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HOUSE OF REPRESENTATIVES
REPORT
115–347

SUNSHINE FOR REGULATIONS AND REGULATORY DECREES AND SETTLEMENTS ACT OF 2017

OCTOBER 16, 2017.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 469]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 469) to impose certain limitations on consent decrees and settlement agreements by agencies that require the agencies to take regulatory action in accordance with the terms thereof, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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79–006

Purpose and Summary

H.R. 469, the "Sunshine for Regulatory Decrees and Settlements Act of 2017," limits the ability of defendant federal regulators and pro-regulatory plaintiffs to abuse federal consent decrees and settlement agreements to require new regulations, reorder regulatory priorities, bind the discretion of future administrations, and limit the rights of regulated entities and State, local and Tribal co-regulators affected by actions taken under such decrees and settlements. The bill accomplishes this by improving transparency, increasing participation by affected regulated entities and co-regulators in the negotiation and consideration of decrees and settlements, strengthening public comment on and judicial review of proposed decrees and settlements, and assuring review by the Attorney General and agency heads of the types of proposed decrees and settlements that would most intrusively involve the Judiciary in the administration of agencies' regulatory duties.

Background and Need for the Legislation

I. GENERAL BACKGROUND

A. Abuse of Regulatory Consent Decrees and Settlement Agreements and the Rise of "Sue-and-Settle" Litigation

Since the 1960s and 1970s, consent decrees and settlement agreements increasingly have been used in federal litigation to bind executive discretion under judicial authority, including to bind executive discretion over successive administrations. This trend has arisen in litigation against both federal defendants and State and local defendants. In litigation against federal defendants, the problem has been concentrated in litigation against regulatory agencies over allegations that agency action has been unlawfully withheld or unreasonably delayed at the federal level.

In such cases, the tactical use of consent decrees and settlement agreements has, over the decades, essentially been refined into an art form, commonly known as "sue-and-settle" litigation. In sue-and-settle litigation, defendant regulatory agencies, such as the U.S. Environmental Protection Agency, typically have failed to meet mandatory statutory deadlines for new regulations or allegedly have unreasonably delayed discretionary action. Plaintiffs in such matters often have strong cases on liability, giving them substantial leverage over the defending agencies. That leverage is heightened when, as often is the case, the agency actions at issue are politically sensitive, such as major, new anti-pollution regulations to impose high costs on a regulated industry. Political and practical concerns in sue-and-settle cases frequently give rise to perverse agency incentives to cooperate with actual or threatened litigation and negotiate a consent decree or settlement agreement to resolve it. This is because, once a decree or agreement is in place, the defendant agency has a litigation-based excuse to expedite action that helps to diminish political costs, reorder agency funding priorities, or serve other pro-regulatory ends.

As a result of these factors, it has become common in these cases for pro-regulatory plaintiffs to approach vulnerable federal agencies with threats of lawsuits, negotiate consent decrees or settlement agreements in secret in advance of suit, and propose the decrees

or settlements to the courts contemporaneously with the filing of the plaintiffs' complaints. The resulting decrees and settlement agreements often come as surprises to the regulated community, State, local, and Tribal regulators who share responsibility for regulatory programs at issue, and the general public. Further, these decrees and settlements often provide short timelines for agency action, particularly the proposal and promulgation of new regulations. The lack of advance notice and judicially-backed, minimal timeframes for proposal and promulgation allow defendant agencies to undercut the public participation and analytical requirements of the Administrative Procedure Act, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and other regulatory process statutes. Similarly, accelerated timeframes for proposal and promulgation allow agencies to short-circuit review of new regulations by Office of Information and Regulatory Affairs (OIRA) under executive orders applicable to the rulemaking process. Incentives for agencies to pursue these ends—which leave the agencies freer to frame new regulations to fit pre-conceived agency preferences, rather than public preferences, sound policy, and the facts—is particularly strong when plaintiffs and defendant agencies agree on what the content of proposed and final agency action should be and seek to effectuate that agreement without interference by other interested parties and OIRA.

In many cases, agencies also may not be able to conclude desired but controversial rulemakings before a succeeding administration—with potentially different views and priorities—takes office. The approaching expiration of an administration's term in office gives agency officials a powerful incentive to control the incoming administration's regulatory agenda through consent decrees and settlement agreements finalized before the new administration can assume its duties. That is particularly true when agencies have failed to meet a number of mandatory rulemaking deadlines under one statute. A relatively recent example of that potential was offered by the set of rulemakings required under the Dodd-Frank Wall Street Reform and Consumer Protection Act. Estimates in 2012 were that relevant agencies had missed three-quarters of the pre-2012 rulemaking deadlines in that legislation.[1] Had the Obama Administration been voted out of office in November 2012, a high potential for Dodd-Frank sue-and-settle decrees and settlements would have existed.

When pro-regulatory interest groups and regulatory agencies engage in sue-and-settle practices, the end result is rulemaking that implements the priorities of pro-regulatory advocates, limits the discretion of succeeding administrations, and takes place under schedules that render notice-and-comment rulemaking a formality, depriving regulated entities, the public, and OIRA of sufficient opportunities to influence the content of final rules.

B. Sue-and-Settle Trends Under the Obama Administration

Under the Obama Administration, this phenomenon became particularly troubling. Not only did that administration generally increase the number of major rulemakings, but it also engaged in a

[1] Reuters, *"Regulators Inching Forward on Dodd-Frank Rules"* (Jan. 3, 2012) (available at *http://news.yahoo.com/regulators-inching-forward-dodd-frank-rules-210003595.html*).

flurry of sue-and-settle cases. According to a 2013 study of Clean Air Act (CAA) and Clean Water Act (CWA) sue-and-settle cases, the U.S. Chamber of Commerce found that:

- The sue-and-settle process was increasingly being used as a technique to shape agencies' regulatory agendas, without input from the public or the regulated community.
- The Obama administration had already entered into more than 70 sue-and-settle agreements, which had led to the issuance of at least 100 regulations, including the Utility MACT rule, the Chesapeake Bay Clean Water Act rules, and various regional haze implementation rules.
- The Sierra Club was responsible for 34 of the 71 lawsuits, with WildEarth Guardians coming in second with 20 suits.
- Six of the Obama Administration's sue-and-settle regulations alone reportedly would impose $101 billion in estimated annual costs, while another four would impose compliance costs of as much as $23.66 billion.
- In fiscal year 2011, Congress appropriated $20.9 million to the U.S. Fish and Wildlife Service for endangered species listing and critical habitat designation. That year, the agency spent $15.8 million in response to court orders or settlement agreements.[2]

To provide further examples of sue-and-settle trends, two agencies alone, EPA and the Department of the Interior, were able to institute the following major policy changes under sue-and-settle rulemakings during the Obama Administration:

- the Utility Maximum Achievable Control Technology rule on coal-fired electric utilities;
- the Cement Maximum Achievable Control Technology rule on cement manufacturing;
- the Stream Buffer Zone rule on coal mining;
- the Cooling Water Intake Structure regulations on electric utilities;
- revisions to the definition of solid waste under the Resource Conservation and Recovery Act;
- regulation of greenhouse gases under the Clean Air Act;
- numeric nutrient criteria for the State of Florida under the Clean Water Act;
- federal implementation plans for regional haze in North Dakota and Oklahoma under the Clean Air Act;
- reconsideration of National Ambient Air Quality Standards for ozone;
- New Source Performance, Maximum Achievable Control Technology, and residual risk standards for oil and gas drilling operations;
- first-ever greenhouse gas New Source Performance Standards for coal- and oil-fired electric utilities;
- first-ever greenhouse gas New Source Performance Standards for oil refiners; and
- a commitment to move forward with Endangered Species Act protections for over 250 candidate species.

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[2] U.S. Chamber of Commerce, "Sue-and-Settle—Regulating Behind Closed Doors" (May 20, 2013) (available at http://www.uschamber.com/sites/default/files/reports/SUEANDSETTLEREPORT-Final.pdf).

Notably, between January 2013 and January 2017, EPA entered into an additional 77 consent decrees under the Clean Air Act alone, compared with the 60 CAA agreements the agency made between 2009 and 2012.[3] Collectively, during its eight years in charge of EPA, the Obama Administration welcomed far more Clean Air Act settlements (139) than previous administrations did over a 12-year period (93).[4] Further, the later years of the Obama Administration saw an increase in the use of sue-and-settle agreements to harness the federal government to assert federal control over state and local decision making, including, for example, through the agency's Chesapeake Bay Program and a surge in the imposition of Clean Air Act Federal Implementation Plans via sue-and-settle agreements.[5]

In short, the problem of sue-and-settle decrees, settlements and rulemakings, while not a problem that began during the Obama Administration, is clearly a problem that reached new highs during the Obama years. The costs of sue-and-settle regulations under the Obama Administration, moreover, were extraordinarily high, as displayed by the following table:[6]

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

C. History of Administrative Reforms in Past Administrations

During the Reagan and George H.W. Bush administrations, sue-and-settle problems were alleviated under policy set by Attorney General Meese in 1986. Under this policy, set forth in a memorandum commonly known as the "Meese Memo," the Department of Justice generally refused to enter into consent decrees that:

- converted into a mandatory duty the otherwise discretionary authority of an agency to propose, promulgate, revise or amend regulations;
- committed the agency to expend funds that Congress had not appropriated and that had not been budgeted for the action in question, or committed an agency to seek a particular appropriation or budget authorization;

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[3] *See* U.S. Chamber of Commerce, *"Sue and Settle Updated: Damage Done 2013–2016"* at 3 (May 17, 2016) (available at *https://www.uschamber.com/sites/default/files/u.s.* chamber_sue_and_settle_2017_updated_report.pdf).

[4] *Id.*

[5] Testimony of William L. Kovacs, *"Hearing on Examining 'Sue and Settle' Agreements: Part I,"* Committee on Oversight and Government Reform, U.S. House of Representatives at 4–9 (May 24, 2017) (available at *https://oversight.house.gov/wp-content/uploads/2017/05/Kovacs* Testimony_Sue-and-Settle_05242017.pdf).

[6] *See id.*

- divested the agency of discretion committed to it by Congress or the Constitution whether such discretionary power was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties; or
- otherwise afforded relief that the court could not enter on its own authority upon a final judgment in the litigation.

The Meese Memo also generally prevented the Department from entering into settlement agreements that:

- interfered with the agency's authority to revise, amend, or promulgate regulations through the procedures set forth in the Administrative Procedure Act or other statutes prescribing rulemaking procedures for rulemakings that were the subject of the settlement agreement;
- committed the agency to expend funds that Congress had not appropriated and that had not been budgeted for the action in question; or
- provided a remedy for the agency's failure to comply with the terms of the settlement agreement other than the revival of the suit resolved by the agreement, if the agreement committed the agency to exercise its discretion in a particular way and such discretionary power was committed to the agency by Congress or the Constitution to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties.[7]

The Meese Memo was grounded in separation-of-powers concerns. The Clinton Administration reviewed the questions addressed by the Memo and found that these policy concerns were sound. It did not, however, conclude that the Department was legally bound to respect the lines drawn in the Memo, and it substantially relaxed the Department's policy in 1999.[8]

D. Resolution of the Environmental Council of the States on Sue-and-Settle Practices

In light of the impacts that sue-and-settle consent decrees and settlement agreements often have on State agencies that co-regulate with the federal government (*e.g.*, under the Clean Air Act), the Environmental Council for the States (ECOS) undertook a review of the concerns raised by sue-and-settle practices.[9] That review culminated in ECOS Resolution 13–2, effective March 6, 2013. The resolution emphasized that States may be adversely affected by consent decrees or settlement agreements in sue-and-settle cases, may have information that would help the federal government defend or settle sue-and-settle cases, and may have interests

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[7] Memorandum from Attorney General Edwin Meese III to all Assistant Attorneys General and United States Attorneys, "*Department Policy regarding Consent Decrees and Settlement Agreements*" (Mar. 13, 1986).

[8] Memorandum from Randolph D. Moss, Acting Assistant Attorney General for Office of Legal Policy, to Associate Attorney General Raymond C. Fisher, "*Authority of the United State to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion*" (June 15, 1999).

[9] As described on its website, "[t]he Environmental Council of the States (ECOS) is the national non-profit, non-partisan association of state and territorial environmental agency leaders. ECOS was established in December 1993 at a meeting of approximately 20 states in Phoenix, Arizona and is a 501(c)(6) non-profit organization." *See* http://www.ecos.org/section/_aboutecos. "The purpose of ECOS is to improve the capability of state environmental agencies and their leaders to protect and improve human health and the environment of the United States of America." *Id.* ECOS' membership currently includes all 50 States, plus the District of Columbia and Commonwealth of Puerto Rico.

that should be accounted for in the consideration of settlements in these cases. It also stressed that States are not always given notice of such suits, are often not parties to them, and are typically not afforded an opportunity to assist in the negotiation of relevant settlements. In light of these concerns, in Resolution 13–2, ECOS stated that it:

- "Affirms that states have stand alone rights and responsibilities under federal environmental laws, and that the state environmental agencies are co-regulators, co-funders and partners with U.S. EPA;"
- "Urges the U.S. EPA to devote the resources necessary to perform its nondiscretionary duties within the timeframes specified under federal law, especially when required to take action on a state submission made under an independent right or responsibility (*e.g.*, State Implementation Plans under the Clean Air Act)."
- "Specifically calls on U.S. EPA to notify all affected state environmental agencies of citizen suits filed against U.S. EPA that allege a failure of the federal agency to perform its nondiscretionary duties;"
- "Believes that providing an opportunity for state environmental agencies to participate in the negotiation of citizen suit settlement agreements will often be necessary to protect the states' role in implementing federal environmental programs and for the administration of authorized or delegated environmental programs in the most effective and efficient manner;"
- "Specifically calls on U.S. EPA to support the intervention of state environmental agencies in citizen suits and meaningful participation in the negotiation of citizen suit settlement agreements when the state agency has either made a submission to EPA related to the citizen suit or when the state agency either implements, or is likely to implement, the authorized or delegated environmental program at issue;"
- "Believes that no settlement agreement should extend any power to U.S. EPA that it does not have in current law;"
- "Believes that greater transparency of citizen suit settlement agreements is needed for the public to understand the impact of these agreements on the administration of environmental programs;"
- "Affirms the need for the federal government to publish for public review all settlement agreements and consider public comments on any proposed settlement agreements;" and,
- "Encourages EPA to respond in writing to all public comments received on proposed citizen suit settlement agreements, including consent decrees." [10]

E. Reforms Embodied in the Sunshine for Regulatory Decrees and Settlements Act

Consistent with the record compiled by the Committee, the measures in H.R. 469 include provisions that: (1) require notices of intent to sue, complaints, consent decrees and settlement agreements, and attorneys' fee agreements in lawsuits attempting to

[10] The full, official text of Resolution 13–2 is available at http://www.ecos.org/section/policy/resolution.

force regulatory action be more transparent to the public and regulated entities; (2) give to regulated entities, State, local and Tribal co-regulators, and the public more rights to participate in the shaping or judicial evaluation of sue-and-settle consent decrees and settlement agreements, whether through notice-and-comment procedures or rights to participate in litigation as intervenors or amici curiae; (3) provide courts with more complete records and tools to review proposed sue-and-settle consent decrees and settlement agreements; and, (4) codify key Meese Memo restrictions to constrain the authority of the Department of Justice and defendant agencies to agree to sue-and-settle consent decrees and settlements that present separation-of-powers concerns.

II. PRIOR LEGISLATIVE HISTORY

The Sunshine for Regulatory Decrees and Settlements Act was first introduced as H.R. 3862 in the 112th Congress. H.R. 3862 was reported favorably by the Committee and passed the House on July 26, 2012, as title III of H.R. 4078, the "Red Tape Reduction and Small Business Job Creation Act of 2012," with a bipartisan vote (245–172). The bill was reintroduced in the 113th Congress as H.R. 1493 by Rep. Collins, who has sponsored the legislation in each succeeding Congress. H.R. 1493 was reported favorably by the Committee and passed the House twice with bipartisan support, first, on February 27, 2014, as title IV of H.R. 2804, the "Achieving Less Excess in Regulation and Requiring Transparency Act of 2014" (236–179), and, second, on September 18, 2014, as title IV of Subdivision B of Division III of H.R. 4 on September 18, 2014 (253–163). During the 114th Congress, the bill was reintroduced as H.R. 712, which the Committee similarly reported favorably and the House similarly passed on a bipartisan basis, on January 7, 2016 (244–173).

Hearings

The Committee's Subcommittee on Regulatory Reform, Commercial and Antitrust Law held one day of hearings on the Sunshine for Regulatory Decrees and Settlements Act in its embodiment as H.R. 712 on March 2, 2015. Witnesses at the hearing included: William L. Kovacs, Senior Vice President for Environment, Technology & Regulatory Affairs, the U.S. Chamber of Commerce; Patrick A. McLaughlin, Senior Research Fellow, Mercatus Center, George Mason University; Sam Batkins, Director of Regulatory Policy, American Action Forum; and, Amit Narang, Regulatory Policy Advocate, Public Citizen. The Subcommittee also held one day of hearings on the legislation during the 113th Congress (H.R. 1493), and the Committee's Subcommittee on Courts, Commercial and Administrative Law held one day of hearings on the legislation during the 112th Congress (H.R. 3862).[11]

During this term of Congress, the Committee held no hearings on H.R. 469. The Committee urges Members to consider the records

[11] *See Sunshine for Regulatory Decrees and Settlements Act of 2013: Hearing before the Subcomm. on Regulatory Reform, Commercial and Antitrust of the H. Comm. on the Judiciary,* Serial No. 113–28, 113th Cong. (June 5, 2013) ("*Sunshine Hearing II*"); *Federal Consent Decree Fairness Act, and the Sunshine for Regulatory Decrees and Settlements Act of 2012: Hearing before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary,* Serial No. 112–83, 112th Cong. (Feb. 3, 2012) ("*Sunshine Hearing I*").

of the aforementioned prior hearings and also to consider the record of the Committee on Oversight and Government Reform's related May 24 and July 25, 2017, hearings entitled "Hearing on Examining 'Sue and Settle' Agreements: Part I" and "Hearing on Examining 'Sue and Settle' Agreements: Part II."

Committee Consideration

On July 12, 2017, the Committee met in open session and ordered the bill, H.R. 469, favorably reported, without amendment, by a roll call vote of 15 to 8, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following roll call votes occurred during the Committee's consideration of H.R. 469.

1. An Amendment, offered by Mr. Conyers to exempt from the requirements of H.R. 469 any consent decree or settlement agreement that "prevents or is intended to prevent discrimination based on race, religion, national origin, or any other protected category." The amendment was defeated by a rollcall vote of 6 to 14.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)			
Mr. Chabot (OH)		X	
Mr. Issa (CA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)			
Mr. Jordan (OH)			
Mr. Poe (TX)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)			
Mr. Labrador (ID)		X	
Mr. Farenthold (TX)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)			
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Ms. Roby (AL)			
Mr. Gaetz (FL)			
Mr. Johnson (LA)		X	
Mr. Biggs (AZ)			
Mr. Rutherford (FL)		X	
Ms. Handel (GA)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)			
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)	X		

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Cohen (TN)			
Mr. Johnson (GA)			
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Mr. Jeffries (NY)			
Mr. Cicilline (RI)	X		
Mr. Swalwell (CA)			
Mr. Lieu (CA)			
Mr. Raskin (MD)	X		
Ms. Jayapal (WA)	X		
Mr. Schneider (IL)	X		
Total	6	14	

2. An Amendment offered by Ms. Jackson Lee to exempt from the requirements of H.R. 469 any consent decree or settlement agreement that "pertains to a reduction in illness or death from exposure to toxic substances or hazardous waste in communities that are protected by Executive Order 12898[.]" The amendment was defeated by a rollcall vote of 7 to 15.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)			
Mr. Chabot (OH)		X	
Mr. Issa (CA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)			
Mr. Jordan (OH)			
Mr. Poe (TX)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)			
Mr. Labrador (ID)		X	
Mr. Farenthold (TX)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)			
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Ms. Roby (AL)			
Mr. Gaetz (FL)		X	
Mr. Johnson (LA)		X	
Mr. Biggs (AZ)			
Mr. Rutherford (FL)		X	
Ms. Handel (GA)		X	

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)			
Mr. Johnson (GA)			
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Mr. Jeffries (NY)			
Mr. Cicilline (RI)	X		
Mr. Swalwell (CA)			
Mr. Lieu (CA)			
Mr. Raskin (MD)	X		
Ms. Jayapal (WA)	X		
Mr. Schneider (IL)	X		
Total	7	15	

3. An Amendment, offered by Mr. Cicilline to exempt from the requirements of H.R. 469 any consent decree or settlement agreement "pertaining to a deadline established by Congress through the enactment of a Federal statute to address the misuse of prescription painkillers, including the Comprehensive Addition and Recovery Act of 2016." The amendment was defeated by a rollcall vote of 8 to 15.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)			
Mr. Chabot (OH)		X	
Mr. Issa (CA)			
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)			
Mr. Poe (TX)		X	
Mr. Marino (PA)		X	
Mr. Gowdy (SC)			
Mr. Labrador (ID)		X	
Mr. Farenthold (TX)			
Mr. Collins (GA)		X	
Mr. DeSantis (FL)			
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Ms. Roby (AL)			
Mr. Gaetz (FL)		X	

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Johnson (LA)		X	
Mr. Biggs (AZ)			
Mr. Rutherford (FL)		X	
Ms. Handel (GA)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)	X		
Mr. Johnson (GA)			
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Mr. Jeffries (NY)			
Mr. Cicilline (RI)	X		
Mr. Swalwell (CA)			
Mr. Lieu (CA)			
Mr. Raskin (MD)	X		
Ms. Jayapal (WA)	X		
Mr. Schneider (IL)	X		
Total	8	15	

4. Motion to report H.R. 469 Favorably to the House. Approved by a rollcall vote of 15 to 8.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman	X		
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)			
Mr. Chabot (OH)	X		
Mr. Issa (CA)			
Mr. King (IA)	X		
Mr. Franks (AZ)	X		
Mr. Gohmert (TX)	X		
Mr. Jordan (OH)			
Mr. Poe (TX)	X		
Mr. Marino (PA)	X		
Mr. Gowdy (SC)			
Mr. Labrador (ID)	X		
Mr. Farenthold (TX)	X		
Mr. Collins (GA)	X		
Mr. DeSantis (FL)			
Mr. Buck (CO)	X		
Mr. Ratcliffe (TX)	X		
Ms. Roby (AL)			
Mr. Gaetz (FL)			

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Johnson (LA)	X		
Mr. Biggs (AZ)			
Mr. Rutherford (FL)	X		
Ms. Handel (GA)	X		
Mr. Conyers, Jr. (MI), Ranking Member		X	
Mr. Nadler (NY)		X	
Ms. Lofgren (CA)		X	
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)		X	
Mr. Johnson (GA)			
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Mr. Jeffries (NY)			
Mr. Cicilline (RI)		X	
Mr. Swalwell (CA)			
Mr. Lieu (CA)			
Mr. Raskin (MD)		X	
Ms. Jayapal (WA)		X	
Mr. Schneider (IL)		X	
Total	15	8	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to H.R. 469, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 19, 2017.

Hon. BOB GOODLATTE, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 469, the Sunshine for Regulations and Regulatory Decrees and Settlements Act of 2017.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Janani Shankaran who can be reached at 226–2860.

Sincerely,

KEITH HALL.

Enclosure.

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 469—Sunshine for Regulations and Regulatory Decrees and Settlements Act of 2017.

As ordered reported by the House Committee on the Judiciary on July 12, 2017.

H.R. 469 would modify the process used to develop consent decrees and settlement agreements that require federal agencies to take specified regulatory actions. When citizens or organizations file a lawsuit against a government agency, both parties can negotiate a consent decree or settlement agreement as an alternative to a trial. In certain cases, the terms of the consent decree or settlement agreement may require an agency to undertake a regulatory action before a specified deadline. H.R. 469 would apply to such cases.

Under the bill, federal agencies would be required to publish proposed consent decrees and settlement agreements in the Federal Register for public comment 60 days prior to filing with the court and to respond to all public comments. The bill also would prohibit a court from approving a consent decree or settlement agreement unless any such agreement incorporates adequate time and procedures for agencies to comply with statutes that govern rulemaking. The legislation would require the Attorney General (for cases litigated by the Department of Justice) or the head of the relevant federal agency to certify approval of certain types of settlement agreements and consent decrees to the court. Finally, H.R. 469 would require courts to more closely review consent decrees and settlement agreements when agencies seek to modify them.

Based on an analysis of preliminary information provided by the Department of Justice, the Administrative Office of the U.S. Courts, and other agencies that are frequently involved in consent decrees—the Environmental Protection Agency, the Forest Service, and the Department of the Interior—CBO estimates that implementing H.R. 469 would cost $9 million over the 2018–2022 period; any such spending would be subject to the availability of appro-

priated funds. Most of those additional costs would be incurred to hire additional staff because litigation involving consent decrees and settlement agreements would probably take longer under the bill. Federal agencies and courts would face additional administrative requirements, including the requirement to make more information available to the public.

Enacting H.R. 469 would affect direct spending; therefore, pay-as-you-go procedures apply. Under several statutes, plaintiffs who successfully challenge the federal government are entitled to repayment of attorneys' fees through the Department of the Treasury's Judgment Fund (a permanent appropriation available to pay claims against the government). The annual total of all such payments has averaged about $2 million in recent years. By lengthening the process of developing consent decrees and settlement agreements, H.R. 469 would lead to an increase in the amount of reimbursable attorneys' fees, thus increasing the amount of such payments from the Judgment Fund. Based on average hourly attorney fees and the number of covered civil actions in recent years, CBO estimates that the small additional workload would increase reimbursable attorney's costs and direct spending by about $1 million over the 2018–2027 period. Enacting the bill would not affect revenues.

CBO estimates that enacting H.R. 469 would not significantly increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 469 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Janani Shankaran. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 469 establishes or reauthorizes a program of the Federal government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee finds that H.R. 469 contains no directed rule makings within the meaning of 5 U.S.C. § 551.

Performance Goals and Objectives

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee states that H.R. 469 limits the ability of defendant federal regulators and pro-regulatory plaintiffs to abuse federal consent decrees and settlement agreements to require new regulations, reorder regulatory priorities, bind the discretion of future administrations, or limit the rights of regulated entities and State, local, and Tribal co-regulators affected by actions taken under such decrees and settlements.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 469 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short title

Section 1 sets forth the short title of the bill as the "Sunshine for Regulatory Decrees and Settlements Act of 2017."

Sec. 2. Definitions

Under the definitions in Section 2, the bill applies to specific classes of consent decrees and settlements, as follows:

Subsec. 2(1): "Agency" and "Agency action" have the meanings given those terms under 5 U.S.C. § 551.

Subsec. 2(2): "Covered civil action" means a civil action brought under chapter 7 of title 5, United States Code, or any other statute authorizing suit against the United States, to compel agency action alleged to be unlawfully withheld or unreasonably delayed that pertains to a regulatory action that affects the rights of private parties other than the plaintiff or the rights of state, local, or tribal governments.

Subsec. 2(3): "Covered consent decree" means any consent decree entered in a covered civil action and any consent decree that requires agency action that pertains to a regulatory action that affects the rights of private parties other than the plaintiff or the rights of state, local, or tribal governments.

Subsec. 2(4): "Covered consent decree or settlement agreement" means a covered consent decree and a covered settlement agreement.

Subsec. 2(5): "Covered settlement agreement" means any settlement agreement entered in a covered civil action and any settlement agreement that requires agency action that pertains to a regulatory action that affects the rights of private parties other than the plaintiff or the rights of state, local, or tribal governments.

Sec. 3. Consent decree and settlement reform

Section 3 of the bill sets forth the following requirements applicable to consent decrees and settlement agreements covered by the bill:

Subsec. 3(a)(1)—notice of intent to sue and complaints in covered civil actions must be made publicly available, within 15 days after receipt of service of the notice of intent to sue or the complaint, respectively, through readily accessible means, including electronic means by the agency against which the action is filed.

Subsec. 3(a)(2)—the opportunity for affected parties to intervene in the litigation must conclude before covered consent decrees and settlement agreements may be proposed to the court.

Subsec. 3(b)(1)—in considering motions to intervene, the court must adopt a rebuttable presumption that an intervenor-movant's rights are not adequately represented by the plaintiff or defendant agency.

Subsec. 3(b)(2)—in considering motions to intervene, the court must take due account of whether the movant is a state, local, or tribal government that co-administers with the federal government the statutory provisions at issue in the litigation or administers state, local or tribal regulatory authority that would be preempted by the defendant agency's discharge of the regulatory duty alleged in the complaint.

Subsec. 3(c)(1)–(2)—if the court grants intervention, it must include the plaintiff, defendant agency, and intervenor(s) in court-supervised settlement talks. Settlement negotiations are to occur in the court's mediation or ADR program or to be presided over by a district judge other than the presiding judge, a magistrate judge, or a special master, as determined appropriate by the presiding judge.

Subsec. 3(d)(1)—the defendant agency must publish in the Federal Register and online any proposed consent decree or settlement agreement for no fewer than 60 days of public comment before filing it with the court and must specify the statutory basis for the covered consent decree or settlement. The agency must also publish a description of the covered consent decree or settlement, including whether it provides for an award of attorney's fees.

Subsec. 3(d)(2)(A)—during the 60-day period, the defendant agency must allow public comment on any issue related to the matters alleged in the complaint in the applicable civil action or addressed or affected by the covered consent decree or settlement agreement.

Subsec. 3(d)(2)(B)—the defendant agency must respond to any public comments received.

Subsec. 3(d)(2)(C)—the defendant agency must submit to the court a summary of the public comments and agency responses when it moves for entry of the covered consent decree or dismissal of the case based on the settlement agreement, inform the court of the statutory basis for the proposed covered consent decree or settlement, certify an index of the administrative record for the notice and comment proceeding to the court, and make the administrative record fully accessible to the court.

Subsec. 3(d)(2)(D)—the court must include in the record the index of the administrative record certified by the agency under subparagraph (C) and any documents listed in the index that any party or *amicus curiae* appearing before the court in the action submits to the court.

Subsec. 3(d)(3)(A)—the defendant agency may, at its discretion, hold a public agency hearing on whether to enter into the proposed consent decree or settlement agreement.

Subsec. 3(d)(3)(B)—If such a hearing is held, then a summary of the proceedings must be filed with the court, the hearing record must be certified to the court and included in the judicial record, and full access to the hearing record must be given to the court.

Subsec. 3(d)(4)—if a proposed consent decree or settlement agreement requires agency action by a date-certain, the defendant agency must inform the court of any uncompleted mandatory agency duties the covered consent decree or settlement agreement does not address, how the covered consent decree or settlement agreement would affect the discharge of those duties, and why the covered consent decree's or settlement agreement's effects on the order in which the agency discharges its mandatory duties is in the public interest.

Subsec. 3(e)(1)–(2)—in the case of a covered consent decree, the Attorney General or, in cases litigated by agencies with independent litigating authority, the defendant agency head, must certify to the court that he or she approves of a proposed covered consent decree that includes terms that: (i) convert into a non-discretionary duty a discretionary authority of an agency to propose, promulgate, revise, or amend regulations; (ii) commit an agency to expend funds that have not been appropriated and that have not been budgeted for the regulatory action in question; (iii) commit an agency to seek a particular appropriation or budget authorization; (iv) divest an agency of discretion committed to the agency by statute or the Constitution of the United States, without regard to whether the discretion was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties; or (v) otherwise affords relief that the court could not enter under its own authority upon a final judgment in the civil action.

In the case of a covered settlement agreement, the Attorney General or, in cases litigated by agencies with independent litigating authority, the defendant agency head, must certify to the court that he or she approves of a proposed covered settlement agreement that provides a remedy for failure by the agency to comply with the terms of the covered settlement agreement other than the revival of the civil action resolved by the covered settlement agreement and that: (i) interferes with the authority of an agency to revise, amend, or issue rules under the procedures set forth in chapter 5 of title 5, United States Code, or any other statute or executive order prescribing rulemaking procedures for a rulemaking that is the subject of the covered settlement agreement; (ii) commits the agency to expend funds that have not been appropriated and that have not been budgeted for the regulatory action in question; or (iii) for a covered settlement agreement that commits the agency to exercise in a particular way discretion which was committed to the agency by statute or the Constitution of the United States to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties.

Subsec. 3(f)(1)—when it considers motions to participate as *amicus curiae* in briefing over whether it should enter or approve a consent decree or settlement, the court must adopt a rebuttable presumption that favors *amicus* participation by those who filed public comments on the covered consent decree or settlement agreement during the agency's notice and comment process.

Subsec. 3(f)(2)(A)–(B)—the court must ensure that a proposed consent decree or settlement agreement allows sufficient time and procedure for the agency to comply with the Administrative Procedure Act and other applicable statutes that govern rulemaking, and, unless contrary to the public interest, any executive orders that govern rulemaking;

Subsec. 3(g)—requires agencies to submit annual reports to Congress on the number, identity, and content of covered civil actions brought against and covered consent decrees and settlement agreements, including the statutory bases of the covered consent decrees and settlement agreements, and the decrees' and settlements' related complaints and attorneys' fee awards.

Sec. 4. Motions to modify consent decrees

The bill establishes a *de novo* standard of review for the courts' consideration of motions to modify covered consent decrees and settlement agreements due to agency obligations to fulfill other duties or changed facts and circumstances.

Sec. 5. Effective date

The bill becomes effective upon enactment and applies to any covered civil action filed or covered consent decree or settlement agreement proposed to a court on or after that date.

Dissenting Views

H.R. 469, the "Sunshine for Regulations and Regulatory Decrees and Settlements Act of 2017," threatens to undermine the ability of federal regulators to protect the health and safety of Americans. This ill-conceived bill imposes numerous new procedural burdens on agencies and courts intended to dissuade them from using consent decrees and settlement agreements to resolve enforcement actions filed to address agency noncompliance with the law. Among these burdens are the requirements that agencies solicit public comments on such proposed consent decrees and settlement agreements and that they respond to each public comment before submitting them to the court. The bill would also require courts to presume, subject to rebuttal, that almost any private third party is entitled to intervene in litigation concerning a regulatory action and would require that such third party be permitted to participate in settlement negotiations between the litigants.

Although proponents of this legislation argue that agencies and interest groups collude to "sue and settle" in order to avoid compliance with the rulemaking procedures set forth in the Administrative Procedure Act (APA),[1] as well as other statutes, these unsubstantiated allegations ignore long-established procedures that regulate agencies' use of consent decrees and settlement agreements. H.R. 469 will effectively delay and possibly derail efforts by agencies to implement congressionally-mandated public health and environmental safeguards. In addition, the bill will encourage costly and wasteful litigation, the expense of which will be borne by American taxpayers.

In recognition of H.R. 469's many serious flaws, the Coalition for Sensible Safeguards—an alliance of more than 150 consumer,

[1] 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 5372, 7521 (2017).

labor, research, faith, and other public-interest groups—strongly opposes this legislation, stating that it "would create a gauntlet of duplicative, burdensome, and time-consuming procedures that apply to settlements and decrees, once again slowing down the rulemaking process and preventing federal law from being effectively implemented."[2] A coalition of twenty-nine environmental groups—including the Center for Biological Diversity, Earthjustice, Environmental Defense Fund, and Sierra Club—similarly oppose the bill because it would "undermine the enforcement of federal laws and impede the resolution of various consumer protection, anti-discrimination, environmental, and public health cases before our federal courts.[3] Last Congress, the Obama Administration issued a veto threat to substantively identical legislation, stating that it "would impose additional, unnecessary procedural requirements that would seriously undermine the ability of agencies to execute their statutory mandates," while addressing a "nonexistent problem that is already prohibited by Federal regulations: collusion between agencies, interest groups, and the courts to avoid compliance with the rulemaking procedures."[4]

For these reasons and others discussed below, we strongly oppose H.R. 469 and respectfully dissent.

DESCRIPTION AND BACKGROUND

H.R. 469, the "Sunshine for Regulatory Decrees and Settlements Act of 2017," is intended to address the perceived problem of collusion between public-interest plaintiffs and sympathetic federal agencies in entering into consent decrees or settlement agreements that oblige the agency to take a particular action regarding a regulatory action, such as a rulemaking, often under a certain timeline. Proponents of the bill call this alleged phenomenon "sue and settle."

A description of the bill's substantive provisions follows. Section 2 defines various terms. Of significance, section 2(1) imports the definitions of "agency" and "agency action" from the APA. As a result, H.R. 469 would apply to executive branch as well as independent agencies.[5]

Section 2(2) defines "covered civil action" as meaning a civil action that: (1) seeks to compel agency action; (2) alleges that an agency is unlawfully withholding or unreasonably delaying "agency action relating to a regulatory action" that affects the rights of private third parties or state, local, or tribal governments; and (3) is brought pursuant to the judicial review provisions of the APA or

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[2] Letter to Rep. Bob Goodlatte (R–VA), Chair, and Rep. John Conyers, Jr. (D–MI), Ranking Member, H. Comm. on the Judiciary, from the Coalition for Sensible Safeguards (July 11, 2017) (on file with the H. Comm. on the Judiciary, Democratic Staff); Coalition for Sensible Safeguards, *Members, http://sensiblesafeguards.org/about-us/members/* (last visited on Oct. 6, 2017).

[3] Letter to Rep. Bob Goodlatte (R–VA), Chair, & Rep. John Conyers, Jr. (D–MI), Ranking Member, H. Comm. on the Judiciary, from 29 public-interest organizations (July 11, 2017) (on file with the H. Committee on the Judiciary, Democratic Staff).

[4] Executive Office of the President, Office of Management and Budget, Statement of Administration Policy on H.R. 712, the "Sunshine for Regulatory Decrees and Settlements Act of 2015" (2016), *http://www.presidency.ucsb.edu/ws/?pid=111576.*

[5] Independent regulatory agencies, as opposed to executive branch agencies, are considered "independent" because the President has limited authority to remove their leaders, who can only be removed for cause, rather than simply serving at the President's pleasure. Such agencies are usually styled "commissions" or "boards" (e.g., National Labor Relations Board, Securities and Exchange Commission). Stephen G. Breyer et al., Administrative Law and Regulatory Policy 100 (4th ed. 1999).

any other statute authorizing judicial review of agency action. The scope of and distinction between "agency action" and "regulatory action" are not entirely clear, nor is the meaning of "rights" or "private persons." Given that these are threshold terms, their vagueness is likely to lead to litigation over whether H.R. 469's provisions apply to a given proposed consent decree or settlement agreement.

Section 2(3) defines "covered consent decree" as a consent decree in a covered civil action and any other consent decree requiring agency action concerning a rulemaking or other regulatory action that affects private third parties or state, local, or tribal governments. Thus, H.R. 469 would apply not just to consent decrees in covered civil actions, but to matters that are not "covered civil actions."

Section 2(4) defines "covered consent decree or settlement agreement" as a covered consent decree and a covered settlement agreement. This definition's purpose is unclear.

Section 2(5) defines "covered settlement agreement" in a manner similar to the definition for "covered consent decree," except that it applies to settlement agreements rather than consent decrees. As with "covered consent decrees," this means that H.R. 469 could apply to settlement agreements in cases that are not "covered civil actions" under the bill.

Section 3 of the bill sets forth several new procedures that agencies and parties in litigation must follow before a court may enter a consent decree or settlement agreement, as well as certain rebuttable presumptions that courts must make.

Section 3(a)(1) requires a defendant agency in a covered civil action to post online a copy of the notice of intent to sue and the complaint in the covered civil action not later than 15 days after receiving service of each. Section 3(a)(2) prohibits a party to a civil action from moving to enter a covered consent decree or to dismiss a civil action pursuant to a covered settlement agreement until after compliance with the bill's notice-and-comment requirements or after a public hearing allowed under the bill, whichever is later.

Section 3(b)(1) applies a unique standard for third-party intervention in covered civil actions. Specifically, it requires a court, when considering a motion to intervene in a covered civil action or in a civil action in which a covered consent decree or settlement agreement is proposed, to presume that the interests of "a person who alleges that the agency action in dispute would affect the person" would not be adequately represented by the parties to the action. This places the burden on the non-moving parties to show that they can adequately represent the putative intervenor's interests, in contrast to current law, which places the burden on the party seeking intervention to demonstrate that its interests are not adequately represented by the parties per Federal Rule of Civil Procedure 24.

With respect to motions to intervene by state, local, and tribal governments, section 3(b)(2) requires a court to "take due account of whether the movant" jointly administers with a defendant agency the statutory provisions giving rise to the underlying lawsuit or administers under state, local, or tribal law an authority that would be preempted by the regulatory action at issue in the underlying lawsuit.

Section 3(c) outlines certain requirements regarding the negotiation to settle a covered civil action or to reach an agreement on a covered consent decree or settlement agreement. Section 3(c)(1) requires that such negotiation be conducted pursuant to the court's alternative dispute resolution program or by a judge other than the presiding judge, a magistrate, or a special master, as the presiding judge may determine. Such settlement negotiations must also include any intervening party.

Section 3(d) imposes a series of notice-and-comment procedures on agencies before they can file a consent decree or settlement agreement with a court. Section 3(d)(1) requires an agency to publish in the Federal Register and post online a proposed covered consent decree or settlement agreement and a description of its terms (including whether it provides for attorneys' fees or costs and a basis for such award) at least 60 days before such consent decree or settlement agreement is filed with a court.

Section 3(d)(2)(A) requires the agency to accept public comment on any issue in the underlying civil action or regarding the proposed consent decree or settlement agreement during that minimum 60-day period provided for in section 3(d)(1). Section 3(d)(2)(B) requires the agency to respond to any public comments. Section 3(d)(2)(C) requires an agency to: (1) inform the court of the statutory basis for the proposed consent decree or settlement agreement and a summary of public comments that it has received; (2) submit to the court a certified index of the administrative record of the notice and comment proceeding; and (3) make the administrative record available to the court. Finally, section 3(d)(2)(D) requires the court to include in the record of the underlying civil action the administrative record submitted by an agency, as well as any documents listed in the index that any party or *amicus curiae* appearing before the court submits.

Section 3(d)(3) allows an agency to hold a public hearing on whether to enter into a proposed covered consent decree or settlement agreement and outlines the procedures for holding such a hearing.

Section 3(d)(4) requires an agency to present to the court certain explanations before moving to enter a covered consent decree or settlement agreement, or to dismiss the civil action based on the covered consent decree or settlement agreement, when the agency is required to take an action by a date certain pursuant to such decree or settlement. The required explanations must describe: (1) any required regulatory action that the agency has not taken and that the decree or settlement does not address; (2) a description of how the decree or settlement would affect the discharge of such required regulatory action; and (3) why the effects of the decree or settlement on the discharge of required regulatory action would be in the public interest.

Section 3(e) codifies long-standing guidelines, known as the Meese Memo, which Justice Department and other agency attorneys follow to ensure that consent decrees or settlement agreements are not used by them to circumvent the normal rulemaking process. These guidelines are already codified in the Code of Federal Regulations.[6] Section 3(e)(1) provides that if a covered consent

[6] 28 C.F.R. §§ 0.160–0.163 (2017).

decree or settlement agreement contains certain terms as set forth in section 3(e)(2), the Attorney General or the head of an independent agency (depending on which agency is the litigating party) must submit to the court a signed certification that he or she approves the proposed consent decree or settlement agreement. Section 3(e)(2) sets forth the terms that would subject a proposed covered decree or settlement to the certification requirement. For covered consent decrees, these terms are those that: (1) convert an agency's discretionary rulemaking authority into a nondiscretionary rulemaking obligation; (2) commit an agency to expend funds for the regulatory action at issue that have not been appropriated and budgeted; (3) commit an agency to seek a particular appropriation or budget authorization; (4) divest an agency of discretion committed to it by statute or the Constitution; or (5) affords relief that the court otherwise would not have authority to grant. For covered settlement agreements, the terms triggering the certification requirement are those that: (1) remedy the agency's failure to comply with the covered settlement agreement, other than a revival of the underlying civil action; and (2) interfere with agency rulemaking procedures under the APA, another statute, or executive order; commit the agency to expend non-appropriated and nonbudgeted funds for the regulatory action at issue; or commit the agency to exercise discretion in a particular way when the discretion was committed to it by statute or the Constitution to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties.

Section 3(f) imposes certain requirements on courts with respect to proposed covered consent decrees and settlement agreements. Section 3(f)(1) requires a court reviewing a proposed covered consent decree or settlement agreement to presumptively allow amicus participation by any party who filed public comments or participated in a public hearing regarding such proposed decree or settlement. Section 3(f)(2) prohibits a court from entering a consent decree unless an agency has sufficient time or procedures for the agency to comply with the APA's rulemaking procedures or other statutes and executive orders that govern rulemaking. The court must also "ensure" that such provisions are included in the proposed settlement agreement.

Section 3(g) requires agencies to submit annual reports to Congress that include the number, "identity," and content of covered civil actions brought against the agency as well as covered consent decrees or settlement agreements that the agency has entered into. Additionally, the report must describe the statutory basis for each covered consent decree or settlement agreement entered into by the agency and for any award of attorneys' fees or costs in the underlying civil action.

Section 4 of the bill specifies that when an agency moves to modify a covered consent decree or settlement agreement because it is no longer "fully in the public interest due to the obligations of the agency to fulfill other duties or due to changed facts and circumstances," the court must review the decree or settlement *de novo*.

Section 5 states that the bill's provisions apply to covered civil actions filed on or after the bill's enactment date. It further provides that the bill's provisions apply to all covered consent decrees

and covered settlement agreements proposed on or after the bill's enactment date.

CONCERNS WITH H.R. 469

I. H.R. 469 Is a Solution in Search of a Problem

Proponents of H.R. 469 contend this legislation is necessary to address alleged collusion among federal agencies, public-interest organizations, and other private-citizen plaintiffs that enter into consent decrees or settlements as a way of circumventing rulemaking procedures. Tellingly, however, these proponents offer debunked evidence to support their contention. For example, at the hearing on substantively similar legislation last Congress, William Kovacs, a Senior Vice President at the U.S. Chamber of Commerce, testified that as "a result of the sue and settle process, the agency intentionally transforms itself from an independent actor that has discretion to perform its duties in a manner best serving the public interest, into an actor subservient to the binding terms of settlement agreements, including using its congressionally-appropriated funds to achieve the demands of specific outside groups." [7] In support of his statement, he cited a 2013 U.S. Chamber of Commerce study.[8]

But the independent and non-partisan Government Accountability Office (GAO) has subsequently issued a report in December 2014 that made several findings that refute the claims of H.R. 469's supporters. The report, which focused on lawsuits involving environmental litigation, found that "the effect of settlements in deadline suits on EPA's rulemaking priorities is limited." [9] The GAO referred to so-called "sue and settle" litigation as "deadline suits" because they involve an agency's non-performance of a non-discretionary act, which is required by law, by a deadline also imposed by law. The GAO noted that certain laws allow for any party to compel the Environmental Protection Agency (EPA) through lawsuits to "take statutorily required actions" within a designated time frame if it has not done so already.[10] As the GAO also observed, deadline suits typically involve a person suing the EPA because it "missed a recurring deadline to review and revise" an existing rule.[11] And, as Robert Weissman, the President of Public Citizen, explained during a hearing in June 2017, these lawsuits are some of the "simplest to understand" because they only allege that

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[7] *The Responsibly And Professionally Invigorating Development Act of 2015 (RAPID Act), the Sunshine for Regulatory Decrees and Settlements Act of 2015, and the Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015 (SCRUB Act): Hearing on H.R. 348, H.R. 712 & H.R. 1155 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. 15–16 (2015), (statement of William Kovacs, Senior Vice President at the U.S. Chamber of Commerce) [hereinafter *2015 Hearing*]; *The Sunshine for Regulatory Decrees and Settlements Act of 2013: Hearing on H.R. 1493 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. 86 (2013) [hereinafter *2013 Hearing*]; *The Federal Consent Decree Fairness Act and the Sunshine for Regulatory Decrees and Settlements Act: Hearing on H.R. 3041 and H.R. 3862 Before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary,* 112th Cong. (2012) [hereinafter *2012 Hearing*] (statement of Roger R. Martella, Jr., Partner, Sidley Austin LLP) ("[C]ertain groups increasingly are employing a 'sue and settle' approach to interactions with the government on regulatory issues.").

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

[9] U.S. Gov't Accountability Office, GAO–15–34, Environmental Litigation: Impact of Deadline Suits on EPA's Rulemaking is Limited (2014), *http://www.gao.gov/assets/670/667533.pdf.*

[10] *Id.* at 3.

[11] *Id.*

agencies "broke the law by failing to commit a congressionally mandated action by a date established in statute." [12] Mr. Weissman further noted that enforcing these laws through deadline litigation is important to "holding federal agencies accountable when they ignore Congress." [13] Furthermore, as the GAO found, it is "very unlikely that the government will win" these lawsuits.[14]

The GAO has also determined that there is little evidence that deadline suits determine the substantive outcome of agency action, as alleged by proponents of H.R. 469.[15] According to the GAO, "EPA officials stated that they have not, and would not agree to, settlements in a deadline suit that finalize the substantive outcome of the rulemaking or declare the substance of the final rule." [16] The GAO found little evidence that deadline suits determine the substantive outcome of agency action, as alleged by proponents of H.R. 469.[17] A subsequent GAO report issued in February 2017 bolsters this conclusion. In a study of 141 lawsuits against the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS), GAO found no evidence that either agency circumvented the rulemaking system through deadline litigation:

> The majority of deadline suits filed during fiscal years 2005 through 2015 were resolved through negotiated settlement agreements that established schedules for the agencies to complete the actions involved in the suits. Agency officials said that most deadline suits are resolved through settlement because it is undisputed that a statutory deadline was missed. Other than setting schedules for completing Section 4 actions, the settlement agreements did not affect the substantive basis or procedural rulemaking requirements the Services were to follow in completing the actions, such as providing opportunities for public notice and comment on proposed listing rules he U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS).[18]

These findings confirm that there is little support for the proposition that federal agencies engage in "back-room deals" with pro-regulatory groups to circumvent federal laws or substantively bind the agency in a subsequent rulemaking.[19] In fact, as Policy Advocate for Public Citizen Amit Narang clarified during the hearing on substantively identical legislation last Congress, "All of the settlements scrutinized by GAO pursuant to the EPA's remaking authority under the Clean Air Act went through the public notice and

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[12] *A Time to Reform: Oversight of the Activities of the Justice Department's Civil, Tax and Environment and Natural Resources Divisions and the U.S.: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 115th Cong. 17 (2017), http://docs.house.gov/meetings/JU/JU05/20170608/106076/HHRG–115–JU05–Wstate-WeissmanR–20170608.pdf.

[13] *Id.*

[14] U.S. Gov't Accountability Office, GAO–15–34, Environmental Litigation: Impact of Deadline Suits on EPA's Rulemaking is Limited 7 (2014), *http://www.gao.gov/assets/670/667533.pdf.*

[15] *2015 Hearing, supra* note 7, at 16 (statement of William Kovacs, Senior Vice President, Chamber of Commerce) ("These agreements often go beyond simply enforcing statutory deadlines and themselves become the legal authority for expansive regulatory action with no meaningful participation by affected parties or the public.").

[16] U.S. Gov't Accountability Office, GAO–15–34, Environmental Litigation: Impact of Deadline Suits on EPA's Rulemaking is limited 8 (2014), *http://www.gao.gov/assets/670/667533.pdf.*

[17] *2015 Hearing, supra* note 7, at 16.

[18] U.S. Gov't Accountability Office, GAO–17–304, Environmental Litigation: Information on Endangered Species Act Deadline Suits (2017), https://www.gao.gov/assets/690/683058.pdf.

[19] *Id.* at 8, 12.

comment process allowing all members of the public an opportunity to comment on the rule before it is finalized."[20]

John Walke, Clean Air Director and Senior Counsel with the Natural Resources Defense Council, likewise identified serious flaws with the Chamber's study. During a hearing before the Judiciary Committee's Subcommittee on Courts, Commercial and Administrative Law in the 113th Congress on substantively similar legislation, Mr. Walke testified that the Chamber's methodology relied on "Internet searches identifying all cases in which the EPA and an environmental group entered into a consent decree or settlement agreement between 2009 and 2012."[21] In doing so, Mr. Walke explained that the report ignored EPA settlements with industry parties or conservative groups and did not examine any EPA settlements under the Bush administration, during which the EPA also entered into settlements and consent decrees, noting:

> Most striking of all is that by merely compiling EPA settlements (with just environmental groups, under just [the Obama] administration), the report's methodology quietly dispenses with any need for proof of collusion or impropriety in consent decrees or settlement agreements. The Chamber cannot remotely back up the charge that collusion was involved in all of these settlements, or even in any of them, so the report does not even try.[22]

Mr. Walke also observed that the Chamber report simply sought to transform evidence of the use of a "common and long-accepted form of resolving litigation over clear legal violations under any administration" into evidence of inappropriate collusion.[23] It is also critical to note that, while proponents of H.R. 469—including the Chamber of Commerce—have focused their arguments in favor of the legislation on consent decrees and settlements involving the EPA, the bill would apply to consent decrees and settlement agreements involving *all* federal agencies, not just the EPA.

Likewise, John Cruden, a former senior career official with the Justice Department's Environment and Natural Resources Division (ENRD) for more than two decades during two Republican and two Democratic Administrations, testified that the "sue and settle" allegations were unfounded. In fact, he stated that he was "not aware of any instance of a settlement" that could remotely be described as "collusive" that occurred during his long tenure as a senior ENRD official and that the Justice Department "vigorously represented the federal agency, defending the agency's legal position and obtaining in any settlement the best possible terms that were consistent with the controlling law."[24] He also emphasized that agencies enter settlements only when they have failed to meet mandatory rulemaking obligations:

> In my long experience with the types of cases covered by [this legislation], EPA only agreed to settle when the agency had a mandatory duty to take an action, or to prepare a rule, based on specific legislation enacted by Congress.

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[20] *2015 Hearing, supra* note 7, at 6–7.
[21] *2013 Hearing, supra* note 7, at 115.
[22] *Id.* at 116.
[23] *Id.*
[24] *2012 Hearing, supra* note 7, at 106–107.

> The settlement in those cases was straightforward: setting a date by which the agency would propose a draft rule and, quite often, a date for final action. Had there not been such a settlement, a federal court would have issued an injunction setting the date for EPA to take action, since the agency's legal responsibility was quite clear.[25]

In addition, he explained that a proposed rule emerging from a settlement would provide the same notice-and-comment opportunities as any other rulemaking, and the final rule still would be subject to challenge under the APA. Thus, this process does not avoid public comment, and already allows interested parties their full range of substantive and procedural rights.[26]

Mr. Walke also noted in his Subcommittee testimony that the Chamber report ultimately identifies as its culprit the citizen-suits that Congress has authorized under various environmental statutes.[27] The entire "sue and settle" allegation that undergirds H.R. 469, therefore, is really aimed at congressionally-authorized provisions that permit citizens to sue agencies to enforce statutory requirements. If these citizen-suit provisions are the true cause for concern, then it is for H.R. 469's proponents to push for their repeal by Congress, rather than seek to disrupt the use of longstanding and uncontroversial mechanisms for resolving litigation.

Other observers have also refuted the "sue and settle" allegation. As a Sierra Club representative observed, this theory is a "sad attempt to create a boogie man out of vital and broadly supported protections that have improved and saved millions of Americans' lives."[28] Likewise, David Goldston of the Natural Resources Defense Council testified in 2011 at a House Energy and Commerce subcommittee hearing that the "whole 'sue and settle' narrative is faulty."[29]

In the absence of any credible evidence that federal agencies collude with plaintiffs to circumvent proper rulemaking procedures by use of consent decrees and settlement agreements, H.R. 469 simply addresses a non-existent problem.

II. By Undermining Enforcement of Mandatory Rulemaking Duties, H.R. 469 Threatens Public Health and Safety

H.R. 469, by undermining the ability of agencies to enforce statutory mandates, jeopardizes public health and safety. As noted, most consent decrees and settlement agreements arise from civil actions where a citizen lawsuit has been filed against an agency for its failure to meet a statutory rulemaking deadline or other rulemaking duty. Congress imposes these mandatory duties on agencies—many of which concern public health and safety—so that they will be executed. In fact, Congress authorizes citizen-lawsuit provisions in these statutes to ensure agency compliance with these statutory mandates. Therefore, when agencies fail to meet such mandatory duties, the harm that they were supposed to respond to remains unaddressed.

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[25] *Id.* at 66, 106.
[26] *Id.*
[27] *2013 Hearing*, *supra* note 7, at 154.
[28] John McCardle, *House Republicans Accuse EPA, Enviros of Collusion,* N.Y. Times (July 15, 2011), http://www.nytimes.com/gwire/2011/07/15/15greenwire-house-republicans-accuse-epa-enviros-of-collus-69925.html.
[29] *Id.*

Given the fact that many of these statutory mandates concern public health and safety, H.R. 469, by making it harder for citizens to compel agencies to meet their duties, puts public health and safety at risk. Health and safety concerns are not a mere abstraction. Regarding the issue of workplace safety alone, the Bureau of Labor Statistics reported that in 2013, "Slightly more than 3.0 million nonfatal workplace injuries and illnesses were reported by private industry employers."[30] Additionally, an analysis by the National Institute for Occupational Safety and Health, the American Cancer Society, and Emory University's School of Public Health estimates that after factoring in disease and injury data "there are a total of 55,200 US deaths annually resulting from occupational disease or injury (range 32,200–78,200)."[31] To the degree that H.R. 469 makes it harder for citizens to force agencies to address these kinds of concerns, it unnecessarily endangers the American people.

In response to these concerns presented by the bill, several Democratic Members offered amendments exempting certain categories of rules from H.R. 469. For example, Representative Sheila Jackson Lee (D–TX) offered an amendment that would have exempted from the bill any consent decree or settlement agreement concerning a potential rule regarding environmental justice in low-income minority communities as defined by Executive Order 12898.[32] This amendment failed by a vote of 7 to 15.

Subcommittee Ranking Member David N. Cicilline (D–RI) offered an amendment that would have exempted from the bill any consent decree or settlement agreement concerning a deadline established by the Comprehensive Addiction and Recovery Act of 2016 (CARA)[33] to address the misuse of prescription pain killers.[34] Recognizing that many laws passed by Congress include deadlines for agency action, Representative Cicilline stated in support of his amendment that CARA requires certain regulatory actions within 18 months of the bill's enactment, including forming best practices for the research and treatment of opioid use disorder. Should the Department of Health and Human Services not perform this mandatory duty by the statute's deadline, any party with standing could enforce the requirement. Nevertheless, as Representative Cicilline noted, H.R. 469 "would paralyze this process by requiring notice and comment prior to the settlement of deadline suits and allowing practically unlimited intervention in these cases."[35] This amendment failed by a vote of 8 to 15.

III. H.R. 469 Is Unnecessary in Light of the Justice Department's "Meese Memo" and Other Existing Legal Mechanisms

H.R. 469's proponents offer no evidence substantiating the existence of the so-called sue-and-settle problem. The likely reason is

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[30] U.S. Dep't of Labor Bureau of Labor Statistics, *Employer-Reported Workplace Injury and Illness Summary* (Dec. 4, 2014), http://www.bls.gov/news.release/osh.nr0.htm.

[31] Kyle Steenland *et al., Dying for Work: The Magnitude of US Mortality from Selected Cases of Death Associated with Occupation*, 43 Am. J. Industrial Medicine 461 (2003).

[32] Tr. of Markup of H.R. 469, "The Sunshine for Regulations and Regulatory Decrees and Settlements Act of 2017," by the H. Comm. on the Judiciary, 115th Cong. 73 (July 12, 2017) [hereinafter H.R. 469 Markup Tr.].

[33] Pub. L. No. 114–198 (2016).

[34] H.R. 469 Markup Tr., *supra* note 32, at 93.

[35] *Id.* at 94.

that the Meese Memo, codified in the Code of Federal Regulations,[36] has for more than 30 years specified a detailed process intended to address the potential abuse of consent decrees and settlement agreements used by federal agencies. In 1986, then-United States Attorney General Edwin Meese issued a set of guidelines for the Justice Department and other government attorneys in entering into consent decrees and settlement agreements in response to the following concerns:

> In the past . . . executive departments and agencies have, on occasion, misused [consent decrees] and forfeited the prerogatives of the Executive in order to preempt the exercise of those prerogatives by a subsequent Administration. These errors sometimes have resulted in an unwarranted expansion of the powers of [sic] judiciary—often with the consent of government parties—at the expense of the executive and legislative branches.[37]

The Meese Memo identified three types of potentially problematic provisions. It directed departments and agencies to not enter into a consent decree that: (1) "converts into a mandatory duty the otherwise discretionary authority of the Secretary or agency administrator to revise, amend, or promulgate regulations;" (2) "commits the department or agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question, or commits a department or agency to seek a particular appropriation or budget authorization;" or (3) "divests the Secretary or agency administrator, or his successors, of discretion committed to him by Congress, or the Constitution where such discretionary power was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties."[38] The policy outlines similar restrictions on settlement agreements.[39] If special circumstances require departure from these guidelines, the Attorney General, the Deputy Attorney General, or the Associate Attorney General must authorize such a departure.[40] The Meese Memo ultimately was codified into the Code of Federal Regulations.[41]

H.R. 469's proponents also fail to provide any proof that the Justice Department and agencies are not complying with the Meese Memo. As Mr. Cruden noted, "I am personally unaware of any examples of the Department failing to comply with the existing C.F.R. provision [codifying the Meese Memo]; nor did the other witnesses present any such examples at the hearing."[42] Moreover, the Majority's witnesses at a hearing on H.R. 469's predecessor in the 112th Congress specifically praised the Meese Memo and offered no

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[36] 28 C.F.R. §§ 0.160–0.163 (2017).

[37] Memorandum from Edwin Meese III, Attorney General, to All Assistant Attorneys General and All United States Attorneys Regarding Department Policy Regarding Consent Decrees and Settlement Agreements (Mar. 13, 1986), http://www.archives.gov/news/samuel-alito/accession-060–89–1/Acc060–89–1–box9–memoAyer–LSWG–1986.pdf.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] 28 C.F.R. §§ 0.160–0.163 (2017).

[42] *2012 Hearing, supra* note 7, at 111.

argument as to why it was insufficient to address the alleged "sue and settle" problem.[43]

A recent report by the GAO confirms that agencies continue to follow the Meese Memo.[44] In February 2017, GAO determined that Department officials are guided by the Meese Memo when negotiating settlement terms and may only commit agencies to perform actions that are mandated by statute:

> According to officials from DOJ and the Services, the agencies coordinate in deciding how to respond to a deadline suit, including whether or not to negotiate a settlement with the plaintiff or proceed with litigation. In reaching its decision, DOJ considers several factors, including whether there may be a legal defense to the suit—such as providing information establishing that the agency took action on the finding at issue or that the plaintiff lacked standing—and the likelihood that the government could obtain a favorable outcome. The officials said that most deadline suits are resolved through a negotiated settlement agreement because in the majority of them, it is undisputed that a statutory deadline was missed. . . . DOJ officials said they are guided by a 1986 DOJ memorandum—referred to as the Meese Memorandum—in negotiating settlement terms. Accordingly, officials from DOJ and the Services stated that any agreement to settle a deadline suit would only include a commitment to perform a mandatory Section 4 action by an agreed-upon schedule and would not otherwise predetermine or prescribe a specific substantive outcome for the actions to be completed by the Services. Similarly, for those suits resolved by a court order, DOJ officials said they present what they believe is a reasonable timeframe for the court to consider in establishing a schedule for the Services to complete the action.[45]

In addition to the Meese Memo, there are other mechanisms that address the purported concerns of H.R. 469's proponents. For example, parties whose interests may be affected by a consent decree or settlement agreement may move to intervene in the case pursuant to Federal Rule of Civil Procedure 24, under which the moving party bears the burden of demonstrating that the parties to the case do not adequately represent the movant's interest.[46] Similarly, any rulemaking that is required as a result of a consent decree or settlement agreement would still be subject to the APA's notice-and-comment procedures, whereby affected parties who are not parties to the consent decree or settlement agreement have the opportunity to weigh in on any negative impacts of a proposed rule.[47]

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[43] *See Id.* at 60 (statement of Andrew M. Grossman) ("The Meese Policy was, and remains, notable for its identification of a serious breach of separation of powers, with serious consequences, and its straightforward approach to resolving that problem. By reducing the issue, and its remedy, to their essentials, the Meese Policy identifies and protects the core principles at stake. This explains its continued relevance.").

[44] U.S. Gov't Accountability Office, GAO–17 304, Environmental Litigation: Information on Endangered Species Act Deadline Suits (2017), https://www.gao.gov/assets/690/683058.pdf.

[45] *Id.* at 20–21.

[46] Fed. R. Civ. P. 24(a)(2).

[47] 5 U.S.C. § 553 (2017).

In sum, to the extent that the federal government is, in fact, tempted to use consent decrees and settlement agreements to do an end-run around the rulemaking procedures of the APA and other statutes, the Meese Memo effectively prevents the government from doing so thereby making H.R. 469 unnecessary.

IV. H.R. 469 Opens the Door to Dilatory Tactics by Well-Financed Opponents of Agency Action

In addition to being unnecessary, H.R. 469 threatens to impose significant financial costs on taxpayers. Various provisions of H.R. 469 would give opponents of regulations opportunities to effectively stifle rulemaking by allowing them to slowdown one of the processes by which agencies agree to abide by their congressionally-assigned duty to regulate. As Minority witnesses Messrs. Narang, Walke, and Cruden testified, agencies enter into consent decrees and settlement agreements when they have a mandatory duty to act, including the requirement to promulgate a new rule.[48] By opening opportunities for industry to slow down this process, H.R. 469 effectively makes it more expensive for agencies to do what Congress has mandated it to do.

Section 3(b)(1) of the bill, for example, contains a nearly open-ended intervention right by mandating that a court presume, subject to rebuttal, that the interests of any private third party affected by the agency action in dispute in the underlying litigation will not be represented by the parties to that litigation.[49] This presumption upends current law, which places the burden of proof on a third party to show that its interests are not represented by the parties in the case.[50] Effectively, this shift in the burden of proof on the issue of the representation of third-party interests will make it much easier for any entity not a party to the case to intervene in a case involving a consent decree or settlement agreement that seeks to compel agency action.

Hypothetically, under H.R. 469, if the regulatory action at issue involved the Clean Air Act, a person who breathes air would have the right to intervene in a consent decree or settlement agreement, as would any affected industry entity, subject to a refutable presumption that the parties to the litigation do not adequately represent the third party's interest. If a court were to construe section 3(b)(1) broadly, this provision could allow virtually anyone to intervene in a covered civil action.

Section 3(c) of H.R. 469 also tilts the playing field sharply in favor of industry interests by giving them an opportunity to slow down agency compliance with federal law. Under this provision, courts must delay entry of a consent decree or settlement agreement by referring settlement discussions to the court's mediation or alternative dispute resolution program, or to a district judge, magistrate judge, or special master.[51] Such discussions must include the plaintiff, defendant agency, and any third party intervenors.[52] In addition to delaying the settlement process, this provi-

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[48] *2015 Hearing, supra* note 15; *2013 Hearing, supra* note 7, at 117–118; *2012 Hearing, supra* note 7, at 106–107.
[49] H.R. 469, 115th Cong. § 3(b)(1) (2017).
[50] Fed. R. Civ. P. 24.
[51] H.R. 469, 115th Cong., § 3(c) (2017).
[52] *Id.*

sion would impose costs on plaintiffs and defendant agencies alike by forcing them to pay mediation and other dispute resolution costs beyond what they may have had to pay in the absence of this process.

H.R. 469 provides other opportunities for industry to engage in dilatory tactics by virtue of sections 3(d)(1) and 3(d)(2)(A), which require an agency to publish any proposed consent decree or settlement agreement and to allow at least 60 days for public comments.[53] The agency must then respond to every comment pursuant to section 3(d)(2)(B).[54] Under these provisions, industry interests could potentially overwhelm an agency by flooding it with comments in an effort to stall resolution of the underlying dispute, which, as noted, usually concern enforcement of rulemaking deadlines.

As if forcing an agency to respond to potentially numerous public comments on a proposed consent decree or settlement agreement was not enough, section 3(f)(1) requires a court to presume amicus status for any member of the public that submits comments on a proposed consent decree or settlement agreement, subject to rebuttal, in any proceeding on a motion to enter such consent decree or settlement agreement.[55] This provision would further allow industry and other regulatory opponents to delay resolution of the underlying dispute between the plaintiff and the defendant agency.

V. H.R. 469 Uses Ambiguous Language in Many Key Provisions That Will Create Confusion, Litigation, and Delay in Resolving Disputes

Many of H.R. 469's key provisions are written in ambiguous, ill-defined language, which will foster costly litigation over their meaning and cause delay in resolving the underlying lawsuit against the federal agency. For example, section 2(2) states that the bill applies to consent decrees and settlement agreements in an action seeking to compel agency action and alleging that the agency is "unlawfully withholding or unreasonably delaying agency action relating to a regulatory action."[56] It is unclear what the distinction is between "agency action" and "regulatory action," what the scope of the phrase "relating to" is, or what "unlawfully withholding" and "unreasonably delaying" mean, opening the door to litigation over the meaning of these threshold terms.

Additionally, section 2(2) refers to "private persons" whose "rights" are affected by the regulatory action, but the bill fails to define what "private parties" or "rights" means.[57] As noted above, without a definition, almost any third party could, in theory, intervene in a consent decree or settlement discussion under this bill. As with other ambiguous text in H.R. 469, confusion and a lack of clarity over the meaning of these terms will lead to litigation. H.R. 469's requirement that, under certain circumstances, agencies must inform the court of all mandatory rulemaking deadlines and describe how a consent decree or settlement agreement "would affect the discharge of those duties," is thoroughly ambiguous.[58] The re-

[53] *Id.* at § 3(d)(1), 3(d)(2)(A) (2017).
[54] *Id.* at § 3(d)(2)(B).
[55] *Id.* at § 3(f)(1).
[56] *Id.* at § 2(2).
[57] *Id.*
[58] *Id.* at § 3(d)(4).

quirement, outlined in section 3(d)(4), has no definition or clarification of what "affect the discharge of those duties" would mean.

H.R. 469 also imposes several new procedural requirements on agencies and courts that are designed to slowdown the resolution of litigation over an agency's failure to meet a statutory deadline or other regulatory obligation. These include: (1) a limitation on when a party may file a motion for a consent decree or to dismiss the case pursuant to a settlement agreement; (2) a mandate requiring the court to presume that the interests of a third party seeking to intervene in settlement discussions is not adequately represented; (3) a requirement that the court refer consent decree or settlement discussions to mediation or another alternative dispute resolution mechanism; (4) a requirement that the defendant agency publish a proposed consent decree or settlement agreement; (5) a requirement that agencies accept public comments on proposed consent decrees or settlements to which the agency must respond; (6) a requirement that an agency submit to a court explanations of vaguely defined factors underlying a proposed consent decree or settlement agreement whenever such decree or agreement requires agency action by a date certain; and (7) a requirement that a court to allow *amicus* participation in any motion to enter a consent decree or settlement agreement by any party that submitted public comments on such decree or agreement.

Implementing any one of these new requirements, much less all of them, drains agency and judicial time and resources without adding to the fairness of any consent decree or settlement agreement. In times when federal agencies and the court system are facing budgetary shortfalls, we should be crafting legislation to streamline and improve efficiencies for all. Unfortunately, H.R. 469 will have the opposite result.

VI. The Cumulative Effect of H.R. 469's Provisions Will Be to Discourage the Use of Consent Decrees and Settlement Agreements, Forcing Expensive and Time-Consuming Litigation

By facilitating dilatory conduct by anti-regulatory forces, using vague language in key provisions, and imposing numerous and burdensome procedural requirements on agencies and courts with respect to consideration of consent decrees and settlement agreements, H.R. 469's cumulative effect will be to discourage the use of consent decrees and settlement agreements and thereby delay or eliminate early resolution of litigation against the government. This legislation will ultimately increase costs for taxpayers, who must pay for the protracted litigation associated with fewer consent decrees and settlement agreements. Indeed, the Congressional Budget Office (CBO) noted that a previous version of H.R. 469 would impose millions of dollars in costs "primarily because litigation involving consent decrees and settlement agreements would probably take longer under the bill and agencies would face additional administrative, including new requirements to report more information to the public."[59]

[59] Congressional Budget Office, Cost Estimate for H.R. 712, The Sunshine for Regulatory Decrees and Settlements Act of 2015 (2015), https://www.cbo.gov/sites/default/files/hr7120.pdf.

Consent decrees benefit both plaintiffs and defendants. For plaintiffs, consent decrees allow for meaningful and timely relief without the risks and costs associated with prolonged litigation. Governmental defendants can also avoid the burdens and costs of protracted litigation and the particular risk that a costly or cumbersome solution simply will be imposed on them should they lose the suit. Additionally, defendants can avoid judicial determination of liability and obtain flexibility in terms of how they implement needed reforms. This is why the use of consent decrees in federal court litigation is a longstanding part of the judicial and congressional policy of encouraging alternative dispute resolution.[60] H.R. 469 flies in the face of this policy and will ultimately cost plaintiffs and governmental defendants more in litigation costs by making consent decrees and settlements more difficult to obtain. As John Cruden explained:

> As compared to full-blown litigation, consent decrees allow for a faster and less expensive, but still comprehensive resolution of a dispute. Congress' underlying statutory objectives are satisfied, while at the same time, the [defendant] is able to exercise its sovereignty through the negotiation of binding contracts and the resolution of potentially onerous pending litigation. Indeed, the finality and certainty afforded by the consent decree makes it far easier for a [defendant] to follow through on its commitments.[61]

By making consent decrees and settlement agreements more difficult and costly to enter into, H.R. 469 will generate increased litigation costs and expensive judgments, which will ultimately be passed along to the taxpayer.

VII. H.R. 469 Subverts the Federal Rules of Civil Procedure and Judicial Discretion

H.R. 469 overrides the Federal Rules of Civil Procedure, the courts' power to manage litigation in several respects, and their authority to consider equities in their decision making. First, it undermines Federal Rule of Civil Procedure 24, which sets forth the process for determining when a third party may intervene in a pending case, placing the burden on the third party to show that its interests are not adequately represented by the plaintiff and the defendant. H.R. 469 overrides this Rule by requiring courts to presume the opposite, namely that the parties in the litigation do not adequately represent the interests of the third party.

Second, H.R. 469 tampers with the process for modifying consent decrees under Federal Rule of Civil Procedure 60(b)(5). Under that Rule, a court may modify a consent decree when "the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable."[62] Section 4 of H.R. 469 attempts to skew the result of such a motion to modify by specifying that when a defendant agency moves to modify a previously entered consent

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[60] *See* Timothy Stoltzfus Jost, *Breaking the Deal: Proposed Limits on Federal Consent Decrees Would Let States Abandon Commitments*, Legal Times, Apr. 25, 2005, at 59 ("Yet the Supreme Court has long articulated a policy encouraging settlement of cases, as has Congress.").

[61] *2012 Hearing*, supra note 7, at 108.

[62] Fed. R. Civ. P. 60(b)(5).

decree, the court "shall" review the motion and consent decree de novo whenever the motion to modify is based on the grounds that the decree is "no longer fully in the public interest due to the agency's obligations to fulfill other duties or due to changed facts and circumstances." This provision clearly is intended to result in modification or revocation of an existing consent decree when a government agency moves to do so, regardless of the equities involved, which Rule 60 permits a court to consider.

Beyond the specific changes that H.R. 469 makes to the civil procedure rules at issue, the bill hamstrings judicial discretion in matters concerning the management of litigation before a court. In addition to questions about intervention or modification of consent decrees, H.R. 469 repeatedly requires courts to make certain presumptions (subject to rebuttal) on other litigation management issues such as when to permit amicus participation by third parties; when to enter a consent decree or settlement agreement; and when to refer matters to mediation, other alternative dispute resolution, a special master, or another judge. In short, H.R. 469 seeks to dictate courtroom management issues that have traditionally been left to judges to decide.

VIII. The Bill's Open-Ended Intervention Provision Could Undo Critical Civil Rights Protections

Section 3(b)(1) of the bill would create a rebuttable presumption that the interests of "a person who alleges that the agency action in dispute would affect the person . . . would not be represented adequately by the existing parties to the action," and then require that such party be included in "[e]fforts to settle a covered civil action or otherwise reach an agreement on a covered consent decrees or settlement agreement." In effect, this rebuttable presumption would reverse the burden for intervention currently in Federal Rule of Civil Procedure 24 from the party seeking to intervene in the case to the parties themselves.[63]

In response to this concern, Ranking Member John Conyers, Jr. (D–MI) offered an amendment that would have excluded from the coverage of the bill a covered consent decree or settlement agreement that prevents or is intended to prevent discrimination based on race, religion, national origin, or any other protected category.[64] The amendment failed along a party-line vote of 6–14.

CONCLUSION

As with all the anti-regulatory proposals this Committee has considered in this Congress, H.R. 469 is a solution in search of a problem. Notwithstanding a lack of credible evidence that agencies "collude" with plaintiffs to enter consent decrees or settlement agreements, this legislation will impose new burdensome procedural requirements on agencies and courts. As a result, well-funded third-party interests will have further opportunities to delay the resolution of litigation intended to force agencies to meet their legal obligations. And, the bill will make it harder to resolve such litigation quickly and cost-effectively. The cumulative effect of H.R. 469 will be to derail a time-honored tool that has helped protect the

[63] Fed. R. Civ. P. 24. 64H.R. 469 Markup Tr., *supra note* 32, at 50.
[64] H.R. 469 Markup Tr., *supra* note 32, at 50.

health and safety of Americans from a vast array of life-threatening harms, including polluted air and water, unsafe products, contaminated food, and adulterated medicines.

There are already procedures in place that address any purported collusion or lack of transparency. These procedures, originally implemented during the Reagan Administration, effectively deal with any such problem. Other than unsupported allegations, however, proponents of H.R. 469 offer no explanation as to why current law is insufficient. Instead, the bill employs ambiguous terms in key provisions that will actually generate additional litigation over their meaning. Finally, H.R. 469 undermines existing civil procedure rules and undermines judicial discretion.

For these reasons, we respectfully dissent and urge our colleagues to oppose H.R. 469.

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