, thanks. First of all, I want you to all know you are doing a great job, and as soon as Mr. Palmer, Mr. Farenthold, and I get back on the floor in about an hour, we are really going to rub it in on these congressmen who did not show up because they missed a great show.

I guess that is it. I will not ask the other questions. Well, I will ask for Mr. Pidot because it is something we wonder about. We had another hearing, another subcommittee before, and we feel one of the problems with the government is they only see things from the perspective of the government, not the huge burdens that the government can place on the private property owner.

I was noticing right now you are a professor, but for a while you did work for Interior, and you worked for Justice I think. Did you ever, prior to being hired on at Interior, Justice, work for somebody or represent somebody where you had to be on the other end of government, in other words, the private property owner, that sort of thing, or when you got hired at Justice or Interior, did you solely come from a background of kind of government background?

Mr. PIDOT. Thank you for the question. During law school, I worked at a legal aid clinic where I was working with and pursuing wage and hour claims on behalf of indigent individuals. Beyond

that, my work has primarily been either pro bono work. I am currently representing some tribes in some pro bono matters, environmental groups, or the government.

Mr. GROTHMAN. Okay. Ms. Helmick, I am sorry for what you have to put up with from the government.

Mr. FARENTHOLD. Thank you very much. The chair notes the presence today of Congressman Jason Smith of Missouri. We appreciate your interest in this topic, and welcome your participation, and ask unanimous consent that Congressman Smith be permitted to fully participate in today's hearing.

Without objection, so ordered.

And your timing is perfect because you are up for 5 minutes of questioning, sir.

Mr. SMITH. Thank you, Mr. Chairman, for allowing me to enjoy and participate in your wonderful committee hearing today. This is an important issue to me, so I am grateful to be here to ask a few questions.

I have numerous pieces of different legislation discussing the topics of today. I also have legislation addressing this issue called the Stop Taxpayer Funded Settlement Act. My bill is very simple. It removes a key incentive for environmental groups to sue Federal agencies by preventing those agencies from paying the environmental groups' attorney's fees. This would apply to any settlement under the Clean Air and Clean Water Act and the Endangered Species Act. These are taxpayer dollars paying for outcomes in which the public have little to no opportunity to participate.

On that topic, I have a couple of questions. Mr. Kovacs, are these groups basically receiving their attorney's fees from the taxpayers?

Mr. KOVACS. Yes.

Mr. SMITH. Also, is it easy to track the taxpayer expense for sue and settle legislation?

Mr. KOVACS. It is getting easier, but 6 years ago when we started, it was virtually impossible. We were told both by Justice as well as EPA that they did not keep unified records.

Mr. SMITH. Is it common for a lot of these environmental groups to receive thousands, sometimes hundreds of thousands of dollars, in attorney's fees?

Mr. KOVACS. Yes.

Mr. SMITH. Mr. Holsinger, is it not true that some of the groups that regularly sue EPA and other agencies and receive large taxpayer attorney's fees actually have large financial resources?

Mr. HOLSINGER. Yes. In fact, I recall one case were involved in we were shocked to compare an oil and gas trade association's annual budget to that of WildEarth Guardians, and WildEarth Guardians absolutely dwarfed its budget.

Mr. SMITH. Do you believe that the provisions allowing recovery of attorney's fees for sue and settle cases are being abused by environmental groups?

Mr. HOLSINGER. Absolutely by some.

Mr. SMITH. Mr. Pidot?

Mr. PIDOT. It is Pidot.

Mr. SMITH. Pidot. Do you believe it is right for environmental groups with large budgets and millions in assets to collect six-fig-

ure attorney's fees off of sue and settle, especially when the lawsuits are non-adversarial?

Mr. PIDOT. My apologies. I am sure I can accept all the premises of the question, Congressman. I think that the proceedings are adversarial, and I do think it is right for settlements where a plaintiff is going to recover anyway for those to include attorney's fees because the alternative is for them to continue litigating and to receive more attorney's fees. So, the settlement saves taxpayer dollars. It does not consume extra taxpayer dollars to my thinking.

Mr. SMITH. So, let get this right. Any lawsuit where there has been a settlement, you would consider that adversarial.

Mr. PIDOT. As I mentioned earlier, I am aware of no evidence that there is collusion that goes on between the Department of Justice lawyers and the agency lawyers and people who have sued them. So ——

Mr. SMITH. Yes or no, is there any settlement case that would be in your eyes considered not adversarial?

Mr. PIDOT. In my eyes, no. Every case that is brought is an adversarial case.

Mr. SMITH. Okay. That is plain enough. Mr. Kovacs, do you believe it would harm the mission of agencies, such as the EPA and Fish and Wildlife, if they were to no longer be obligated to pay out these attorney's fees?

Mr. KOVACS. I do not believe it would harm the mission of the agency, no.

Mr. SMITH. Nor do I. Thank you, Mr. Chairman. It is a pleasure to be in your committee.

Mr. FARENTHOLD. Thank you. We appreciate your participation. I do have a couple more questions. Do you have more questions?

Ms. PLASKETT. Go right ahead.

Mr. FARENTHOLD. Do you mind if I just ask a couple more? I will do one quick round of questions to follow up.

Mr. Kovacs, I just want to make sure we have laid the groundwork here. Who establishes the laws and deadlines being enforced through these sue and settlement agreements? It is Congress, right?

Mr. KOVACS. It is Congress.

Mr. FARENTHOLD. We set up the laws. Now, in your opinion, how does the practice of sue and settle bypass the laws that promote transparency, public input, and other safeguards such as notice and comment under the Administrative Procedures Act or review at OIRA?

Mr. KOVACS. See, I think that is the crux of the issue. What happens when you have an agency like EPA where they miss all of the deadlines, you have the ability to go in and pick and choose what issues are going to be the priority for the Agency. And then when you pick that particular issue, let us say the utility mac has to be on the list, then all of a sudden the Agency, because it is under a court order, has to put that to the top of the pile. And once it is at the top of the pile, it is gone.

And to give you an idea of how big of a disparity, there are about 8,000 regulations from EPA over the last 9 years, and you have roughly about 150 ——

Mr. FARENTHOLD. Correct.

Mr. KOVACS.—sue and settle cases. It gives you an idea of where their priority is and where their money goes.

Mr. FARENTHOLD. All right. And I am going to go out on a limb and ask this question to Mr. Pidot. Do you agree that Congress anticipates that agencies will normally comply with the laws that we enact, like the Administrative Procedures Act, the Regulatory Flexibility Act, Paperwork Reduction Act, and all these other laws, as well as meet the deadlines that Congress sets? Do you believe that they are trying to do that?

Mr. PIDOT. Yes, I believe that is what Congress expects, and I also believe that is what the agencies attempt to do.

Mr. FARENTHOLD. All right. So, what is the necessity of these suits then if you believe that the agencies are doing the best they can? How do they improve the situation and not make it worse by taking away time and resources that could be done going through the prescribed methodology Congress put in place?

Mr. PIDOT. Two parts to my answer, Chairman. First, the fact that I ordinarily believe the agencies do the right thing does not mean agencies always get it right. Agencies are sometimes wrong about the law. They can be wrong about the facts. And ——

Mr. FARENTHOLD. But most of these suits are about deadlines.

Mr. PIDOT. And they also can fail to meet their obligations that Congress imposed. Now, the reason I said there are two parts to my answer, if you will bear with me, is that the decision whether or not to initiate a rulemaking is not itself a decision subject to the EPA. Under these settlements, all that happens is the agency now commences its public process.

So, all of the EPA provisions that apply to the Agency's decision-making process are met. OIRA review is met. All of those boxes are checked. The Agency has followed their legal obligation. This is a prior question of do we initiate a rulemaking or not.

And with respect to that question, there are no EPA constraints. OIRA is not involved. And indeed, the only person who is involved is Congress, and Congress has told the Agency do it and do it now. So, when someone holds them to account for that legislative command, to my mind that advances the rule of law.

Mr. FARENTHOLD. Mr. Holsinger, do you agree that the sue and settle practice helps and is a positive, or do you think it is a negative and interferes with the intent of Congress?

Mr. HOLSINGER. I think ——

Mr. FARENTHOLD. Microphone, please.

Mr. HOLSINGER. Mr. Chairman, there is great abuse of the process that has mired the agencies in needless litigation. There is no question about that.

Mr. FARENTHOLD. All right. And I want to go back to a couple of questions for Mr. Kovacs as we round this out. Are environmental groups using sue and settle tactics to overturn State policy at the Federal level as well?

Mr. KOVACS. Well, they certainly have in all of the regional haze SIPs and FIPs that they have put in.

Mr. FARENTHOLD. And what impact do these sue and settle agreements ——

Mr. KOVACS. Mr. Chairman, could I just add one point?

Mr. FARENTHOLD. Sure.

Mr. KOVACS. I do not want to correct the professor, but when you have a sue and settle agreement, OIRA is not involved at that point in time because what happens is the deadlines get crunched. And when the deadlines are crunched, it is a court order that they have to meet, not an OIRA review. And that is a major event because then there is no real review over what the agency procedure is going to be and what the rule might be. It is a timing problem.

Mr. FARENTHOLD. All right. And I just want to get back to the States for a second. What impact do these sue and settlement agreements, Mr. Kovacs, have against State policies in terms of labor and budget? What are the burdens on the State?

Mr. KOVACS. Sure. Once the sue and settle is imposed upon the State and they have to do a FIP, they literally have to go back and change all of their administrative code. That is the first thing. They then have to shuffle resources. So, when you have two or three of these hitting a State at a time, whatever the State is doing at that time, it has to now move those resources to apply to what EPA has just settled.

Mr. FARENTHOLD. All right. Thank you very much. I appreciate you folks' input, and hopefully it will go to working towards making this situation better and making more folks aware of what is going on.

Ms. Plaskett, I appreciate your and Ms. Demings' participation in this hearing, as well as the members on my side.

So, there being no further questioning going on, I am going to thank our witnesses for their testimony and their appearances.

And without objection, the subcommittee is adjourned.

[Whereupon, at 3:28 p.m., the subcommittees were adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Opening Statement
Chairman Blake Farenthold
"Examining 'Sue and Settle' Agreements: Part I"
Wednesday, May 24, 2017

Good morning. Today the Subcommittee on the Interior, Energy and Environment and the Subcommittee on Intergovernmental Affairs will begin to examine the consequences of "sue and settle" agreements, which have become increasingly common in recent years. Sue and settle agreements occur behind closed doors, outside of the regulatory framework set forth by the Administrative Procedure Act, aka the APA, with very little transparency and often appear to thwart congressional review.

Today, we will begin the discussion on sue and settle agreements, their impact, and potential solutions to what I consider an unacceptable and possibly unconstitutional expansion of both judicial and regulatory power. We need a solution that returns legislative authority to Congress and equally importantly, lets the American people see and have input into the process. Specifically today, we will examine sue and settle agreements that impact environmental policy through the Endangered Species Act, the Clean Air Act, and the Clean Water Act.

The APA has long ensured transparency and public engagement in the federal rulemaking process. Federal agencies have enacted countless environmental rules and regulations

using this framework. However, the sue and settle process short-circuits this long-used and congressionally created rulemaking process.

Many of our nation's most famous environmental statutes, such as the Clean Air Act or the Endangered Species Act, allow for citizen suits, which ensure that the government is held accountable to these laws. However, through sue and settle, citizens and environmental interest groups have found a way to exploit these provisions by suing federal agencies for failing to complete a specified action by a certain date and time, then come to a favorable "friendly" settlement with government regulators. These agreements are quietly negotiated, away from the public eye, and are finalized by the court.

While one may argue the merits of this system, it, unfortunately, is very susceptible to manipulation and abuse. This tactic results in the agency agreeing to prioritize the plaintiff's agenda, not Congresses' or the American people's. In an effort to comply, the agency can inadvertently divert large quantities of their time, money, and other resources to fulfilling just one consent decree.

A prime example of this kind of manipulation was when WildEarth Guardians and the Center for Biological Diversity proposed that the U.S. Fishing and Wildlife Service, or FWS, expand the Endangered Species Act to include more than 720 additional species. When FWS failed to accomplish this daunting task in the necessary time, the two groups sued. The

negotiated agreement allowed WildEarth Guardians and the Center for Biological Diversity to essentially dictate the agency's priorities moving forward, which ultimately cost 75% of FWS's funds that were allocated for endangered species listing and critical habitat designation.

The sue and settle process creates an unfair system. The winners are the small few who manage to manipulate the federal government into doing their bidding. The losers are the taxpayers, whose hard-earned money goes to pay attorneys for both sides of the case and focuses agency resources on the plaintiff's priorities for listing and enforcements, as opposed to the other responsibilities of the agency, Congress, and the American people.

Recently, Congressman Doug Collins introduced the Sunshine for Regulations and Regulatory Decrees and Settlements Act of 2017 to increase transparency and public engagement by ensuring there is notice and input for public comments. I think this is a good first step and I thank Congressman Collins for introducing this bill. I look forward to exploring additional suggestions with our panel today.

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