MANDATE MADNESS: WHEN SUE AND SETTLE JUST ISN'T ENOUGH

HEARING

BEFORE THE

SUBCOMMITTEE ON TECHNOLOGY, INFORMATION POLICY, INTERGOVERNMENTAL RELATIONS AND PROCUREMENT REFORM

OF THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

JUNE 28, 2012

Serial No. 112–185

Printed for the use of the Committee on Oversight and Government Reform

Available via the World Wide Web: http://www.fdsys.gov
http://www.house.gov/reform

U.S. GOVERNMENT PRINTING OFFICE

76–368 PDF WASHINGTON : 2012

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

DARRELL E. ISSA, California, *Chairman*

DAN BURTON, Indiana
JOHN L. MICA, Florida
TODD RUSSELL PLATTS, Pennsylvania
MICHAEL R. TURNER, Ohio
PATRICK T. MCHENRY, North Carolina
JIM JORDAN, Ohio
JASON CHAFFETZ, Utah
CONNIE MACK, Florida
TIM WALBERG, Michigan
JAMES LANKFORD, Oklahoma
JUSTIN AMASH, Michigan
ANN MARIE BUERKLE, New York
PAUL A. GOSAR, Arizona
RAÚL R. LABRADOR, Idaho
PATRICK MEEHAN, Pennsylvania
SCOTT DESJARLAIS, Tennessee
JOE WALSH, Illinois
TREY GOWDY, South Carolina
DENNIS A. ROSS, Florida
FRANK C. GUINTA, New Hampshire
BLAKE FARENTHOLD, Texas
MIKE KELLY, Pennsylvania

ELIJAH E. CUMMINGS, Maryland, *Ranking Minority Member*
EDOLPHUS TOWNS, New York
CAROLYN B. MALONEY, New York
ELEANOR HOLMES NORTON, District of Columbia
DENNIS J. KUCINICH, Ohio
JOHN F. TIERNEY, Massachusetts
WM. LACY CLAY, Missouri
STEPHEN F. LYNCH, Massachusetts
JIM COOPER, Tennessee
GERALD E. CONNOLLY, Virginia
MIKE QUIGLEY, Illinois
DANNY K. DAVIS, Illinois
BRUCE L. BRALEY, Iowa
PETER WELCH, Vermont
JOHN A. YARMUTH, Kentucky
CHRISTOPHER S. MURPHY, Connecticut
JACKIE SPEIER, California

LAWRENCE J. BRADY, *Staff Director*
JOHN D. CUADERES, *Deputy Staff Director*
ROBERT BORDEN, *General Counsel*
LINDA A. GOOD, *Chief Clerk*
DAVID RAPALLO, *Minority Staff Director*

SUBCOMMITTEE ON TECHNOLOGY, INFORMATION POLICY, INTERGOVERNMENTAL RELATIONS AND PROCUREMENT REFORM

JAMES LANKFORD, Oklahoma, *Chairman*

MIKE KELLY, Pennsylvania, *Vice Chairman*
JASON CHAFFETZ, Utah
TIM WALBERG, Michigan
RAÚL R. LABRADOR, Idaho
PATRICK MEEHAN, Pennsylvania
BLAKE FARENTHOLD, Texas

GERALD E. CONNOLLY, Virginia, *Ranking Minority Member*
CHRISTOPHER S. MURPHY, Connecticut
STEPHEN F. LYNCH, Massachusetts
JACKIE SPEIER, California

CONTENTS

MANDATE MADNESS: WHEN SUE AND SETTLE JUST ISN'T ENOUGH

Thursday, June 28, 2012

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON TECHNOLOGY, INFORMATION POLICY, INTERGOVERNMENTAL RELATIONS AND PROCUREMENT REFORM,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, D.C.

The subcommittee met, pursuant to call, at 9:02 a.m., in Room 2203, Rayburn House Office Building, Hon. James Lankford [chairman of the subcommittee] presiding.

Present: Representatives Lankford, Kelly, Labrador, Connolly and Speier.

Staff Present: Alexia Ardolina, Assistant Clerk; Joseph A. Brazauskas, Counsel; Brian Daner, Counsel; Linda Good, Chief Clerk; Kristina M. Moore, Senior Counsel; Noelle Turbitt, Assistant Clerk; Jeff Wease, Deputy CIO; Jaron Bourke, Minority Director of Administration; Adam Koshkin, Minority Staff Assistant; Suzanne Owen, Minority Health Policy advisor; and Cecelia Thomas, Minority Counsel.

Mr. LANKFORD. The committee will come to order.

This is a hearing from the Oversight and Government Reform, Technology and Procurement Reform and Intergovernmental Relations Subcommittee. We exist to secure two fundamental principles: First, that Americans have the right to know the money Washington takes from them is well spent; and, second, Americans deserve an efficient and effective government that works for them.

Our duty on the Oversight and Government Reform Committee is to protect these rights. Our solemn responsibility is to hold government accountable to taxpayers because taxpayers do have a right to know what they get from their government. We will work tirelessly in partnership with citizen watchdogs to deliver the facts to the American people and bring genuine reform to the Federal bureaucracy. This is the mission of the Oversight and Government Reform Committee.

We have a significant amount of attention that is going to happen today focused on the red tape, and that has happened across all of Congress recently from both parties actually trying to make us more efficient. This is an issue that does hold us back from our own growth in prosperity.

Today's hearing we are going to focus on examining the highly questionable practice that's been perfected by the Environmental Protection Agency known as "sue and settle." This has emboldened

the administration to pursue an aggressive green agenda while escaping political accountability for the costs and burdens of these regulations and what they impose on job creators.

The process is rather simple. Environmental groups will sue the EPA, demanding the agency issue a regulation on an accelerated timeframe. Rather than fighting the lawsuit, EPA quickly agrees to the special interest demands. These settlement agreements are reached after closed-door negotiations between EPA and environmental groups, where other interested parties are excluded. Once the settlement agreement is approved by a Federal Court in a consent decree, the EPA is legally bound to engage in the rulemaking.

It is important to note that when a court approves the consent decree, it does not consider the merits. The court is merely accepting and ratifying what the parties agreed to.

In the past 3 years, the administration has conducted approximately 60 settlements with special interests. Twenty-nine of these agreements bound the EPA to make major policy changes. The plaintiffs in these cases are often the very same reoccurring players: The Sierra Club, NRDC, Defenders of Wildlife, Wild Earth Guardians, Center for Biological Diversity. These special-interest groups not only hold a special seat at the table with the EPA, EPA is effectively paying them to sue the agency. In 2011 alone, taxpayers reimbursed these groups millions of dollars to participate in these sue-and-settle agreements.

In addition to examining this outrageous practice, we will hear today about two particular egregious cases where EPA defied all norms of transparency, sidelined interested parties, and is now in the process of imposing extraordinary burdensome regulations. These two cases are EPA's regional haze regulations and its greenhouse gas standards for power plants.

In the case of regional haze, Congress was crystal clear that this is purely an aesthetic visibility program and is to be administered by the States, not by the EPA. Through sue and settle, EPA is attempting to federalize the program in imposing costs well beyond what the State had determined was necessary or justified. Ultimately, EPA's proposal will cost billions of dollars for visibility improvements that are undetectable to the human eye.

In the second case study, New Source Performance Standards for electric utilities, EPA concluded settlement negotiations on December 23rd, 2010, and agreed to promulgate NSPS for greenhouse gases for both new and existing electric generating units under section 111(a) and 111(d) of the Clean Air Act. At the time this settlement was reached, EPA was not in violation of any mandatory duty, and as such the litigants didn't have a legal leg to stand on. And yet the Agency settled, committing the Agency to make major policy changes without interested parties at the table, and they rewarded litigants with a cash prize they were never entitled to.

These two case studies are but two examples of the dozens of policy changes EPA has committed to in sweetheart sue-and-settle arrangements with special interests.

Time and again when the EPA is criticized for the excessive burden imposed by their Agency, whether it be Utility MACT, Boiler MACT, Florida water quality standards, regional haze, NSPS, EPA's response is suspiciously similar: The Agency had no discre-

tion to extend the timeline to hear additional points of view. It is under a court order to finalize those regulations by date certain. Of course, that court order was agreed to by EPA in the first place.

Let's be clear: What EPA claims the law requires them to do is nothing more than what EPA agreed to do in a collusive agreement with special-interest allies. The lack of transparency is designed to circumvent other regulatory checks Congress has put in place.

Environmental regulations only work when they are made in an open process that involves all stakeholders. Sue-and-settle rulemaking is an affront to that process.

Finally, I want to tell you that we very much wanted a representative from the EPA here today to respond to these concerns that our panelists will raise and that I am raising. However, despite adequate notice, EPA has refused to provide a witness for today's proceedings. I am hopeful we can find a date in the near future when they can make an appropriate witness available to respond and add to detail to our questions today.

With that, I would like to recognize the person filling in for our ranking member today Ms. Speier for an opening statement.

Ms. SPEIER. Mr. Chairman, thank you. And let me say at the outset, first I would like to offer this into the record and ask unanimous consent that it be placed in the record. This is a letter from the United States Environmental Protection Agency dated June 22.

The chair mentioned that there was ample time offered to those at EPA to have a participant here. Actually, the first request came in on June 14th. They checked their travel schedules and other hearing requirements and found that one of the—both of the people that would be appropriate to testify at this hearing could not make it. So rather than finding a date that could accommodate both our schedules, this hearing went forward without having EPA represented, which frankly does not meet my standards as a committee that is supposed to be about oversight and hearing from the parties. So I would like to submit this for the record.

Mr. LANKFORD. Without objection.

Mr. LANKFORD. And one additional side note. We responded back to them when they said these three individuals were not available, asked for other individuals, asked for people by name. They responded back they had no one available. We asked for basically what the reasons were there was no one available on any of the topics on it, and we just received back a correspondence on that. So we do look forward to having them to get a chance to discuss this at a further hearing.

Ms. SPEIER. All right. Thank you, Mr. Chairman.

I must say that I have been a member of this committee for 4 years. I chaired a committee on oversight when I was in the State legislature in California for 6 years. And oversight hearings are supposed to be objective evaluations of an issue. It is in the interests of both the Democrats and the Republicans in Congress to find where there are problems and to fix them. But when hearings are entitled, as most hearings in this committee recently, with a point of view, we are not being objective, we are not looking at both sides, we are ramming down a particular principle, and I find that particularly disconcerting.

The focus of today's subcommittee hearing is on consent decrees and settlement agreements to commonplace court procedures that give parties in lawsuits the opportunity to settle their differences, while avoiding prolonged trials and mounting legal expenses. These procedures help parties in court cases reach compromises that bring advantages to both sides.

In lawsuits against the Environmental Protection Agency, whether brought by State or local governments, private companies, environmental groups or local citizens, a consent decree often leads to a timelier and less expensive resolution for all involved. Consent decrees and settlements provide resolution and certainty, while allowing EPA to do its job and protect the public interest. That is the commonsense, noncontroversial context for today's hearing. Or at least it should be.

Unfortunately, the majority has chosen to break with this historic support for these environmental protections, which are overwhelmingly popular with the public, and which they once helped create, in order to push a false narrative to fit a propollution agenda. Terms to describe consent decrees like "mandate madness" and "sue and settle" are catchy political slogans, but they are based on a flawed understanding of how our environmental laws work.

Accusations that environmental groups are somehow dictating government policy through court settlements rings just as hollow. In fact, an August 2011 GAO report covering the years 1995 to 2010 found, and I repeat this, no discernible, no discernible trend in lawsuits against the EPA. Now, this is the GAO, which is a separate entity that is independent, making that statement. However, it did note that private companies and industry trade associations accounted for 48 percent of those lawsuits, while local and national environmental and citizen groups collectively accounted for 30 percent.

So what are we saying here? Is black white and white black? The reality is that EPA gets sued a lot, not just by green groups, but more often than not by polluting industries, which are better funded and choose to fight their violations in court instead of cleaning up their acts. "Sue and settle" is a manufactured term and a distraction from the real sue-and-pollute strategy that these corporations prefer.

Existing law already provides ample means for parties to comment on and seek changes to consent decrees that they don't like. However, partisan attempts to rewrite those rules that have served the courts and the American people so well for decades is a solution in search of a problem.

I would like to thank our witnesses here for appearing before the subcommittee, and I would like to say that I look forward to your testimony. We will see.

Mr. LANKFORD. Thank you.

Mr. LANKFORD. All the Members will have 7 days to submit opening statements and extraneous material for the record.

I would like to recognize our panel. The Honorable Scott Pruitt is the attorney general of my State, of the State of Oklahoma. I know that he also has an appointment across the street at the Supreme Court. There is something happening today at 10 o'clock, I understand, over there, I have heard some sort of rumor on that.

And our State was also part of that, so he will be part of that as well. So we will excuse you around 9:30 today after we hear your testimony.

Mr. Roger Martella is a partner at Sidley Austin LLP and a former general counsel of the U.S. Environmental Protection Agency. Thank you for being here as well.

Mr. William Kovacs is senior vice president for environment and technology and regulatory affairs at the U.S. Chamber of Commerce.

Mr. Robert Percival is the director of the environmental law program, professor of law at the University of Maryland Francis King Carey School of Law. Thank you for being here very much.

And Mr. William Yeatman—is that correct, Yeatman—is the assistant director for the Center for Energy and Environment at the Competitive Enterprise Institute. Thank you for being here.

Pursuant to committee rules, all witnesses are sworn in before they testify. If you would please rise and raise your right hands, please.

Do you solemnly swear or affirm that the testimony you're about to give to this committee will be the truth, the whole truth, and nothing but the truth so help you God?

Thank you.

Let the record reflect all witnesses answered in the affirmative.

You may be seated.

In order to allow time for discussion, I would like you to limit your oral testimony to 5 minutes. You will see there the time, but we will also be attentive to that as well. We are not going to try to cut people off in the middle of it, but we would like you to be attentive to that. Your written statement, of course, has already been submitted for the record itself.

I would like to recognize Mr. Scott Pruitt to begin our testimony today.

WITNESS STATEMENTS

STATEMENT OF E. SCOTT PRUITT

Mr. PRUITT. Chairman Lankford, Ranking Member Connolly and members of the subcommittee, good morning, and thank you for inviting me to appear before you today to present my concerns on the legal and policy implications of recent actions that the chairman identified taken by the U.S. Environmental Protection Agency. This is a critical issue for Oklahoma, and I appreciate the attention that the chairman and this subcommittee is devoting to this matter.

First I would like to be clear about my intentions today regarding environmental policy. My comments will in no way disregard the law or the provisions we as a Nation or States have put into place to protect our natural resources. We take seriously our responsibility to preserve and protect these valuable natural assets so that they may be enjoyed by our children and grandchildren.

This responsibility requires a delicate balance between environmental and economic interests, which is why Congress, when drafting the Clean Air Act and the Regional Haze Program, gave deference and authority to the States, not a Federal agency, to take economic factors into consideration when deciding what actions

needed to be taken and over how many years for implementation. With these considerations in mind, the State of Oklahoma submits that Oklahoma stakeholders, not the EPA, should make decisions on regional haze where outcomes directly affect Oklahomans.

Congress was clear when they drafted the Clean Air Act and other environmental laws they intended for States and EPA to work together. They intended for cooperative federalism to take place to reach outcomes that protect our environment and at the same time take into consideration the economic costs. Unfortunately, this has not been the case over the past 3 years.

In Oklahoma's case, the regional haze matter, the EPA ignored its own provisions and denied our carefully crafted State plan in place of an unwarranted Federal plan. The State plan was not devised on a whim, but created after careful consideration and input from all the stakeholders in the State, including the Oklahoma Department of Environmental Quality. We followed the rules. The EPA did not.

If the EPA's unlawful Federal plan is allowed to move forward, utility rates in the State of Oklahoma will rise as much as 20 percent over a 3-year period, and the economic harm to the State will be irreparable. To stop the Federal plan, I, on behalf of the State, filed an appeal to the EPA's final rule and asked the tenth circuit for a stay. In a rare decision, as this committee will recognize, the court granted a stay this month, which we believe recognizes the potential merits of our case.

Once we became aware of actions by the EPA in Oklahoma, we began to dig deeper into the current EPA practices across the country. What we found was a complete abrogation of notice and public comment requirements when instituting Federal plans, as well as a setting of an environmental agenda through consent decrees. In several instances the EPA filed consent decrees on the same day that environmental groups filed lawsuits. This was in spite of the fact that these cases involved, as you know, Mr. Chairman, involved complex legal issues that typically would take weeks to review and respond. Such actions raised questions and concerns about the motives and transparency behind EPA's activities.

Attorneys general are in the process of evaluating the EPA's alarming practice of relying on consent decrees to deny States their important role as a partner under cooperative federalism. We are also concerned with the use of these consent decrees to implement Federal law. These decisions have put States in the position of dealing with burdensome regulations and harmful outcomes through processes in which they have no say.

In conclusion, the EPA's refusal to follow its own rules and create its agenda through consent decrees has denied States due process and ignored the foundation of cooperative Federalism set forth by Congress under the Clean Air Act. With the backing of the administration, the EPA is conducting, we believe, superlegislative activity that Congress has not authorized.

Members must take seriously their role in passing legislation and not delegate their authority to agencies through unchecked rulemaking and questionable settlements. These issues are of great importance to the State of Oklahoma because Oklahomans value

our State's natural resources which provide sustenance to Oklahoma's citizens and fuel our economic development.

I look forward to answering any questions the chairman and the committee may have. Thank you.

Mr. LANKFORD. Thank you.

[Prepared statement of Mr. Pruitt follows:]

Testimony before the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform of the House Committee on Oversight and Government Reform

"Mandate Madness: When Sue and Settle Just Isn't Enough"

June 28, 2012

E. Scott Pruitt
Attorney General
State of Oklahoma

Dear Chairman Lankford, Ranking Member Connolly, and Members of the Subcommittee,

Thank you for allowing me to present my concerns on the legal and policy implications of the U.S. Environmental Protection Agency's actions regarding Regional Haze Regulations ("RHR"). There are three main points that cause concern among members of my staff, state leadership and Oklahoma stakeholders in relation to the EPA's actions: (1) the arbitrary and capricious nature of the EPA's preemption and disapproval of the Oklahoma State Implementation Plan ("SIP"); (2) the EPA's abrogation of notice and comment requirements when it imposes Federal Implementation Plans ("FIP") under the Regional Haze Regulations; and (3) the economic cost to states, industry and utility customers from the EPA's illegal actions under the Regional Haze Regulations. The EPA's refusal to follow its own rules has denied states due process and ignored the foundation of cooperative federalism set forth by Congress under the Clean Air Act. With the backing of the Obama Administration, the EPA is engaging in super legislative activity that Congress has not authorized, resulting in unchecked rule-making through questionable consent decrees. These issues are of great importance to the State of Oklahoma because Oklahomans value our state's natural resources, which provide sustenance to Oklahoma citizens and fuel our economic development. We take seriously our responsibility to preserve and protect these valuable natural assets so they may be enjoyed by future generations. This responsibility requires a delicate balance between environmental and economic interests. We must craft our environmental protection objectives with due consideration of the burden those objectives place on our economic development and overall well-being. With these considerations in mind, the State of Oklahoma submits that Oklahoma stakeholders, not the federal agency, should make decisions where outcomes directly affect Oklahomans.

Background on Oklahoma's Battle against the EPA and the Agency's Abuse of Regional Haze Regulations

In Section 169A of the 1977 Amendments to the Clean Air Act (CAA), Congress created a program for protecting visibility in the nation's national parks and wilderness areas. This section establishes as a national goal the "prevention of any future, and the remedying of any existing, impairment of visibility in mandatory Class I federal areas which impairment results from manmade air pollution." 42 U.S.C. § 7491(a)(1). Congress recognized that this program requires a delicate balance that considers the timing, cost and economic impact of alternative methods to achieve such goals. 42 U.S.C. § 7491(g)(1) ("In determining reasonable progress there shall be taken into consideration the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance . . . .").

Congress added Section 169B to the Act in 1990 to address regional haze issues, and in 1999, EPA promulgated regulations addressing regional haze, 70 Fed. Reg. 39,104 (July 6, 2005), codified at 40 C.F.R. part 51, subpart P ("Regional Haze Regulations" or "RHR"). In Section 169B, Congress made clear its intent to delegate significant power to States to develop, review, approve, and implement site-specific implementation plans designed to make reasonable progress in achieving regional haze goals while balancing each State's unique economic and power needs. *See, e.g.*, 123 Cong. Rec. 13,696, 13,709 (1977). EPA has recognized that, because the issues to be balanced are uniquely State and source specific, "the State must determine the appropriate level of BART (best available retrofit technology) control for each source subject to BART." 70 Fed. Reg. at 39,107.

Ultimately, the CAA requires deference to State decision-making. The structure of CAA and RHR create distinct and defined duties of the State and EPA. The EPA is, for instance,

charged with promulgating general regulations designed to "assure ... reasonable progress toward meeting the national goal." *Id.* § 7491(a)(4). The EPA must also promulgate the list of "mandatory Class I Federal areas" which are to receive visibility protection under the Act. *Id.* § 7491(a)(2). Further, the statute tasks the EPA with providing support to the states by, for instance, studying methods for redressing visibility impairment and then providing "guidelines" to the states suggesting such appropriate methods. Similarly, under section 169B of the Act, the EPA is tasked with studying regional visibility impairment, and convening regional commissions comprised of state authorities. *Id.* § 7492(a)(1), (c). The CAA does not give the EPA authority to question the wisdom of a state's choices of emission limitations if they are part of a plan that satisfies the standards of the Act.

For more than a decade, Oklahoma Gas & Electric (OG&E) has voluntarily burned low sulfur coal with the electrical generating units ("EGUs") at the Muskogee and Sooner Generating Stations ("OG&E Units") in order to limit sulfur dioxide emissions (SO2). OG&E is Oklahoma's largest electricity provider and serves approximately 789,000 customers in 268 communities in Oklahoma and western Arkansas. Oklahoma Industrial Energy Consumers (OIEC) is a non-partisan, unincorporated association of large consumers of energy with facilities located in the State of Oklahoma. OIEC members are engaged in energy price-sensitive industries such as pulp and paper, cement, refining, glass, industrial gases, plastic, film, and food processing. OIEC members employ thousands of Oklahomans.

On February 17, 2010, the State of Oklahoma submitted to EPA its regional haze revisions to the Oklahoma State Implementation Plan ("Oklahoma SIP"). *See* Oklahoma SIP, Doc. ID No. EPA-R06-OAR-2010-0190-0002 (relevant portions attached hereto as Exhibit 3). After properly balancing the statutory factors related to regional haze, Oklahoma determined that

low sulfur coal constituted BART for SO2 emissions from the OG&E Units and proposed a SIP that would have made OG&E's continued use of that low sulfur coal a mandatory condition of operation. In balancing the BART factors, Oklahoma had before it both a 2008 cost analysis for the OG&E Units — one that both the EPA and the Oklahoma Department of Environmental Quality ("ODEQ") had stated was prepared in conformity with the EPA Air Pollution Control Cost Manual ("CCM") — and a 2009 cost analysis prepared at ODEQ's and EPA's request that was more robust and site-specific than the 2008 cost estimate. *See id.* Both the 2008 Cost Analysis and the 2009 Cost Analysis were prepared with the assistance of OG&E's engineering consultant, Sargent & Lundy LLC ("S&L"). Oklahoma concluded, based on this and other information, that scrubbers were not cost effective for the OG&E Units.

On March 22, 2011, more than one year after Oklahoma submitted its SIP to the EPA, EPA published a proposed rule in the Federal Register proposing to approve in part and disapprove in part the Oklahoma SIP. *See* Proposed Rule, 76 Fed. Reg. 16,168. In the same notice, and without waiting for its proposed disapproval of parts of the Oklahoma SIP to become final — i.e., without waiting for and considering public comments on its proposed disapproval of portions of the Oklahoma SIP — EPA proposed a FIP to substitute its judgment for the judgment of Oklahoma on certain key issues statutorily delegated to Oklahoma, including the BART determinations for the OG&E Units.

On May 23, 2011, the State of Oklahoma, OIEC, and OG&E (among others) separately submitted extensive legal, policy, and technical comments to EPA opposing its proposed action and arguing that, for numerous reasons, the EPA's proposed action was contrary to the CAA and RHR and was otherwise arbitrary and capricious. Despite these comments, EPA published the Final Rule with respect to the Oklahoma SIP on December 28, 2011, disapproving the State's

SO2 BART determinations for the OG&E Units and for two units at another facility in the State. *See* 76 Fed. Reg. 81,728. EPA then simultaneously finalized the Oklahoma FIP that imposed an SO2 emission limit of 0.06 lbs/MMBtu for each OG&E Unit, which would require the installation of a scrubber at each affected unit by January 27, 2017. Moreover, in support of the FIP, EPA adopted entirely new approaches not contained within its proposed rule without proper notice and the opportunity to comment, in violation of APA requirements.

On December 28, 2011, EPA published a final rule with respect to the Oklahoma SIP, disapproving the State's SO2 BART determinations for the four OG&E units and for two units at another facility in the State based on EPA's own balancing of the five statutory factors. *See* Partial Approval of Oklahoma SIP and Promulgation of FIP, 76 Fed. Reg. 81,728 (Dec. 28, 2011) ("Final Rule"), JA 23. Petitioners filed requests for reconsideration with EPA in February 2012, but no action has been taken on those requests. The Final Rule both disapproved the Oklahoma SIP provisions that set out BART for the OG&E Units and promulgated a FIP, substituting EPA's own BART determination in place of the State's.

On February 24, 2012, the State of Oklahoma filed its Petition for Review in the Tenth Circuit Court of Appeals. On April 4, 2012, the State of Oklahoma filed a Joint Motion for a Stay of the Final Rule.

On June 15, 2012, Oklahoma filed its Joint Opening Brief in the Tenth Circuit Court of Appeals to resolve the pressing issues surrounding the EPA's abuse of the RHR, CAA, and rulemaking procedures. On June 22, 2012, the Tenth Circuit Court of Appeals granted the Petitioners Joint Motion for Stay of the Final Rule, concluding that the stay factors had been

met.[1] The stay was granted pending a hearing by the Tenth Circuit Court of Appeals merits panel.

a. The Role of the States

The role of the states under the CAA's visibility program is unique, as provided by sections 169A and 169B of the CAA. Unlike other programs where the states' role is to implement federally established standards, under the visibility program, the states have primary responsibility for establishing standards. In particular, the states are charged with developing emissions limitations after balancing a number of factors. The EPA's role under this program is simply one of support. Accordingly, the EPA must treat with special deference the determinations of a state, as embodied in a state's proposed Regional Haze SIP. States also are tasked with determining "such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal ...." *Id.* § 7491(b)(2). States are responsible for determining best available retrofit technology for BART-eligible facilities. *Id.* § 7491(b)(2)(A). The states define the long-term strategy for making reasonable progress toward the national visibility goal. *Id.* § 7491(b)(2)(B). And it is the states, in consultation with one another, who are directed to assess the interstate transport of visibility impairing emissions and to decide what measures are necessary to address regional haze. *Id.* § 7492(d). Congress believed it important that states retain wide latitude in choosing how best to achieve national standards, given local needs and conditions. In addition to plain statutory language and the case law interpreting this language, the legislative history behind the Regional Haze Rule also is clear that Congress intended to vest individual states with broad authority to make BART determinations. For example, the following exchange occurred during the U.S.

[1] The stay factors are" I. Petitioners Are Likely To Succeed on the Merits II. Petitioners Will Suffer Irreparable Harm Absent a Stay III. The Balance of Equities Favors Granting Petitioner' Stay Request, and Granting a Stay is in the Public Interest.

Senate debate preceding adoption of the Conference Agreement behind Section 169A of the CAA:

> *Mr. McClure:* Under the conference agreement, does the state retain the sole authority for identification of sources for the purpose of visibility issues under this section?
>
> *Mr. Muskie:* Yes; the State, not the Administrator, identifies a source that may impair visibility and thereby falls within the requirement of section 128.
>
> *Mr. McClure:* And does this also hold true for determination of "Best Available Retrofit Technology?"
>
> *Mr. Muskie:* Yes; here again it is the State which determines what constitutes "Best Available Retrofit Technology," as defined in section 128. . . . .

123 CONG. REC. S13696, S13709 (1977).

Consistent with this legislative intent, EPA itself has explained that "the State must determine the appropriate level of BART control for each source subject to BART." 70 Fed. Reg. at 39, 107. The EPA has even acknowledged that "[i]n some cases, the State may determine that a source has already installed sufficiently stringent emission controls for compliance with other programs . . . such that no additional controls would be needed for compliance with the BART requirement." *Regional Haze Regulations*, 64 Fed. Reg. 35,714, 35,740 (July 1, 1999). The EPA also has acknowledged that "the State retains the primary responsibility of developing a viable visibility program" consistent with the goal established in section 169 A (a). This responsibility includes "final authority for the development of the SIP, BART determinations, and implementation of the visibility program" in light of the goals of the Act. *See Am. Corn Growers Ass'n v. E.P.A.*, 291 F.3d 1 (D.C. Cir. 2002).

b. Limitations on EPA's authority

The content of the EPA's regulations and guidance and their deference to State decision-making is no accident. These rules stem from the 2002 opinion of the D.C. Circuit in *American Corn Growers*. That case involved a challenge to EPA's 1999 regional haze rules. *See* 64 Fed. Reg. 35714 (July 1, 1999). The court confirmed the primacy of the states by invalidating EPA's rule on the grounds that it impermissibly constrained state authority. *See Am. Corn Growers Ass'n*, 291 F.3d at 8 (EPA's rule is invalid because it is "inconsistent with the Act's provisions giving the states broad authority over BART determinations"). The D.C. Circuit relied on, in part, the legislative history of the CAA's visibility provisions in reaching this conclusion. Summarizing H.R. CONF. REP. NO. 95-564 , the court stated:

> The Conference Report thus confirms that *Congress intended the states to decide* which sources impair visibility and *what BART controls should apply to those sources*. The Haze Rule attempts to deprive the states of some of this statutory authority, in contravention of the Act. *Id.* (emphasis added).

The EPA therefore, cannot, through either approving or disapproving a SIP, interfere with the state's primary role in determining how national ambient air quality standards should be met under the CAA. 42 U.S.C.A. §§ 7401 et seq. As long as the ultimate effect of a state's choice of emission limitations is compliant with the national standards for ambient air, the state is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation. Reviewing the history of section 110, and judicial interpretations of it, the court in *Commonwealth of Virginia v. Environmental Protection Agency*, noted that as section 110 stood in 1975, and as it stood after the 1977 and 1990 amendments, the provision did not confer upon the EPA authority to condition approval of a state implementation plan on the state's adoption of specific control measures. *See* 108 F.3d 1397(D.C. Cir. 1997). Although the EPA has the authority to determine whether a state's plan meets the Act's requirements for approval (42

U.S.C.A. § 110(a)(2)), courts have held that the agency cannot tell the states what measures they should employ in meeting the requirements. (42 U.S.C.A. § 7410)

In *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975) the U.S. Supreme Court found that although the CAA plainly charges the EPA with the responsibility for setting the national ambient air quality standards, the Act, just as plainly, relegates the EPA to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations that are necessary if the national standards are to be met. According to the Court, the Act gives the agency no authority to question the wisdom of a state's choices of emission limitations if they are part of a plan that satisfies the standards of §110(a)(2), and the agency may devise and promulgate a specific plan of its own only if a state fails to submit an implementation plan that satisfies those standards. The Court stated:

> "So long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation."

Id at 79.

The CAA then "establishes a partnership between EPA and the states for the attainment and maintenance of national air quality goals." *Natural Res. Def. Council, Inc. v. Browner*, 57 F.3d 1122, 1123 (D.C. Cir. 1995). "Air pollution prevention . . . at its source is the primary responsibility of States and local governments. . . ." 42 U.S.C. § 7401(a)(3). Congress "carefully balanced State and national interests by providing for a fair and open process in which State and local governments, and the people they represent, will be free to carry out the reasoned weighing of environmental and economic goals and needs."

The CAA specifically vests states with the primary authority to determine BART by weighing the five statutory criteria set forth in 42 U.S.C., section 7491(g)(2). CAA Section

169A provides that "in determining [BART] the State (or the Administrator in determining emission limitations which reflect such technology) shall take into consideration [the five BART factors]." 42 U.S.C. § 7491 (g)(2). Section 169A also provides that sources subject to BART "shall procure, install, and operate, as expeditiously as practicable (and maintain thereafter) the [BART], as determined by the State (or the Administrator in the case of a plan promulgated under section 7410(c) of this title) . . . ." 42 U.S.C. §§ 7491(b)(2)(A). The EPA may disapprove a SIP and issue a FIP under section 7410(c) only where the State's SIP fails to meet minimum CAA requirements. 42 U.S.C. § 7410(k)(3). In the case of regional haze, the CAA requires only that States weigh the five statutory factors and arrive at a reasonable understanding of BART requirements. 42 U.S.C. § 7491 (g)(2).

As stated above, the U.S. Court of Appeals for the D.C. Circuit has reviewed the EPA's authority under the Regional Haze program and agreed that the CAA "calls for states to play the lead role in designing and implementing regional haze programs." *Am. Corn Growers Ass'n.* 291 F.3d 1, at 2. In 2002, the court reversed a portion of the EPA's original Regional Haze Rule that required states to analyze visibility improvements from multiple sources, rather than on a source-by-source basis, when determining BART requirements. The court held that the EPA could not require the states to evaluate one BART factor collectively while mandating that the other four factors be evaluated separately for individual sources. In addition to distorting the statutory factors, the court thought the EPA's approach was "inconsistent with the Act's provisions giving the states broad authority over BART determinations." *Id.* at 8; *see also Utility Air Regulatory Group v. E.P.A.*, 471 F.3d 1333, 1336 (D.C. Cir. 2006) (The second step in a BART determination "requires states to determine the particular technology that an individual source subject to BART must install.")

I. The Arbitrary and Capricious Nature of the EPA's Preemption and Disapproval of Oklahoma's SIP

The CAA directs the States — not the EPA — to determine the appropriate level of BART to regulate regional haze. The EPA's proposed Federal Implementation Plan ("FIP") as it pertains to the disapproval of portions of the State Implementation Plan ("SIP") as to best available retrofit technology ("BART") and the long-term strategy ("LTS") is in violation of the Clean Air Act (CAA) and the discretion and authority granted to the State under that Act. In its quest to issue a Federal Implementation Plan ("FIP") that requires Oklahoma Gas and Electric Company ("OG&E") to spend over $1.2 billion to install dry flue gas desulfurization technology ("scrubbers") on four electric generating units in the next five years to address aesthetic concerns about regional haze, the Environmental Protection Agency ("EPA") eviscerated the authority and discretion given to the State of Oklahoma by the Clean Air Act ("CAA" or "Act"). In substituting its judgment for the judgment of the State, EPA illegally usurps the broad authority given by Congress to the States to make best available retrofit technology ("BART") determinations for regional haze. *See* 42 U.S.C. § 7491. The Oklahoma SIP included a state-specific balancing of BART factors that considered Oklahoma's unique energy and economic needs; a balancing that EPA is neither equipped nor authorized to conduct. Instead, EPA improperly mandated its desired outcome in place of Oklahoma's considered judgment as to the appropriate BART for facilities in the state.

The CAA and RHR set forth the process that must be followed in determining BART, but neither requires any specific outcome. Thus, the CAA and RHR require, in part, that a State balance five factors in making a BART determination for each qualifying facility.[2] EPA

[2] The five BART factors are: (i) the costs of compliance; (ii) the energy and nonair quality environmental impacts of compliance; (iii) any existing pollution control technology in use at the source; (iv) the

recognizes that "States are free to determine the weight and significance to be assigned each factor." Proposed Oklahoma BART Rule, 76 Fed. Reg. 16,168, 16,174 (Mar. 22, 2011) ("Proposed Rule"). EPA further acknowledges that "[i]n some cases, the State may determine that . . . no additional controls would be needed for compliance with the BART requirement." Original Regional Haze Regulations, 64 Fed. Reg. 35,714, 35,740 (July 1, 1999).

The CAA and RHR require that *States*, not EPA, have the primary role in implementing the regional haze program, including making BART determinations. *See, e.g.*, CAA § 169A(b)(2)(A), (g)(2), 42 U.S.C. § 7491(b)(2)(A), (g)(2) ("in determining [BART] *the state* (or the Administrator in determining emission limitations which reflect such technology) shall take into consideration [the BART factors]") (emphasis added). The states are directed to define the long-term strategy and BART, one component of the long-term strategy, under the Act. It is the states that are required to consider and balance the five factors relevant to a BART determination. *See id.* § 7491(g)(2). The scope of state discretion is further confirmed in EPA guidance, which states that "*[t]he glidepath [to the national goal] is not a presumptive target, and States may establish a RPG [reasonable progress goal] that provides for greater, lesser, or equivalent visibility improvement as that described by the glidepath." Guidance for Setting Reasonable Progress Goals Under the Regional Haze Program* at 1-3 (June 1, 2007)(emphasis added).

The EPA Proposed Rule ignores the plain language of the CAA and the Court of Appeals' recognition of the states' dominant role in determining BART in an effort to advance EPA's preference for scrubbers on all EGUs. EPA does not have authority to disapprove a SIP simply because it disagrees with a state's choice in emission control measures for specific

---

remaining useful life of the source; and (v) the degree of improvement in visibility that may be expected as a result of such technology. 2 U.S.C. § 7491(g)(2); 40 C.F.R. § 51.308(e)(1)(ii).

sources. *Florida Power & Light Co. v. Costle*, 650 F.2d 579, 581 (5th Cir. 1981) ("If an [sic] SIP or a revised SIP meets the statutory criteria, however, the EPA must approve it").

The EPA is proposing to take an action that usurps authority granted to Oklahoma in the Clean Air Act. The Clean Air Act created a Regional Haze program to improve visibility in certain national parks and wilderness areas. The EPA can set national goals and guidelines for the program, but individual states have the authority to craft plans specific to and appropriate for their state's citizens and interests. Each state has the right to select the best control technology ("BART") for sources of emissions that contribute to regional haze, taking into consideration five specific factors, including costs of control. Oklahoma chose the technologies that are appropriate for its sources in light of these five factors and submitted an implementation plan to EPA in February 2010. In particular, Oklahoma determined that low sulfur coal was the cost effective way to control sulfur dioxide emissions to address haze issues. A benefit of this determination is that it gives state utilities greater flexibility to switch to generating electricity with natural gas or renewable sources. The state determined that installing scrubbers now is not cost effective and would lock the utilities into burning coal for the next 20 years.

On March 22, 2011, EPA proposed to reject the state's determination and substitute its own judgment for the state's via implementation of its proposed FIP.[3] The EPA proposed to select scrubbers as the best technology for the relevant sources in Oklahoma. The adoption of a Federal Plan would go beyond the authority granted to the EPA by the Clean Air Act because the

[3] On March 23, 2011 The State of Oklahoma submitted to the Administrator of the EPA a Notice of Intent to file suit pursuant to Clean Air Act section 304 (b)(2), 42 U.S.C. section 7604 (b)(2) and 40 C.F.R. Part 54, for the EPA's failure to perform nondiscretionary duties. The suit against the EPA will be filed because the EPA was not authorized to propose a FIP for regional haze in Oklahoma on March 22, 2011, as no final action has been taken regarding Oklahoma's SIP. In addition, the window for EPA to propose a regional haze FIP was not open on March 22nd. The EPA has violated its nondiscretionary duty to honor the time constraints provided in Section 110 (c) of the CAA and 42 U.S.C. § 7410(c) regarding the promulgation of a FIP.

EPA does not have the power to question the state's determination as long as the state relied on the proper factors in making it, which Oklahoma did. It is estimated that the emission controls required by EPA will cost approximately $2 billion to install and result in a 15% - 20% increase in residential electric rates.

EPA may disapprove a SIP and promulgate a FIP only where a State's SIP fails to meet minimum CAA requirements. 42 U.S.C. § 7410(k)(3); *see also Train v. Natural Res. Def. Council*, 421 U.S. 60, 79 (1975). The RHR and BART guidelines issued by EPA, 70 Fed. Reg. 39,104 (July 6, 2005), require only that States engage in the process of weighing the five statutory factors in determining BART for eligible sources in a manner consistent with the RHR, and that "States are free to determine the weight and significance to be assigned to each factor." *See* 76 Fed. Reg. 16,168, 16, 174 (Mar. 22, 2011). As the Oklahoma SIP clearly shows, Oklahoma did properly engage in that process in making its BART determinations for the OG&E Units.

Oklahoma submitted its' SIP to EPA long before EPA proposed the Oklahoma FIP, and with a full record. Since ODEQ applied the statutory factors in promulgating the Oklahoma SIP, EPA was not free to reject Oklahoma's BART determinations with respect to the OG&E Units and promulgate a FIP substituting its judgment for that of the State.

As previously set forth, the U.S. Court of Appeals for the D.C. Circuit has affirmed that EPA's role in determining regional haze plans is limited, stating that the CAA "calls for states to play the lead role in designing and implementing regional haze programs." *Am. Corn Growers Ass'n v. EPA*, 291 F.3d 1, 2 (D.C. Cir. 2002). The Court reversed a portion of EPA's original RHR because it found that EPA's method of analyzing visibility improvements distorted the statutory factors and was "inconsistent with the Act's provisions giving the *states* broad authority

over BART determinations." *Id.* at 8 (emphasis added); *see also Utility Air Group v. EPA*, 471 F.3d 1333, 1336 (D.C. Cir. 2006) (The second step in a BART determination "requires states to determine the particular technology that an individual source 'subject to BART' must install"). EPA lacks the authority to disapprove the Oklahoma SIP merely because it disagrees with Oklahoma's choice in emission controls for specific sources.

The CAA gave Oklahoma the right to conduct this analysis and make a determination without being second-guessed by EPA. Oklahoma exercised the authority granted by the CAA and determined that "[t]he cost for [scrubbers] is too high, the benefit too low and these costs, if borne, further extend the life expectancy of coal as the primary fuel in the Sooner facility for at least 20 years and beyond. BART is the continued use of low sulfur coal." *See* Ex. 3, Oklahoma SIP, App. 6-5, Item 1, Sooner BART Review at p. 29, and Muskogee BART Review at p. 29.

EPA second guessed Oklahoma's authority by rejecting significant portions of the 2009 site-specific costs estimates, in many instances simply assuming, without verifying, that they resulted in the double counting of expenses. While OG&E disputes EPA's conclusion regarding the 2009 cost estimates, once EPA reached the conclusion that the CCM estimates should control, the proper response by EPA should have been to return to the 2008 cost estimates, which both EPA and ODEQ had stated complied with the CCM and which support the State's BART determinations for the OG&E Units. EPA's attempt to create a hybrid cost estimate by selectively modifying the 2009 estimate resulted in cost estimates that were neither site-specific and real (like OG&E's 2009 cost estimates) nor reflective of the CCM general estimates (like OG&E's 2008 cost estimates). EPA's "cherry-picking" approach to the cost estimates for the OG&E Units in order to justify its predetermined conclusion that scrubbers were BART was, therefore, arbitrary and capricious.

Despite the Act's exclusive assignment to the States of the authority to weigh the statutory factors, EPA nonetheless disputes Oklahoma's cost effectiveness analysis and seeks to use the assumptions and speculation of its consultant as the basis for disapproval of the Oklahoma SIP. EPA's principle contention is that the 2009 site-specific cost estimates considered by Oklahoma did not comply with the CCM. To reach that result, however, EPA (i) ignored the 2008 cost estimates that it had acknowledged were prepared in accordance with the CCM; (ii) rejected the 2009 estimates by giving preference to the assumptions and speculation of its consultant over the judgment of the State; and (iii) manipulated the inputs for the cost effectiveness calculation by ignoring the requirements of its own guidelines and basic engineering principles. Even beyond these fundamental flaws in EPA's cost effectiveness review of the Oklahoma SIP, the separate cost analysis conducted by EPA's consultant was not supported by the record and was arbitrary in its approach. At the same time, EPA took an improper approach to visibility improvement designed to overstate the benefits from the installation of scrubbers. The fundamental flaws in EPA's cost-effectiveness analysis not only demonstrate that its disapproval of the Oklahoma SIP was arbitrary and capricious, but also preclude a finding that EPA had a reasoned and proper basis for the FIP.

"States have flexibility in how they calculate costs." 70 Fed. Reg. at 39,127. Where the RHR give States flexibility and Congress has designated that States take the dominant role in determining BART, EPA is not free to undercut the State's reasonable exercise of that flexibility, particularly by substituting its own arbitrary approach. EPA illegally usurped State authority in violation of the plain language of the Act when it rejected Oklahoma's BART determination for the OG&E Units and, thus, the FIP is unlawful. In addition, because EPA published a notice that certain States, including Oklahoma, had initially failed to meet the deadline for submitting

regional haze SIPs, the CAA unequivocally imposed a two-year requirement for EPA to issue a FIP. *See* 42 U.S.C. § 7410(c); *Gen. Motors v. United States*, 496 U.S. 530, 537 (1990) (citing CAA §110(c) as an example of "explicit deadlines" established by the CAA). It is undisputed that EPA failed to promulgate a FIP within that two-year window. Thus, EPA's attempt to promulgate the Oklahoma FIP outside that two-year window, without first providing a new notice to re-open the two-year window for doing so, was contrary to the Act. Clearly, the EPA is going beyond its authority and abusing its power by overregulating in areas statutorily regulated by the States.

As previously noted, Oklahoma has the primary authority to determine BART and, pursuant to EPA's own guidelines, this primacy extends to the cost analysis, where the State is given "flexibility in how [it] determines costs." 70 Fed. Reg. at 39,127. Oklahoma's cost analysis, set forth in the Oklahoma SIP, clearly meets statutory requirements. Even if EPA was authorized to second guess Oklahoma's judgment, EPA has not articulated any sound or reasonable basis for rejecting Oklahoma's considered judgment regarding the appropriate costs to consider.

II. The EPA's Abrogation of Notice and Comment Requirements When Imposing FIP's

The Final Rule violates the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et. seq.*, because it introduces and relies upon rules or approaches not previously discussed in the proposed rule. *See* 5 U.S.C. § 553(b)(3) (requiring agencies to give notice of "the terms or substance of the proposed rule or a description of the subjects and issues involved."). "To satisfy the APA's notice requirement, . . . an agency's final rule need only be a logical outgrowth of its notice." *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009) (internal

quotations and citations omitted). However, "a final rule fails the logical outgrowth test and thus violates the APA's notice requirement where interested parties would have had to divine the agency's unspoken thoughts because the final rule was surprisingly distant from the proposed rule." *Id.* (vacating portion of agency's final rule for violating APA's notice requirements) (internal quotations and citations omitted). Here, Oklahoma had no means by which to divine EPA's introduction of several new outcome determinative approaches set forth for the first time in the Final Rule and, therefore, had no opportunity to properly comment on or present evidence regarding them. The issues raised by the use of these new approaches are particularly important in this case because they tread on areas that the CAA commits to the discretion of the State in the first instance.

EPA's issuance of the Oklahoma FIP was also procedurally defective because of its timing. First, the CAA does not give EPA authority to propose a FIP prior to final disapproval of the Oklahoma SIP. The Act, moreover, requires that EPA give Oklahoma a reasonable opportunity to cure any alleged defects in a disapproved SIP. CAA Section 110(c)(1)(A) allows promulgation of a FIP after EPA "finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section or . . . disapproves a State implementation plan submission in whole or in part." 42 U.S.C. § 7410(c)(1). Section 110(c) also states that EPA shall propose a FIP "unless the State corrects the deficiency," thereby reflecting Congress's intention for States to have the power to design their own SIP and have an opportunity to correct a SIP before a FIP is issued. § 7410(c). Simultaneous promulgation of the FIP is also inconsistent with the Act's definition of a FIP. A FIP is defined as a plan "to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in

a State implementation plan." § 7602(y). Thus, a FIP cannot properly exist until after final action has been taken on a State's SIP.

CAA § 307(d)(3) requires that "[t]he statement of basis and purpose" that must accompany each proposed FIP include a summary of "the factual data on which the proposed rule is based" and "the major legal interpretations and policy considerations underlying the proposed rule." 42 U.S.C. § 7607(d)(3). EPA cannot credibly claim to be able to present the relevant factual, legal, and policy information and rationale to justify a proposed FIP before it has: (1) determined whether and to what extent the Oklahoma SIP may be deficient and un-approvable; (2) provided the public with an adequate explanation of any such determination in a proposed EPA rule on SIP approval or disapproval that is published for public review and comment; (3) received, considered, and responded to public comments on the proposed action; and (4) made a final determination and taken final action to disapprove the SIP in whole or in part.

This due order of action by EPA is important because, as demonstrated by the discussion above regarding cost effectiveness, EPA's authority when reviewing a Regional Haze SIP is much different than its authority when promulgating a FIP. Because the CAA delegates the power to determine BART exclusively to the States, the fact that EPA would take a different approach or reach a different conclusion is irrelevant to its approval or disapproval of a Regional Haze SIP. Yet, if EPA is allowed to take final action on such a SIP at the same time that it issues a FIP, it can blur this distinction and impermissibly use the FIP process to impose its preferences with respect to the five statutory BART factors onto the States.

Second, because EPA published a notice that States, including Oklahoma, had failed to meet the statutory deadline for submitting regional haze SIPs, it is undisputed that the CAA

unequivocally imposes a two-year limit on EPA's ability to take such action. *See* 42 U.S.C. § 7410(c)(1); *Gen. Motors v. United States*, 496 U.S. 530, 537 (1990) (citing CAA § 110(c) as example of "explicit deadlines" established by the CAA). It is also undisputed that EPA failed to promulgate a FIP within that two-year window. Thus, EPA's attempt to promulgate the Oklahoma FIP outside that two-year window, without first providing a new notice to re-open the two-year window for doing so, was contrary to the Act.

The new "overnight" cost method used by EPA to determine the cost effectiveness of scrubbers is at the core of EPA's Final Rule, both in disapproving the Oklahoma SIP and in justifying its FIP. EPA's failure to raise these new approaches as justification for its proposed actions in the Proposed Rule deprived Petitioners of the right and opportunity to comment on them. It was, therefore, improper under the APA and it deprived the State of the authority delegated to it by the CAA to determine the reasonable and appropriate methods for evaluating costs in making BART determinations. EPA's Final Rule is fatally defective because of its failure to provide notice of this new approach and allow comment on it.

The Final Rule also reveals, for the first time, EPA's new methodology to determining visibility improvement—the so-called "number of days" approach. 76 Fed. Reg. at 81,736. Again, because this approach was not raised by EPA in the Proposed Rule, the Final Rule is fatally defective. Because the Final Rule fails the logical outgrowth test, Petitioners' challenges to the Oklahoma FIP are likely to succeed, justifying a stay of the FIP.

The administrative record shows that EPA's "nothing but scrubbers" approach led it to reject a final regional haze state implementation plan ("SIP") that Oklahoma sent to EPA over a year before EPA proposed to adopt the FIP. The only way that EPA could achieve this predetermined outcome was to ignore the Act and its own guidance and violate the

Administrative Procedures Act ("APA") by raising and relying on new rules and methodologies for the first time in its final rule adopting the FIP. For EPA to accomplish this objective, it had to ignore its own policies and procedures for making these determinations and, in the Final Rule, use new approaches regarding cost effectiveness and visibility improvement that it had not identified in the proposed rule. This approach precluded public comment and violated Petitioners' procedural rights.

The RHR require States to submit their BART determinations, along with other required elements, as SIP revisions to EPA for approval ("Regional Haze SIPs"). EPA may disapprove a Regional Haze SIP and issue a FIP only when a SIP fails to meet all of the applicable requirements of the Act. 42 U.S.C. § 7410(k)(3). In this instance, the applicable requirements are that the emission limitations developed to address regional haze be developed pursuant to the evaluation process and balancing of the BART factors set out in the CAA and RHR. 42 U.S.C. § 7491(b).

III. Economic Costs Associated with the EPA's Illegal Actions Under the Regional Haze Program

The EPA's action is sure to raise the costs of electricity to consumers, with a corresponding loss of jobs and economic activity. EPA's illegal adoption of the Final Rule will have an immediate and irreparable impact on the State whose CAA authority has been eviscerated by EPA's actions. Likewise, electricity consumers in Oklahoma will face significant electricity rate increases as a result of the costs imposed by the Final Rule.

Oklahoma has demonstrated the substantial economic impact EPA's Final Rule would have on the State. OG&E will be required to expend significant resources immediately in order to implement the installation of the scrubbers with any chance of meeting the five year deadline,

and just in the first two years, the costs will exceed $200 million. Even if OG&E were able to roll some of those costs into its rate structure, this will have an obvious adverse effect on the citizens of Oklahoma who have to pay those higher electricity rates. In today's economic climate, those very real economic impacts of EPA's FIP cannot and should not be ignored.

IV. Conclusion

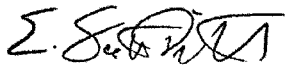
First, as noted above, Congress designated the State as the principle decision maker for BART determinations and regional haze programs. The EPA's actions here deprive Oklahoma of the ability to fashion a regional haze program that balances costs and visibility improvement in a manner that is appropriate for the citizens and economy of this State. The EPA's actions undermine the State's authority and damage the ability of Oklahoma to fulfill its regulatory function as created by Congress.

Second, as noted above, the EPA's abrogation of notice and comments when imposing FIP's on Oklahoma violates key and foundational principles of rulemaking.

Finally, if some of these costs are imposed on consumers in Oklahoma, the increased electricity rates will have an adverse economic impact with consumers paying higher rates directly and businesses looking to pass their higher costs to their customers. Indeed, as a large electricity consumer, the State too will feel the direct economic impact of higher rates. Neither the State nor its citizens has recourse for such unnecessary costs. Thus, irreparable harm will result from continuation of the current effective date for the Oklahoma FIP.

The State of Oklahoma has properly exercised its discretion under the CAA's visibility program to establish a long-term strategy for the reduction of visibility impairing pollutants, including the selection of BART. The EPA's proposed action disregards clear congressional intent that primary regulatory authority under the visibility program rests with the States. The

EPA's proposal would impose the EPA's policy judgments based on the EPA's balancing of factors where it has no authority to do so. The EPA does not have the right under the Clean Air Act to substitute its judgment for that of the state when it comes to determination of the best control technology for sources in the state.



E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

Mr. LANKFORD. Mr. Martella.

STATEMENT OF ROGER R. MARTELLA, JR.

Mr. MARTELLA. Thank you.

Chairman Lankford, Ranking Member Connolly and members of the committee, thank you for providing me the opportunity and the honor to appear before you today.

I would like to start with the uncontroversial proposition that rulemaking activities should be built upon three bedrock principles of transparency, public participation and judicial review. The Administrative Procedure Act guarantees these principles and protections for all citizens when the government engages in rulemaking, and these procedural protections that are inherent to our democratic system are just as critical to protecting the environment as the substantive laws and rules themselves.

However, the APA and our process for enacting effective Federal regulations is confronting new challenges that in some cases are bypassing these protections. Today I want to share with you my concern about recent efforts to circumvent the protections of transparency, public participation and judicial review in an emerging phenomenon that provides an off ramp to these principles.

The concern arises out of a growing trend where certain groups increasingly are employing a so-called sue-and-settle approach to the government on regulatory issues. Such an approach effectively provides an off ramp that ignores these bedrock protections, such as, first, a lack of transparency. In such settlements, discussions and agreements typically are reached with a subset of interested parties without full stakeholder input, and frequently take place outside the boundaries of the public process.

Second, a lack of public participation. In such settlements public participation is foreclosed three times. First, the agreement on how to regulate is reached without full input of stakeholders; second, the negotiated deadlines for final rules are frequently so quick that the public's comments might receive little weight in the actual subsequent rulemaking; third, because the final rule must be the logical outgrowth of the proposal, settlement agreements that influence even the proposed rule effectively preordain the final outcome without full public participation.

Third, a lack of judicial review. In such settlements parties frequently reach an agreement before a lawsuit is even filed or defended, thus depriving interested parties from intervening in the litigation to defend their interests where intervention has been granted.

Fourth, a conflation of government and nongovernmental roles. In such settlements the NGO plaintiffs effectively set the priorities and timelines for how the government enacts certain rulemakings over other competing concerns and resources, in turn influencing policies and priority settings far beyond the reach of a particular settlement. These concerns are not theoretical or abstract, but have been rising with increasing frequency in the last several years.

One recent example alluded to by the chairman includes the greenhouse gas New Source Performance Standards for utilities. In December of 2008, an NGO group predicted publicly it would be successful in convincing the EPA to phase out new coal-fired power

plants by setting a New Source Performance Standard at a level that no coal-fired power plant could meet. Exactly 2 years later, on December 23, 2010, EPA announced a consent decree with the very same NGO committing the Agency to propose and finalize this very rule even though it was not required to do so.

Importantly, EPA agreed to promulgate such standards without any prior input from a single stakeholder in those affected impacted industries. When the ultimate proposal came out on March 27th of this year, it was virtually identical to what the NGO had predicted in 2008 and barred the construction of new coal-fired facilities in the United States. Because of the unique nature of NSPS proposals, the rule is already in effect, even though EPA has yet to respond to a single stakeholder comment from industry on the issue. Thus, as a result of this settlement, we now have an effective rule that is barring new facilities without first offering transparency to the industry impacted, allowing for public participation before the rule took effect, and providing no real means of judicial review at this time.

Finally, Mr. Chairman, just to emphasize a point, I do strongly support and encourage efforts to pursue settlement agreements and consent decrees whenever feasible. I don't intend my comments to suggest it's always inappropriate for a settlement agreement to provide some definition of scope to a proposed rule. However, my overarching recommendation to this subcommittee is to address and improve the process by which these agreements are reached in the first instance.

By promoting fairness, transparency and public participation of interested stakeholders in the first instance, settlement agreements will better reflect a wide range of interests that must be balanced, result in stronger and more defensible outcomes, and improve the success of the subsequent rulemaking process.

Thank you very much for this opportunity today to share my views.

Mr. LANKFORD. Thank you.

[Prepared statement of Mr. Martella follows:]

Addressing Off Ramp Settlements:
How Reform Can Ensure Transparency, Public Participation, and Judicial Review in Rulemaking Activity

Roger R. Martella, Jr.
Sidley Austin LLP

Chairman Lankford, Ranking Member Connolly, and Members of the Subcommittee:

Thank you for providing me the opportunity and the honor to appear before you today.

The subject of today's hearing is critically important because it raises issues about fairness, transparency, and public participation in administrative rulemakings while discussing mechanisms for the Executive Branch to ensure sound and principled environmental decision making in this very litigious environment we all inhabit. I commend the Subcommittee for addressing this issue at a critical time, and look forward to assisting your efforts.

America's successful use of administrative law and rulemaking is critical to implementing the laws that you enact. We should agree that essential hallmarks of administrative law have always included the bedrock principles of:

(1) **transparency** in government action;

(2) **public participation** through the solicitation of public and stakeholder input prior to final government action; and

(3) **equal access to judicial review** by all parties impacted by government action.

The Administrative Procedure Act originally adopted by Congress in 1948 is confronting new challenges in this era where every significant administrative law initiative seems to be comprised of three inexorable components: the agency's proposed rule, the final rule, and the litigation by the loser in the rulemaking. I do not think we can or should endeavor to change those components of modern life in Washington, but it is appropriate and timely that this Subcommittee is focusing on the growing problems regarding settlements of administrative law litigation that bring a new layer of complexity to the ability of the public to participate in the rulemaking process. Key elements of reform, including proposed legislation pending before the House Judiciary Committee, are critical to ensuring that our democratic rulemaking processes maintain the principles associated with enactment of the APA in 1948.

Today, I want to share with you my concern about recent efforts to circumvent such protections in an emerging phenomenon that I call "off ramp settlements."

By way of background, I am both a lifelong environmentalist and a career environmental lawyer. I am very proud to have spent the majority of my career in public service, as a trial attorney in the Justice Department's Environment Division, as the General Counsel of the United States Environmental Protection Agency, and as a judicial law clerk on the Tenth Circuit Court of Appeals. In my current capacity as a private practitioner, I am privileged to work with a plethora of stakeholders including private companies and trade associations, environmental organizations, and the government, to develop creative solutions that advance environmental protection while also enabling the United States to retain economic competitiveness in a trade sensitive, global environment where very few economies provide even the faintest glimmer of our own environmental controls and public process protections. In both my government and private careers, I am very proud of the opportunities I have had to participate in and advance international rule of law initiatives, working to help develop the enactment of environmental and public participation laws in growing economies. In particular, last I was honored to have served as one of five American Bar Association delegates to the United Nations at the Rio+20 sustainable development conference in Brazil.

In my opportunities to explain and teach the American environmental protection regime in China and elsewhere, I always begin with the simple proposition that substantive environmental law is inextricably intertwined with the core process concepts of transparency, public participation, and judicial review. Although it was Congress that took the initiative in the 1970s to enact the suite of environmental laws that continue to provide Americans with the cleanest environment in the world, the success of environmental protection is ultimately attributable to a wide range of actors, including the implementation of the Executive Branch through rulemakings and the rigorous scrutiny of the Judicial Branch. Again, the APA is our benchmark and its preservation is our goal.

But especially in environmental matters, we must look beyond the government and recognize that just as key to the success of our environmental regime has been the role of a myriad of stakeholders and public citizens who have taken part in advancing environmental protection. This includes multinational companies developing novel environmental solutions and technologies, and also encompasses local and national environmental organizations that participate in rulemakings impacting public health and the environment. Ultimately, when a rulemaking is concluded with full public input and participation and any of these parties, including private citizens, invoke the courts to address environmental concerns, the success of environmental protection in

the United States is ensured because of the broad roles played by actors outside the government as much as the role played by the government itself.

Key among the parties contributing to the success of environmental laws are environmental nongovernmental organizations, or NGOs. Decades prior to the enactment of environmental laws, these groups drove the environmental movement in the United States in response to issues such as protecting wilderness areas and addressing Love Canal, the Cuyahoga River, and smog in our nation's urban areas. In my experience, the advancement of environmental protection frequently has been synonymous with efforts by such NGOs. I am personally proud of the opportunities I have had to serve with several NGOs and my experiences with NGOs in various capacities reinforces the strong role they play in advancing environmental protection.

At the same time I believe that a subset of NGOs recently has added a new and unanticipated weapon in an unfortunate effort to conflate the respective roles and boundaries of governmental and nongovernmental organizations. This approach, if not carefully considered, can risk the core principles of transparency, public participation, and judicial review. Specifically, certain groups increasingly are employing a "sue and settle" approach to interactions with the government on regulatory issues. Before going further, let me be perfectly clear about my views: while the general notion of settling disputes with the government is noncontroversial and properly serves as a key component of promoting judicial efficiency and reasonable outcomes to disputes, such an approach takes on new concerns in a regulatory context when such settlements effectively provide an off ramp that ignores these various protections, procedures, and boundaries Congress has established.

Specifically, such off ramp settlements implicate the following issues:

- **The opportunities for non governmental actors to engage in a quasi-governmental role:** Frequently, when NGOs engage in settlements with administrative agencies over rulemaking schedules, the outcome is a reallocation of government priorities, resources, and deadlines. Effectively, in such settlements the NGO plaintiffs and petitioners, and not the government officials entrusted to the effective implementation of the laws, can set the priorities and timelines for how the government enacts certain rulemakings over other competing concerns and resources. A well established line of case law makes it clear that ultimately the government has wide deference and discretion in setting its own regulatory schedule, particularly when Congress has not mandated a given deadline. However, in these off-ramp settlements, the NGOs typically gain agreements that dictate a schedule instead of allowing a Court to address the merits of such arguments. In those circumstances, such

settlements can impose obligations on the government that the Court unlikely would have compelled. Such a quasi-governmental role is not only inconsistent with the respective dividing lines between governmental and nongovernmental functions, but, critically, also threatens to distract the government's limited resources away from other important priorities, contributing to a cycle of the government unable to meet other important obligations and priorities. Further, as described below, experience has shown that such settlements have resulted in unrealistic commitments of government resources that the government is not capable of satisfying. These missed deadlines in turn lead to litigation to enforce such deadlines, thus entailing the further engagement of the Court in a cycle that violates every notion of why judicial settlements make sense.

- **Lack of transparency:** A core element of American environmental rulemaking that is distinguishable from almost every other system in the world is the promise and guarantee of transparency. The Administrative Procedure Act, the Clean Air Act, and many other laws mandate notification to the public and stakeholders of rules and decisions impacted by such governmental actions. Such affected and interested stakeholders, along with other members of the public, have an opportunity and a right for adequate notice and comment. Not only must this opportunity precede any final agency action, but also the government is compelled by the APA to publically respond to and take into account comments. These laws permit only the narrowest of exceptions to waive such processes, and the agencies appropriately have exercised restraint in invoking such exceptions. Similarly, on the rare occasions when the government takes action without providing adequate transparency, notice, and public participation, Courts have been rigorous in their enforcement. Sue and settle consent decrees, however, effectively provide an off ramp to these critical procedural protections. Such discussions and agreements typically are reached with a subset of interested parties without full and broad stakeholder input, and in many instances take place outside the boundaries of the public process.

- **Lack of effective public participation:** In most off ramp settlements, even when the government provides some opportunity for comment after an agreement is reached, experience has shown that in many instances such process is pro forma, with at most minor changes to deals made in rare circumstances. In addition, the negotiated deadlines for final rules are frequently so quick and ambitious that the public's comments might receive little weight in the actual subsequent rulemaking due to artificially imposed time constraints. Thus, public participation is foreclosed essentially twice—at the settlement and the rulemaking stages—leading to final agency action that

circumvents the intended role of stakeholder input and fails to account for broader views.

- **Lack of judicial review:** Another core tenet of environmental rulemaking in the United States is the ability both to challenge rulemaking decisions adversely impacting stakeholders and to participate as intervenors—frequently, in defense of the government's decisions and priorities—in the litigation of rule challenges brought by other parties. Congress guaranteed such protections both by affirmatively waiving the government's sovereign immunity to rulemaking challenges in laws like the Administrative Procedure Act and by providing explicit causes of action under the APA or, for example, the Clean Air Act. However, in off ramp settlements, NGOs and the government may reach an agreement before a lawsuit is even filed, thus depriving interested parties and potential intervenors from participating in the negotiations or intervening in the litigation to defend their interests. Even where settlement occurs later, after parties may have been granted intervention by demonstrating they may be adversely impacted by the outcome of a lawsuit and may not be adequately represented by the government, such parties have little to no opportunity to participate in settlement discussions to which they are not invited by the government and NGOs. Thus, settlements in a regulatory context can adversely impact the interests of interested parties while depriving them of meaningful judicial review.

These concerns regarding off ramp settlements are not theoretical or abstract, but have been rising with increasing frequency in the last several years. In fact, they have become so common that some groups have labeled the phenomenon of reaching an enforceable agreement with the government on regulatory commitments and shifting of government resources as "mega settlements." Some recent examples include:

- **Greenhouse Gases Performance Standards:** On December 23, 2010, EPA announced a consent decree with several NGOs committing the agency to propose and finalize the first ever New Source Performance Standards for greenhouse gases. EPA agreed to promulgate such standards for utilities and refineries without any prior input from stakeholders in those industries. Specifically, EPA committed to propose the first-ever GHG NSPS for these sectors in July and December of 2011, which is an unprecedented quick schedule. In fact, the schedule was so ambitious that it took until March 27, 2012 to propose standards for utilities and the Agency has yet to propose standards for refineries.. Beyond the mere commitment of schedules and timelines, EPA also made various substantive commitments in the agreement that would ordinarily be open for public comment in a rulemaking process,

such as a decision to regulate both new and existing sources in these categories, without prior industry input on the feasibility of such controls, the ability to implement in a timely manner, and the lack of adequate data to create such standards. Although the Agency ultimately held listening sessions and took comment on the agreements after finalizing them, the agreements did not materially change before being lodged with the Court. When the Agency did propose standards for utilities in March, 2012, it essentially adopted a December 2008 Sierra Club proposal to set the standard at 1000 lbs CO2/MWh, which effectively phases out new coal facilities in the United States as of the date of the proposal.

- **Endangered Species Consultations:** In May and June 2011, the Fish and Wildlife Service and certain NGOs filed joint settlement agreements in U.S. District Court to resolve claims that sought to mandate listing decisions on more than 600 species. The settlements specified certain actions the Service is to take regarding 600 species during FY 2011 and FY 2012, including the commencement of a review of 251 candidate species in a five year period, resulting in 130 decisions by September 30, 2013 alone. The Court approved and enforceable settlements, which were negotiated absent participation from stakeholders who ultimately will be impacted by the listing decisions, are raising significant questions about the Agency's resources and ability to meet the deadlines and commitments in a manner that entails adequate public participation and promotes sound decision making.

- **Water:** Chairman John L. Mica, Chairman Bob Gibbs, and Ranking Members James. M Inhofe and Jeff Sessions raised similar concerns regarding two off ramp settlements in the water context. In a January 29, 2012 letter to the Environmental Protection Agency, they pointed to examples of Clean Water Act settlements as demonstrating a "trend recently, whereby EPA has been entering into settlement agreements that purport to expand Federal regulatory authority far beyond the reach of the Clean Water Act and has then been citing these settlement agreements as a source of regulatory authority in other matters of a similar nature."

While the long history of NGO achievements has been essential to the success of environmental protection, there is significant doubt about whether recent off ramp settlements have truly realized better environmental outcomes. From an outsider's perspective, it certainly appears that these agreements have both disrupted and displaced the government's authority to prioritize its resource and rulemaking agendas. In many if not most instances, the government deadlines and commitments are unrealistic and not realistically capable of being met, as demonstrated by the

missed NSPS deadlines above and the unprecedented scope of the endangered species consultation commitments. Meanwhile, the reallocation of resources to the agenda set by outside parties comes at a cost of other priorities, deadlines, and goals for the environment. And while on the surface the agreements may appear procedural over substantive, they ultimately restrain the government's discretion to develop a full range of options on a proposed rule for stakeholder input and even restrict the scope of the final rule, which must be the "logical outgrowth" of the proposal. This unfortunately is a pattern capable of repetition, as groups then initiate litigation to challenge missed deadlines in the settlement agreements all while bringing new actions to create new enforceable deadlines, further constraining the ability and discretion of the Agency to advance its own agenda.

Beyond these substantive concerns, the off ramp settlement approach in the rulemaking context potentially risks greater consequences to the protections Congress established for all stakeholders in environmental rulemaking. Transparency, public participation, and judicial review are the bedrock principles in our rulemaking system that should be provided equally for all parties. Congress should guarantee these protections remain not only to ensure the strongest possible environmental rulemakings, but to uphold the essential democratic process for providing public input and participation into such rulemakings.

Elements of proposed Bills being considered by the House Judiciary Committee could help ensure that these public protections remain in effect in rulemaking challenges while preserving the government's broad discretion to enter into settlement agreements and consent decrees when agencies deem such agreements to be in the government's best interest. Specifically, regarding the Sunshine for Regulatory Decrees and Settlements Act:

- **Requiring transparency:** The proposed Bill provides a process by which affected parties would be notified of proposed settlement agreements and consent decrees, so that such parties can assess whether to intervene in related litigation and participate in commenting on the agreement. I think most if not all would agree that in environmental decision-making, transparency is a good thing, not to be feared or avoided.

- **Providing public participation:** The proposal would memorialize a process where agencies would be required to publish any applicable proposed consent decree or settlement agreement for public comment, and allow comment on any issue related to the matters alleged in the complaint or addressed in the proposed agreement. Government agencies would be required to respond to comments as they do with other regulatory actions and provide a summary and

record to the Court of the comments and concerns that have been raised by all affected parties, not just the parties to the agreement.

- **Enabling opportunities for judicial review:** The proposed Bill facilitates the participation of affected parties and stakeholders before the Court by providing an opportunity for intervention prior to the finalization of an agreement. In addition, the proposal provides the opportunity to bring intervenors—those parties whom the Court necessarily has deemed have an interest that could be adversely affected by the litigation—to the settlement table to contribute ideas, interests, and solutions through a mediated process.

- **Affirming the priority setting discretion of agencies:** Finally, the proposal has a number of provisions intended to ensure that the government, prior to the approval of an agreement or consent decree, can meet the commitments made in any agreement without disrupting other key priorities and allocations of resources. For example, the measure would enable courts to assess whether the agreement allows sufficient time and procedure for the agency to comply with procedural protections relating to public participation in related rulemakings. The provisions requiring certifications to the court on the creation of new mandatory duties through agreements, the expenditure of unappropriated funds, and the divestment of agency discretion may encourage more principled agreements with realistic expectations. And the modification provision would aid the government in seeking modifications to agreements whose implementation jeopardize the public interest when considered against changed facts or circumstances or other pressing mandatory duties.

These key principles promoted in the proposed Sunshine for Regulatory Decrees and Settlements Act will hopefully bring little controversy. The measure would preserve the ability of the government to seek efficient settlement agreements while assuring along the way that information is shared, the public has an ability to participate and be heard, and that that the views of parties that could be adversely affected are considered by the Agency and the Court. Although some may find it inefficient to bring presumably adverse parties together in a mediation program, in my experience the opposite is true. The opportunity and ability to reach compromise prior to an agreement with all interested stakeholder input only increases the likelihood of an agreement that is long lasting, effective at realizing its intended goals, and responsive to a wide range of issues and solutions.

Finally, to emphasize the point, I strongly support and encourage efforts to pursue settlement agreements and consent decrees whenever feasible. And I do not intend my comments to suggest it is always inappropriate for a settlement agreement to

provide some definition and scope to the subsequent proposed rule; I recognize that frequently such terms are critical to reaching an agreement outside of litigation. However, my overarching recommendation to the Subcommittee is to address and improve the *process* by which these agreements are reached in the first instance. By promoting fairness, transparency, and public participation of interested stakeholders in the first instance, settlement agreements will better reflect a wide range of interests that must be balanced, result in stronger and more defensible outcomes, and improve the success of the subsequent rulemaking process.

Thank you for the opportunity to share my views on this important topic. I would be happy to answer any questions.

Mr. LANKFORD. Mr. Kovacs.

STATEMENT OF WILLIAM L. KOVACS

Mr. KOVACS. Thank you, Mr. Chairman and members of the committee. I am not going to try to go over old ground that others have discussed, so I am going to briefly hit sue and settle, but I also would like to talk about how it impacts jobs, and I think that's where the business committee really comes in.

But in essence, sue and settle is really a good-government concern. It's transparency, public participation and the impact on jobs. And really what we are talking about is when you look at sue and settle, this is a subset of the interested community that is actually entering into contract negotiations. They are contracts.

When the contract is decided, it is decided without the rest of the public involved. And I think from the business community point of view, being involved in those contract negotiations should be a fundamental right that we have under the Administrative Procedure Act, which the Congress passed decades ago to literally open up the process to the citizens and for participation between the citizens.

So when this contract is executed and is filed with the court, the court doesn't review the substance. What the court does is the court reviews the representations of the parties. And when it enters a judgment, that judgment cannot be disturbed unless it's shown that there is an abuse of discretion by the court, which is an almost impossible standard. And then when the final rule comes out, even if it's identical to what the agency and the environmental groups sought, our chances of overturning that based on an arbitrary and capricious standard are very, very low. So once the contract is made, the decision is made as to how to go forward.

But let me talk about the more practical aspects of it. Environmental litigation is costing this country tens of thousands and hundreds of thousands and millions of jobs. In 2010, the U.S. Chamber did a study called Project No Project and we looked at environmental litigation across the country from the point of view of what was the private sector trying to finance in 2010. And we looked at just electric generation. We could have looked at cell towers, big box stores, cement companies. We could have looked at anything. We looked simply at electric generation.

There were 351 projects where developers were trying to get permits. They could not get the permits. And the impact of not getting the permits meant that they could not invest $576 billion, which would have created 1.9 million jobs a year during the 7 years of construction.

That is the impact of environmental litigation. There are ways to address it, and the Judiciary Committee is doing some of that. That is not my point here.

The second point in sue and settle—and this is very, very specific because there is great data from the Department of Labor—when sue and settle occurs, it is a specific regulation on a specific industry. Take Utility MACT, take NSPS, take whatever you want, but that regulation is targeted at an industry. Jobs will be lost in that industry.

And let's assume that everything that the other side says is true, that jobs are created somewhere, and there is full employment ev-

erywhere, and, in fact, more jobs are created. But what your own statistics from your Department of Labor show is that the jobs that are created aren't created in the same communities, they are created in different communities. So what happens is you have a real person with a real job that is lost in a real community that is impacted; and then on the other side of the equation, you have jobs created somewhere that they can't get.

Let me give you the statistics, because this is really what the key is. The Bureau of Labor Statistics every 3 years does a study of displaced workers, and the sampling is of about, just so we've got the numbers, 15 million workers. And of the 7 million workers that were what we would call long-term displaced, they didn't have a job for 3 years—or they had worked for 17 years, but were out of a job during the survey—out of that, out of those 7 million workers, a majority of those workers were not able to get a job during the entire survey period, meaning that if the survey was 2007 to 2009, in 2010 51 percent of those workers did not have jobs. Now, that is displaced from all, and we've got to keep that in mind. But once you lose a job in an impacted area, you're not going to get another one. And of the 49 percent who actually ended up getting jobs, we have 55 percent getting lower wages.

So when you look at the impact of regulations, you look at—and litigation, you look at it twofold. One is you don't create the jobs, and that, I think, the Project No Project study clearly determines. And the second part of it is when you lose a job due to a regulation, even if jobs are created in other industries, that community is really impacted and that worker is impacted, and that's something we have to keep in mind.

And the most frustrating part is that since 1977, this Congress mandated that EPA do a continuing analysis of job loss and shifts in employment due to regulations, and in 35 years the Agency has never conducted that study. And this is what is so frustrating about it. On one hand, we want to turn everything into a mandate and let the Agency do what it wants, but Congress can give the Agency a mandate to worry about jobs, and the Agency won't do it.

Thank you very much.

Mr. LANKFORD. Thank you, Mr. Kovacs.

[Prepared statement of Mr. Kovacs follows:]

BEFORE THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM SUBCOMMITTEE ON TECHNOLOGY, INFORMATION POLICY, INTERGOVERNMENTAL RELATIONS AND PROCUREMENT REFORM OF THE U.S. HOUSE OF REPRESENTATIVES

"Mandate Madness: When Sue and Settle Just Isn't Enough"

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

June 28, 2012

Good morning, Chairman Lankford, Ranking Member Connolly, and members of the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform. My name is William L. Kovacs and I am senior vice president for Environment, Technology and Regulatory Affairs at the U.S. Chamber of Commerce. The Chamber is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region. You have asked me to come before the Subcommittee today to discuss the impact of sue and settle agreements on job creation. On behalf of the Chamber and its members, I thank you for the opportunity to testify here today on this most important topic.

I. Introduction

The abuse of citizen suit provisions in 20 environmental statutes and the use of "sue and settle" agreements – out of court settlements that get around the public participation and transparency protections of the Administrative Procedure Act (APA)[1] – have become primary tools used by certain agencies to issue many more regulations than would otherwise be written. The direct result of these tactics is to significantly dampen job creation. If this nation is ever to begin creating the jobs needed by the 23 million citizens who are out of work or underemployed, we need to begin building again. And to begin building we need a transparent and certain regulatory process.

Sue and settle occurs when an activist organization and a federal agency enter into behind closed-doors settlement negotiations in which the agency agrees to undertake the actions requested – usually the implementation of a regulation – and requests the court to enter a consent decree as a judgment against the agency. What is most disturbing however, about sue and settle, is the fact that the federal agencies do not even maintain organized records of the number and types of lawsuits brought against them. And until this Congress, there has not been any oversight of the issue. In short, federal agencies have not provided Congress and the public a comprehensive list:

- of all the litigation in which they are involved;

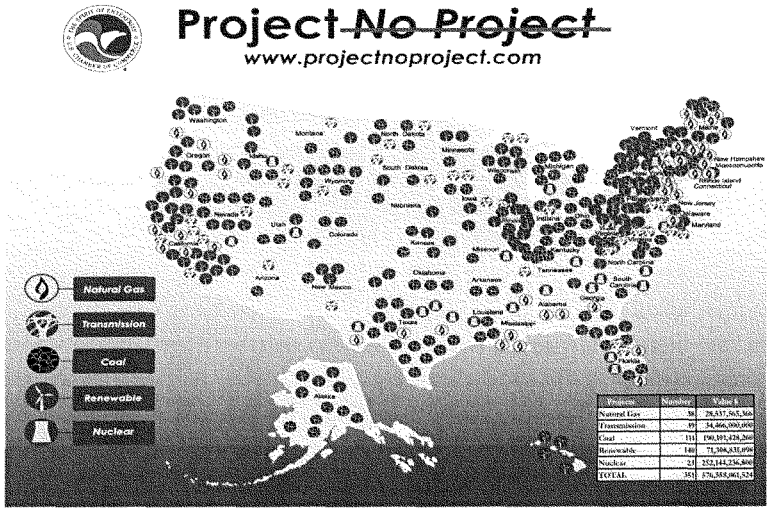
[1] Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*

- of the new regulations they agreed to initiate through a consent decree; or
- of all the attorneys' fees they paid to private litigants under the Judgment Fund or the Equal Access to Justice Act, as part of the entry of a voluntary consent decree.

Accordingly, Congress should (1) pass the Sunshine for Regulatory Decrees and Settlements Act of 2012,[2] which has passed out of the House Judiciary Committee, (2) improve oversight over citizen suits, (3) move the current citizen suit provisions from the various scattered statutes to Title 28 and the direct jurisdiction of the Judiciary Committee, (4) ensure that agencies do not give up their discretionary power contrary to law, and (5) require the Environmental Protection Agency to undertake the congressionally mandated studies on potential job loss and shifts in employment due to its regulations.

While my testimony today will focus on the adverse impacts on the transparency and fairness of the regulatory process caused by the abuses of sue and settle and citizen suits, I want to briefly draw your attention to another way that litigation undermines the regulatory process and as a result has adverse impacts on job creation. Specifically, the current permitting process for projects is broken, making it very difficult if not impossible to create jobs across the country.

The Chamber conducted a study, entitled *Project No Project*, which examined 351 energy projects nationwide being impacted by the current permitting process.



[2] H.R. 3862, Sunshine for Regulatory Decrees and Settlements Act of 2012, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.03862:

If all 351 projects were allowed to move forward the impact would be over one trillion dollars in economic activity and over 1.8 million new jobs created annually during the construction period. To provide context, 1.8 million more jobs would lower the unemployment rate from May's 8.2 percent to 7.0 percent. The critical point is that, as our current energy plants retire and key infrastructure such as ports and highways are needed, we must build ***something***; unfortunately, however, right now we are building very little. More information can be found on the *Project No Project* web site at http://www.projectnoproject.com.

II. How the Sue and Settle Process and the Abuse of Citizen Suit Provisions Limit Public Participation While Increasing the Number of Economically Significant Regulations

A. What is Sue and Settle?

Sue and settle refers to a process whereby friendly advocacy groups sue federal agencies and the agencies settle the cases behind closed doors. Only *after* a settlement has been agreed to does the public have a chance to provide any comments. Often this is a pointless exercise because the meaningful decisions have already been made.

Agencies develop major public policy by entering into consent decrees and settlement agreements without the public having any means to voice whether such actions are appropriate. Often agencies will agree to issue regulations on a fast-track schedule as part of the settlement agreement.

The public does not have a meaningful voice in the agency determination to propose a regulation. While there will be a notice and comment period as required under the APA before the regulation is final, agencies are unlikely to change the regulations in a manner that could threaten the consent decree that has been entered into with environmental organizations. As a result, the limited protections that do exist for public participation are rendered meaningless.

B. Regulations that Otherwise Would Not Have Existed

Courts treat consent decrees between an environmental organization and an agency in the same manner as a consent decree between two private individuals. This is a primary reason why sue and settle is such a major problem. Two private individuals voluntarily enter into agreements acting in their own self-interests. It is appropriate in that situation for a court to defer to their agreement, but the same principle applied to government agency sue and settle agreements enables the agency to avoid meaningful public input.

An environmental organization and government agency may be taking voluntary action, but these organizations and agencies are supposed to be serving the interests of a third party: the public. An agency is not a private individual, it is an arm of the

government with a fiduciary obligation to represent the interests of all the people, but the settlement process enables a few individuals within the agency to substitute their private or political agenda for the general public interest. Environmental groups often are only able to bring lawsuits against agencies because they are supposed to be acting as private attorneys general. To serve the interests of the public, they are supposed to be ensuring that agencies perform nondiscretionary acts that the agency is required to take under statute. Instead, the environmental groups act in their own self-interests. The consent decree reflects not what best serves the public, including job creation, but instead what serves the narrow goals of the environmental organizations and sometimes that of the agencies, without regard for jobs or the interests of the public and regulated community.

Courts do not look at whether agencies are even obligated to enter into a consent decree. As noted in a recent case, *American Nurses Association v. Jackson*,[3] courts do not provide the necessary oversight over consent decrees between environmental organizations and the federal agencies. The District Court of the District of Columbia wrote:

> It is the Administrator's legal position that she is under a mandatory, nondiscretionary duty to issue emission standards for coal- and oil-fired EGUs [electric generating units]...by entering this consent decree the Court is only accepting the parties' agreement to settle, not adjudicating whether the EPA's legal position is correct.[4]

Therefore, courts are approving consent decrees merely on a claim by the agency that it has a nondiscretionary duty to take the requested actions. The courts are not even questioning whether the agency is acting within its statutory authority or requiring proof of the underlying basis for settlement. Once the consent decree is entered, agencies can promulgate more regulations than otherwise would have existed, simply by using the environmental group's lawsuit as justification for the regulations. The agencies may even welcome such lawsuits. They also may not welcome such lawsuits, but because of the threat of litigation they may just settle a suit. Regardless of the reason, the result is more regulation that imposes a greater burden on the regulated community and hurts the businesses that are creating jobs.

C. Regulations that Include New Requirements that are Not Mandated by Statute or Exceed Statutory Limits

Agencies often develop regulations that they are not mandated to promulgate. Through the sue and settle process, new regulatory requirements have been created beyond what the underlying environmental statute requires. The environmental groups are not just compelling agencies to act within clear statutory parameters. These organizations use regulatory agreements to create law, albeit with agency approval, that can hinder economic growth.

---

[3] American Nurses Association v. Jackson, Civil Action No. 08-2198, (D.D.C.), April 15, 2010.
[4] *Id.*

D. Deadlines that are Used as Pretexts by Agencies to Impose Substantive Requirements on Regulated Entities

Even when agencies agree in consent decrees to procedural terms, such as deadlines, this can be used as a means to change the substantive nature of regulations. As noted in the discussion of the Environmental Protection Agency's (EPA) regional haze program in section IV, federal agencies will agree to unrealistic deadlines in consent decrees. For the regional haze program (an aesthetic program addressing visibility), states must file with the EPA their own plans to control regional haze. This program was abused through the use of sue and settle.

Environmental groups sued EPA to act on state regional haze plans. At the last second, EPA informed the states that there was something wrong with their submissions, such as inadequate cost estimates. Since there was inadequate time to fix the problems, EPA stepped in and imposed its own regional haze programs on the states. The federal programs are far costlier than the state programs. Even worse, any benefits are minimal at best, but the cost to states and employers within those states is significant.

E. What is a Citizen Suit?

Citizen suits are often the means by which sue and settle cases are brought. The primary problem with citizen suits is their purpose has been changed from compelling nondiscretionary acts to compelling agencies to give up discretionary power. If this problem were addressed, the costly new regulations that are imposed through sue and settle could be a thing of the past. Private entities that create jobs would not have to bear the brunt of poorly conceived regulations that were never properly vetted through the regulatory process.

In 1970, Congress enacted the first citizen suit provision,[5] which was contained within the Clean Air Act of 1970 (CAA).[6] Since that time, this new approach to enforcing federal law has become a staple of most environmental statutes.

A citizen suit allows a private citizen to sue any person (including the government) for violating environmental laws. Further, the private citizen can sue the federal government for failure to take nondiscretionary acts or duties that are required by an environmental statute.[7]

Citizen suits were not designed to enrich the plaintiffs but to serve the interests of the public.[8] Therefore, plaintiffs are not awarded damages, but can receive injunctive relief to secure the desired action and may be entitled to litigation costs, including

---

[5] *See e.g.* Barton H. Thompson, Jr., Symposium: Innovations in Environmental Policy: *The Continuing Innovation of Citizen Enforcement*, 2000 U. Ill. L. Rev. 185 (2000).
[6] Clean Air Amendments of 1970, Pub. L. No. 91-604.
[7] *See e.g.* 42 U.S.C. § 7604. For a brief discussion of these two types of citizen suit lawsuits, see e.g. Daniel P. Selmi, *Jurisdiction to Review Agency Inaction Under Federal Environmental Law*, 72 Ind. L.J. 65 (1996) at 72-73.
[8] *See supra* note 5 at 198; *See also* Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983).

attorney and expert witness fees, when a court deems it is appropriate.[9] In many of the sue and settle cases that result in a consent decree the federal agency agrees as part of the consent decree to pay the attorneys' fees incurred by the environmental organization.

Under some environmental statutes, plaintiffs also can trigger penalties on polluters. These penalties though are not given to the plaintiffs but instead are placed in a United States Treasury fund that helps finance compliance and enforcement activities.[10]

F. Lack of Congressional Oversight Over Citizen Suits

There needs to be much greater oversight over citizen suits. The judiciary committees should have oversight over these numerous provisions. Since the enactment of the first citizen suit provision in the CAA, the judiciary committees have not had the chance to weigh in and provide the necessary expertise on citizen suits.

The inclusion of a citizen suit provision was far from a given when it was being considered in the CAA. The House version of the bill did not include a citizen suit provision.[11] The Senate bill did include such a provision,[12] but serious concern was expressed during the Senate floor debate.

After acknowledging the importance of the bill, Senator Hruska (R-NE), who was ranking member of the Senate Judiciary Committee, expressed his concerns about the citizen suit provision. Two primary concerns were the limited review time and the failure to involve the Senate Judiciary Committee:

> Frankly, inasmuch as this matter [the citizen suit provision] came to my attention for the first time not more than 6 hours ago, it is a little difficult to order one's thoughts and decide the best course of action to follow.
>
> Had there been timely notice that this section was in the bill, perhaps some Senators would have asked that the bill be referred to the Committee of the Judiciary for consideration of the implications for our judicial system.[13]

The citizen suit provision in the CAA was never considered by either the House or Senate Judiciary Committees.[14] The same is true for the citizen suit provision in the Clean Water Act, which was enacted just two years later.[15]

---

[9] *See e.g.* 42 U.S.C. § 7604.
[10] *Id.*
[11] *See e.g.* "A Legislative History of the Clean Air Amendments, Together with a Section-by-Section Index," Library of Congress, U.S. Govt. Print. Off., 1974-1980, Conference Report, at 205-206.
[12] *Id.*
[13] *Id.* Senate debate on S. 4358 at 277.
[14] "A Legislative History of the Clean Air Amendments, Together with a Section-by-Section Index," Library of Congress, U.S. Govt. Print. Off., 1974-1980; The legislative history was also searched using Lexis.

As shown in Figure 1, there are at least 20 environmental statutes that have citizen suit provisions.[16] Every major environmental statute has a citizen suit provision except the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[17] Based on our research, the House and Senate Judiciary Committees never addressed any of the bills that created the various citizen suit provisions and greatly expanded access to the federal courts.[18] In addition, while there was a Senate Judiciary Committee hearing over 25 years ago on Superfund that discussed various issues, including citizen suits, there has never been a House or Senate Judiciary Committee hearing focused on citizen suits and their impact on the federal court and regulatory system since the creation of the first citizen suit provision in 1970.[19]

---

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

[16] Act to Prevent Pollution from Ships, 33 USC § 1910; Clean Air Act, 42 USC § 7604; Clean Water Act, 33 USC § 1365; Superfund Act, 42 USC § 9659; Deepwater Port Act, 33 USC § 1515; Deep Seabed Hard Mineral Resources Act, 30 USC § 1427; Emergency Planning and Community Right-to-Know Act, 42 USC § 11046; Endangered Species Act, 16 USC § 1540(g); Energy Conservation Program for Consumer Products, 42 USC § 6305; Marine Protection, Research and Sanctuary Act, 33 USC § 1415(g); National Forests, Columbia River Gorge National Scenic Area, 16 USC § 544m(b); Natural Gas Pipeline Safety Act, 49 USC § 60121; Noise Control Act, 42 USC § 4911; Ocean Thermal Energy Conservation Act, 42 USC § 9124; Outer Continental Shelf Lands Act, 43 USC § 1349(a); Powerplant and Industrial Fuel Use Act, 42 USC § 8435; Resource Conservation and Recovery Act, 42 USC § 6972; Safe Drinking Water Act, 42 USC 300j-8; Surface Mining Control and Reclamation Act, 30 USC § 1270; Toxic Substances Control Act, 15 USC § 2619.

[17] Meltz, Robert, "The Future of Citizen Suits After Steel Co. and Laidlaw," Congressional Research Service, January 5, 1999.

[18] The legislative histories for each bill that created the citizen suits were analyzed primarily using Thomas (the Library of Congress legislative web site). Since Thomas does not include bills before 1973, legislative histories were examined through other means, such as the Library of Congress documents cited previously for the Clean Air Act and Clean Water Act. A legislative history search also was conducted using Lexis. The only bills considered are those that created the citizen suits. For example, it does not include a bill that may have amended a citizen suit provision. The bills creating the provisions, as opposed to amending them, generally are the primary opportunity for a committee to address the merits of citizen suits.

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

Figure 1
Statutes and Citizen Suit provisions, including whether the original bill creating the citizen suit provision was heard by the Senate or House Judiciary Committee.

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

Citizen suits are inherently a legal matter, and therefore need the expertise of the judiciary committees. Some of the most important legal questions are brought up as a result of citizen suits. For example, the issue of standing is central to citizen suits. The relationship between citizen suits and standing is unique because citizen suit provisions give plaintiffs unusually wide latitude to sue in federal court. However, this statutory

expansion of standing does not allow federal courts to ignore Article III of the Constitution.[20]

G. Undermining the Purpose of Citizen Suits: Ignoring the Nondiscretionary Language

Citizen suits give plaintiffs the power to compel agencies to take nondiscretionary actions. The Clean Air Act (CAA) language states:

> [A]ny person may commence a civil action on his own behalf—
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator. [21]

The plain language of the statute is clear: citizen suits may be brought to compel *nondiscretionary* acts or duties. On its face, these refer to acts or duties that the Administrator has no choice but to perform. The purpose of this provision is to make sure that agencies do not sit on their hands and ignore their statutory obligations.

The CAA legislative history clarifies the meaning of this provision. In the House debate on the conference report, Representative Springer, who was a conferee, explained:

> Citizen suits may be instituted against the administrator only for failure to act where he must. In other words wherever he is given discretion in the act, he may not be sued. He may be sued only for those matters imposed in the bill upon the administrator as a matter of law.[22]

"Mandatory" is used in the legislative history to describe the government actions that are at issue.[23] Federal courts have used "mandatory" as well.[24] The courts also have used stronger language to clarify the meaning of nondiscretionary acts, including calling them "clear-cut" requirements[25] and "purely ministerial acts."[26]

Put simply, the plain language of the statute, the legislative history, and case law have gone out of their way to make sure that citizen suits do not allow plaintiffs to compel an agency to perform a discretionary act. In practice though, this is precisely what happens many times in sue and settle consent decrees. The nondiscretionary limitation is effectively eliminated when agencies enter into consent decrees because courts allow plaintiffs to dictate terms that are at the discretion of agencies.

---

[20] U.S. Const. art. III.
[21] *See e.g.* 42 U.S.C. § 7604(a)(2).
[22] *Supra* note 14, House Debate on the Conference Report, at 117.
[23] *Id.* at 112 (House Debate on the Conference Report, statement of Rep. Staggers who brought the conference report to the floor). *See also* the Conference Report at 206.
[24] *See e.g.* Kennecott Copper Corporation v. Costle, 572 F. 2d 1349 (9th Cir. 1978).
[25] *See e.g.* Sierra Club v. Thomas, 828 F.2d 783, (D.C. Cir. 1987).
[26] *See e.g.* Environmental Defense Fund v. Thomas, 870 F.2d 892 (2th Cir. 1989).

Courts do not review whether an act or duty is discretionary or nondiscretionary when the plaintiff and the agency come before the court with a settlement agreement. While plaintiffs serve an oversight function over agencies to ensure that they perform their required functions, there is inadequate judicial or congressional oversight as to whether these same agencies are properly entering into consent decrees. Agencies should have discretion when to enter into a consent decree, but that does not entitle agencies to have discretion to ignore the express language of citizen suit statutes.

Courts generally view their role differently when adjudicating a citizen suit case in which the agency is actively defending its actions as opposed to a situation in which the court is asked by the agency to approve a consent decree.[27] As a result, two types of citizen suit cases are created.

In citizen suits, the plaintiff is empowered to bring the case in the first place to serve the public. Both parties, when entering into consent decrees, are supposed to be serving the public. But under sue and settle agreements, the consent decree flips the whole concept of citizen suits on its head. As a result, a legal process designed to protect the public has effectively become a means to protect the interests of special interest actors and the special interests of the agencies. The public is even excluded from having a voice in a process that is supposed to serve the public interest. The loser from this distorted process is the public because sound policy is ignored.

III. Sue and Settle: How Did We Get Here?

To fully appreciate the tremendous impact that the sue and settle process and the abuse of citizen suit provisions has on the federal regulatory process, one needs to review how the federal administrative state has expanded so greatly while the powers of Congress to manage the administrative state have so diminished.

The very first sentence of Article I of the U.S. Constitution reads: "All legislative powers herein granted shall be vested in a Congress of the United States."[28] Congress makes the nation's laws, and the Executive Branch carries them out. Over time, however, this separation of powers has eroded to such an extent that federal agencies can now use the regulatory process to "legislate by regulation." And at times, agency regulations create broad new policies that impact many industries in the regulated community; these policies can literally determine the fate of industrial sectors, the well-being of thousands of families and the competitiveness of the nation. Given the current political climate, Congress cannot easily get its power back.

Congress has long recognized the challenges posed by the power of Executive Branch agencies. Therefore, it has repeatedly attempted to create statutory safeguards to ensure the regulatory state is transparent and accountable, and to ensure agency power is

[27] See, for example, American Nurses Association v. Jackson, Civil Action No. 08-2198, (D.D.C.), April 15, 2010.
[28] U.S. Const. art. I.

properly cabined within appropriate constitutional and statutory limits. For example, in 1946, Congress enacted the Administrative Procedure Act (APA) requiring agencies to regulate openly and with notice to and comment from the public, and subject to judicial review.[29] Over time, the procedural protections in the APA grew in importance as Congress passed vague laws delegating agencies with ever more expansive power. However, increased judicial deference to agency decisions and Congress' general avoidance of its oversight authority over regulatory actions combined to severely limit the operational checks on the regulatory power of federal agencies.

By the late 1970s, it had become clear that the delegation of congressional authority to the agencies to "fill in the legislative blanks," the lack of congressional oversight over the agencies, and judicial deference to agency decisions were fundamentally altering the original constitutional balance between the legislative and executive branches of government. Starting in 1980, Congress began enacting laws to restore the balance and to check executive power.[30] Over the past three decades, Congress has repeatedly attempted to rein in the Executive Branch agencies,[31] but it would be an understatement to assert that efforts to control expanding agency power have been of little impact. Agencies are just too skilled at manipulating the regulatory system.

Regulations are a necessary part of a complex society. But an unbalanced regulatory process, which allows sue and settle agreements, has led to an unprecedented increase in major, economically significant regulations, some of which are harming the economy and inhibiting job creation, and to the erosion of the carefully calibrated constitutional system of checks and balances that is the foundation for our system of government.

IV. Specific Examples of How Sue and Settle Hurts Job Creators

Since 2009, EPA has aggressively used out-of-court settlements as the legal basis for sweeping new rulemakings that, whether viewed separately or together, have a tremendous impact on the U.S. economy and its ability to provide jobs. This is particularly true where EPA enters into settlement agreements that purport to expand Federal regulatory authority well beyond the limits of the statutes the agency administers, e.g., the Clean Air Act, the Clean Water Act, etc. Notable examples of this disturbing trend and the devastating impacts these actions have on our economy include:

A. Reconsideration of the 2008 Ozone National Ambient Air Quality Standards (NAAQS)

Environmental advocacy groups sued EPA in 2008 challenging the just-promulgated NAAQS for ground-level ozone, which had been lowered from 84 parts per

---

[29] *Supra*, note 1.
[30] *See e.g.* Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612.
[31] *See e.g.* Congressional Review Act of 1996, 5 U.S.C. §§ 801-808 and H.R. 10, "Regulations from the Executive in Need of Scrutiny Act of 2011 (REINS Act)," http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.10: The Senate version of the REINS Act is S. 299.

billion (ppb) to 75 ppb.[32] In 2009, EPA announced that it would reconsider the 2008 standard, and an environmental advocacy group agreed to place its lawsuit on hold. EPA subsequently developed a new ozone NAAQS in the range between 60 and 70 ppb. EPA estimated that the reconsidered ozone standard would cost up to **$90 billion per year** to implement nationwide.[33] Industry estimated that the ozone standard would result in the loss of up to **7.3 million jobs** throughout the economy by 2020.[34] The White House ultimately forced EPA to postpone the ozone reconsideration in September 2011. Nevertheless, EPA was content to use the environmental advocacy groups lawsuit as the impetus for agreeing to significantly tighten a NAAQS standard less than a year after it had been finalized, and well before it had been implemented. The resulting regulatory uncertainty caused by EPA's unprecedented and ill-advised action makes businesses reluctant to commit capital to expansion, modernization, and hiring until it is clear what EPA will eventually do.

B. Regional Haze and the Takeover of State Programs

EPA's regional haze program, established decades ago by the Clean Air Act, seeks to remedy visibility impairment at federal national parks and wilderness areas. Because regional haze is an aesthetic requirement, not a health standard, Congress emphasized that **the states** – and not EPA – should decide which measures are most appropriate to address haze within their states.[35] However, EPA has relied on settlements in cases brought by environmental advocacy groups to usurp state authority and federally impose a strict new set of emissions controls costing 10 to 20 times more than the technology chosen by the states. Beginning in 2009, advocacy groups filed lawsuits against EPA alleging that the agency had failed to perform its nondiscretionary duty to act on state regional haze plans. Rather than defend these cases, EPA simply chose to settle. In five separate consent decrees negotiated with the groups and, importantly, **without notice to the states that would be affected**, EPA agreed to commit itself to specific deadlines to act on the states' plans.[36] Next, on the eve of the deadlines it had agreed to, EPA found that each of the state haze plans was in some way deficient. Because the deadlines did not give the states time to resubmit revised plans, EPA claimed that it had no choice but to impose its preferred controls federally. By using the sue and settle process and agreeing to a court-imposed deadline for action, EPA manufactured a way to reach into the state haze decision-making process and supplant the states as

---

[32] Legal challenges to the 2008 Ozone NAAQS were consolidated as State of Mississippi, et al. v. EPA, No 08-1200 (D.C. Cir. 2008).

[33] Letter from President Barack Obama to House Speaker John Boehner, August30, 2011, available at www.whitehouse.gov.

[34] Donald Norman, Manufacturers Alliance, Economic Report, *Economic Implications of EPA's Proposed Ozone Standard* (September 2010), available through http://www.nam.org.

[35] *See* 42 U.S.C. § 7491 (b)(2)(A).

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

decision makers, despite the protections of state primacy built into the regional haze program by Congress.

So far, the federal takeover of the states' regional haze program has cost eight states some **$642 million** over and above what they were planning to spend for visibility improvements.[37] Additional states in all parts of the country will be required to follow suit. And because the federal haze requirements do nothing to improve public health or perceptibly improve visibility in the affected states, citizens of those states are literally being required to spend their money for nothing. The federalized regional haze requirements will cost jobs to be lost at the numerous facilities that must either install costly new equipment in the name of visibility or shut down. Moreover, increases in the cost of electricity and products such as cement caused by the regional haze rules will further strain the weak U.S. economy.

C. Chesapeake Bay Clean Water Act Rules

In response to a lawsuit filed against EPA in January 2009 by environmental advocacy groups, which alleged that EPA had failed to take measures adequately to protect the Bay, EPA agreed in May 2010 to establish a suite of new regulations for the Bay by December 2010.[38] In the settlement agreement, the agency obligated itself to establish stringent new Total Maximum Daily Load (TMDL) standards for the Bay, create a framework for implementation, expand EPA's review of watershed permits, and write new regulations for concentrated animal feedlot operations and stormwater discharges. These actions, the direct result of a settlement of the case, create a rigid federal program to address water quality in the Bay, despite ample evidence that voluntary measures being taken by the states, localities, agricultural operations, and private interests had significantly improved the health of the Bay over the past 25 years. If these voluntary efforts had been allowed to continue, the improvement goal identified by EPA for nitrogen was likely to be achieved by 2027, the phosphorus goal by 2023, and the sediment goal by 2035.[39] In other words, the Bay was on pace to achieve its improvement goals with or without the new federal program.

The federal program for the Chesapeake Bay is major in its scope and economic impact. The TMDLs, which essentially sets land use-type limits on businesses, farms, and communities on the Bay based on their calculated daily pollutant discharges, cover the entire 64,000 square mile Chesapeake Bay watershed and its tidal tributaries. EPA's displacement of state authority to implement TMDLs is estimated to cost Maryland more than **$11 billion**,[40] with an additional **$7 billion** for Virginia.[41] Maryland industries alone

---

[37] *See* William Yeatman, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs* (DRAFT)(August 2012).
[38] Fowler v. EPA, No. 1:09-cv-00005-CKK (D.D.C. Jan. 2009).
[39] *See* U.S. Senate Committee on Environment and Public Works, *Clouded Waters: A Senate Report Exposing the High Cost of EPA's Water Regulations and Their Impacts on State and Local Budgets* (Minority Report) (June 30, 2011), at 2-3.
[40] Sage Policy Group, Inc., *The Impact of Phase I Watershed Implementation Plans o Key Maryland Industries* (April 2011).
[41] *CHESAPEAKE BAY JOURNAL*, January 2011, available at www.bayjournal.com/article.cfm?article=4002.

are expected to suffer an economic loss of $10 billion through 2017, with the commensurate loss of **65,000 jobs**.[42] The federal takeover of the Chesapeake Bay program is unprecedented in its scope and impact, yet by relying solely on the consent agreement as the source of its regulatory authority, EPA did not have to seek public input, or explain the basis for its actions in the Clean Water Act, or give stakeholders an opportunity to evaluate the science which the agency relies on in setting the TMDLs. It is also very likely that the assigned pollutant loads for farms, businesses, and communities are based on incorrect data derived from faulty modeling. Because the TMDL rulemakings resulted from a settlement agreement which set tight timelines for action, the public never had access to the information that would be necessary to comment effectively on the modeling and the assumptions used to set the TMDLs. EPA would have been better served to promulgate the Chesapeake Bay program rules through the normal Administrative Procedure Act notice and comment rulemaking process.

D. Utility MACT Rule

Following the February 2008 rejection of EPA's Clean Air Mercury Rule by the Court of Appeals, environmental advocacy groups sued EPA on December 18, 2008 seeking to force EPA to set MACT standards under Section 112.[43] EPA had sought to avoid promulgating a MACT standard when it originally promulgated the Clean Air Mercury Rule. On April 15, 2010, EPA and the environmental plaintiffs entered into a consent decree requiring EPA to issue MACT standards under Section 112 for coal- and oil-fired electric generating units, also known as the "Utility MACT" rule. Although the rule is supposed to reduce emissions of mercury and other toxic air pollutants, more than 99.9 percent of the rule's purported health benefits come from requiring further reductions in fine particulate matter (which is already adequately regulated under several existing EPA rules). The Utility MACT rule is expected to force 25 percent or more of the country's power stations to be shut down. Power plants that don't shut down will be required to install costly new technology to control particulates. According to recent industry analyses, American energy businesses are more likely to face a total of **$32 billion** in costs to comply with the Utility MACT rule.[44] This is reflected in recent annual reports from two dozen energy producers that have announced power plant closures. These companies' compliance costs alone will be **three times higher than EPA's estimate for Utility MACT <u>for the entire country</u> ($9.6 billion)**.[45] Of the 24 companies that have reported Utility MACT cost estimates, some have announced direct layoffs from the rule, totaling 5,100 jobs so far. Further, according to recently-announced power plant retirements, more than **9,100** jobs are being directly affected by Utility MACT.[46] More will follow as the impacts of Utility MACT ripple out to affected businesses and communities.

---

[42] Sage Policy Group, Inc., *The Impact of Phase I Watershed Implementation Plans o Key Maryland Industries* (April 2011).
[43] American Nurses Association v. Jackson, Case No. 1:08-cv-01298 (D. D.C. 2008).
[44] Sam Batkins, *American Action Forum* (June 6, 2012) available at http://americanactionforum.org/topic/american-energy-companies-report-over-three-times-higher-utility-impact-mact-compliance-costs-epa-pro
[45] *Id.*
[46] *Id.*

E. FWS Critical Habitat Designation

EPA is not the only federal agency to embrace a "sue and settle" approach. The U.S. Fish and Wildlife Service (FWS) used an out of court settlement in 2009 to designate a large critical habitat area under the Endangered Species Act.[47] In 2008, environmental advocacy groups sued FWS to protest the exclusion of 13,000 acres of national forest land in Michigan and Missouri from the final "critical habitat" designation for the endangered Hine's emerald dragonfly under the Endangered Species Act. FWS initially disputed the case. However, while the case was pending, the new administration took office, changed its mind, and settled with the plaintiffs on February 12, 2009. FWS agreed under the settlement to a remand without vacatur of the critical habitat designation in order to reconsider the federal exclusions from the designation of critical habitat for the Hine's emerald dragonfly. On April 30, 2009, FWS doubled the size of the critical habitat from 13,000 acres to 26,000 acres, exactly what the plaintiffs sought in the lawsuit. FWS also agreed to pay $30,000 in attorney's fees and costs to the plaintiffs. The critical habitat designation agreed to by FWS effectively restricts development of all kinds within the 26,000 acre areas. While the cost of the critical habitat designation and its potential impact on jobs can be debated, it is clear that the designation carries a significant impact. The inability to build, or farm, or otherwise use those lands clearly has an economic effect. By simply agreeing to designate the critical habitat, FWS avoided the economic review and impacts analyses that would have been required if the agency had gone through an ordinary notice and comment rulemaking.

F. What is the Larger Economic Impact of These Regulations?

In evaluating the larger impact to the economy of the sue and settle approach to regulation, it is important to remember that much more is at stake than the immediate cost of each new rule an agency agrees to issue or the net number of jobs that will be affected by each new rule. The immediate reality is that these new regulations will deter investment that creates new jobs and dislocate workers from the jobs that they now have. Whatever the future benefits may be, EPA's rush to regulate means that today more workers are losing jobs, families are losing income, and those least able to afford it are saddled with the burden of job search, relocation, and retraining.

The workers who lose their jobs today because regulation forces the plants where they have invested their working lives to shut down typically do not have the skills needed to take the new jobs that EPA promises will materialize. And typically those new jobs are also in the wrong places. For example, the basic idea that a job lost today at a power plant in Ohio that shuts down will be replaced within a year or two by a new job at an electric vehicle plant in Michigan is little comfort for workers who need to feed their families and to make their mortgage payments in Ohio today.

Data from the Bureau of Labor Statistics' latest (January 2010) Displaced Worker Survey underscores the challenges facing workers who are targeted for job losses by

[47] Northwoods Wilderness Recovery v. Kempthorne, No. 1:08-cv-1407 (N.D. Ill. 2008).

EPA. BLS looked at 6.9 million workers who lost jobs from January 2007 through December 2009 and found that in January 2010 over half still had not found another job. Many workers had experienced one to three years of unsuccessful job search. Others dropped out of the labor market in frustration and even quit looking. And it is important to note that the challenge of finding re-employment by displaced workers is not just the result of the recent recession. The previous BLS survey which covered the expansion years of 2005 through 2007 found that one-third of displaced workers did not find another job within three years. The BLS data clearly shows that EPA cannot justify ignoring employment displacement impacts by assuming that displaced workers quickly find new employment at the same wage rate. In short, EPA does not now count the loss of a job as a cost. The government's own survey evidence shows that destroying jobs has long-lasting adverse impacts on workers. When an agency of the federal government proposes a policy that it knows will result in employment dislocation for some citizens, at the very least the costs of job displacement should be recognized in the cost benefit analysis that justifies the regulation, and a decent respect for the families whose livelihoods are affected should require that the agency actively address how the burden of job dislocation will be mitigated. The burden that is being placed on workers today is compounded by the likelihood that new jobs, when and if they materialize, will pay less than the jobs that were destroyed. The same BLS survey found that among the minority who did find new jobs, 55 percent reported lower earnings in the new job than in the job that was lost (in the previous survey round of January 2008, 45 percent of reemployed workers reported lower earnings than in the previous job).[48]

Recent studies discuss the startling human disaster impacts of unemployment. For example, the prospects of re-employment of older workers deteriorate sharply the longer they are unemployed. A 50 – 61 year old worker unemployed for 17 months has only a nine percent chance of securing a job in the next three months and workers over 62 have only a six percent chance of finding a new job.[49] Another study finds mid-career workers who lose long-held jobs and experience long term unemployment can expect to live one and one – half years less than a continuously employed worker.[50] Moreover, the rate of suicides for unemployed workers also increases by up to ten percent.[51] These are real people, and not EPA's computer modeled people.

---

[48] "Worker Displacement: 2007-2009." U.S. Bureau of Labor Statistics (USDL-10-1174) August 26, 2010, at http://www.bls.gov/news.release/pdf/disp.pdf The BLS Displaced Worker Survey focuses on "long-tenured" employees who lose their jobs because of plant closures or relocation, shift elimination, or decline in demand for the product. The survey tracks workers who lost jobs that they had previously held for three or more years. This category fits well with the experience of workers who are in industries most affected by EPA regulations.

[49] Dean Baker and Kevin Hassett, "The Human Disaster of Unemployment." New York Times, May 12, 2012, http://www.nytimes.com/2012/05/13/opinion/sunday/the-human-disaster-of-unemployment.html?pagewanted=all.

[50] Daniel Sullivan and Till von Wachter, "Job Displacement and Mortality: An Analysis Using Administrative Data Quarterly Journal of Economics, Vol. 124 (2009), number 3 (Aug), pp. 1265-1306 at http://qje.oxfordjournals.org/content/124/3/1265.short.

[51] *Supra*, note 49. *See also* Annie Lowery, "Death and Joblessness," Washington Independent, August 17, 2010 at http://washingtonindependent.com/94925/death-and-joblessness.

EPA needs to consider more than the supposed net impacts of its regulations. While EPA's regulations have both benefits and costs, the reality is that the winners and the losers are not the same people and usually not even in the same communities. EPA's regulatory decisions create massive shifts in the structure of the economy, benefiting some workers, some communities and some industries and imposing costs or complete destruction on others. Even if EPA's redistributive mandates yield a net benefit for society as a whole over time, the rapidity of change that EPA mandates and the nationwide scope of change is a tremendous shock to the economic system. EPA needs to consider how it can lessen the burdens it is placing on the workers, families and communities that it targets for losses. EPA could reduce the economic shocks of its mandate by adopting more gradual approaches that phase in new standards over longer periods of time and that apply new standards only to new facilities, allowing existing facilities and the communities that depend on them to live out their natural lives. EPA could learn from the experience of the diffusion of technological change. New technologies yield net benefits to society, but their efficiency gains also come with costs as jobs and industries dependent on old technology are replaced. But in the case of technological change, the typical experience is gradual adjustment that cushions the shocks of economic change. EPA should endeavor to make its program of environmental change resemble more closely the successful experience of adoption of technological change. In addition to gradual schedules for adoption of new standards and "grandfathering" of older facilities, such an approach might also feature greater reliance on voluntary compliance, demonstrations, and incentive programs. A more gradual approach to regulation implementation would yield the added benefit of facilitating empirical study of effects to ensure that policies really are effective and on the right track.

Unfortunately, the sue and settle system makes it difficult, if not impossible for EPA to make such strategic choices. Consent decrees and court orders dramatically accelerate the regulatory juggernaut. Rather than developing regulatory policy in a coordinated, deliberate fashion that includes public participation, rules are hastily issued, one on top of the other. This scattershot approach to regulation makes the shocks to the economic system immediate and more pervasive than would otherwise happen.

Finally as far back as 1977, Congress, in section 321 of the Clean Air Act, anticipated the negative impacts of regulations on jobs and it mandated the Administrator of EPA to "conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision of this Act and applicable implementation plans, including where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement."[52] Thereafter, Congress imposed similar mandates in the Clean Water Act[53]; the Toxic Substances Control Act[54]; CERCLA[55] and the Resource Conservation

[52] 42 U.S.C. § 7621(a).
[53] 33 U.S.C. § 1367(e).
[54] 15 U.S.C. § 2623(a).
[55] 42 U.S.C. § 9610(e).

and Recovery Act.[56] Had these studies been conducted, EPA and Congress would better understand how regulations impact job loss and the impacts of job loss on the communities where the losses occur; unfortunately EPA has failed to implement the clear intent of Congress and has ignored being able to appreciate the hard facts of job loss caused by its regulatory madness.

V. Recommendations

The sue and settle problem can be fixed by ensuring that existing law works as intended. Solutions do not require undermining the government's ability to settle lawsuits or restricting citizen suits. The problem requires solutions based on good government principles. This includes transparency, public participation, and strong government oversight.

A. Sunshine for Regulatory Decrees and Settlements Act of 2012 (H.R. 3862)

There already is a strong bill that would go a long way to addressing many of the problems associated with sue and settle. Representative Benjamin Quayle (R-AZ) introduced the Sunshine for Regulatory Decrees and Settlements Act of 2012, which passed out of the House Judiciary Committee. It would do several very important things:

- Require disclosure of proposed consent decrees and settlement agreements before they are filed with a court;
- Give the public a chance to provide comments before proposed sue and settle agreements are filed with a court, thereby allowing the public to have a meaningful voice;
- Make it easier for affected parties to intervene in legal actions;
- Require agencies to give proper notice of proposed sue and settle agreements.
- Ensure that agencies, in sue and settle agreements, have sufficient time to comply with all statutory requirements.
- Require agencies to give annual reports to Congress regarding the number, identity, and content of complaints and sue and settle agreements, along with attorney's fees and costs awarded in connection with the sue and settle agreements.[57]

With passage of H.R. 3862, the public and Congress would know how often sue and settle agreements are used. The public would get a chance to have a voice in the process and environmental groups and agencies would not be able to do an end-run around the procedural protections that are supposed to apply to regulations under the Administrative Procedure Act. By having public participation, the agencies would formulate better public policy and would better consider the impact regulations have on jobs and employers.

---

[56] 42 U.S.C. § 6971(e).
[57] *Supra*, note 2.

B. Improve Oversight over Citizen Suits: Move Citizen Suit Provisions to Title 28 and Under the Jurisdiction of the Judiciary Committee

The House and Senate Judiciary Committees should have jurisdiction to oversee citizen suit provisions. This would strengthen the oversight over citizen suits by having the committee with the legal expertise and clear jurisdictional charge overseeing this inherently legal matter. To ensure that such jurisdiction exists, citizen suit provisions would need to be included in statutes under the jurisdiction of these committees.

Existing citizen suit provisions would fit perfectly into Title 28 of the United States Code, which addresses the federal judiciary and judicial procedure.[58] Moving the existing citizen suit language to Title 28 would be easy since the language throughout the various environmental statutes is generally identical.

C. Ensure that Agencies Do Not Give Up Discretionary Power Contrary to Law

Congress has made it clear that citizen suits may only be used to compel agencies to perform nondiscretionary acts or duties. When cases are adjudicated, courts and agencies ensure that the will of Congress is respected through judicial rulings and the defense of the agency. Unfortunately, in sue and settle cases, courts allow agencies to give up discretionary power when there are consent decrees and settlement agreements. To address this concern, courts must actively supervise consent decrees entered into by agencies.

Moreover, if agencies were precluded from improperly giving up discretionary power through consent decrees, agencies would not be able to agree to regulations not mandated by law or develop new regulatory requirements that are not contained within environmental statutes. There would be no way for a single environmental group to create major public policy by doing an end-run around the regulatory process.

D. EPA Must Conduct Employment Loss Studies

EPA must comply with the intent of Congress and undertake the mandated continuing evaluations of potential loss or shifts of employment caused by its regulations. Only by undertaking these studies can EPA begin to understand how its regulations impact real people, in real communities. Moreover, since the Bureau of Labor Statistics prepares Worker Displacement Studies every several years, Congress may want to consider having EPA fund a new section of the study that addresses job loss from regulation.

In the final analysis, many activities cause job loss, e.g. technological change, competition, but those changes are caused by market forces and take place over time with the market constantly reallocating jobs and resources. But government regulations are different from market forces. They are direct and blunt instruments intentionally applied

[58] 28 U.S.C. §1 *et. seq.*

against specific industries, in specific areas of the country and designed to change industry practices and employment in the specific industry. As such, EPA must be conscious that its regulations can have severe negative impacts on jobs and it must continuously evaluate these impacts. To address EPA's 35 year indifference to Congress' mandate, EPA should be required to undertake an evaluation of the cumulative impacts of all economically significant regulations it has issued in the last three years on job loss and shifts in employment. It if performed this action it would only be doing what Congress mandate it do.

Again, thank you for the opportunity to testify today. I am happy to answer any questions that you may have.

Mr. LANKFORD. Mr. Pruitt, I know you have got to be able to scoot out of here as well. You are excused from the panel. Thank you for being here.

Mr. PRUITT. Thank you, Mr. Chairman.

Mr. LANKFORD. Mr. Percival.

STATEMENT OF ROBERT PERCIVAL

Mr. PERCIVAL. Thank you, Mr. Chairman. Thank you for inviting me. I am Robert Percival, the director of the environmental law program at the University of Maryland Law School.

I'm afraid I'm going to be a bit of a skunk at the party. I've been practicing environmental law for 31 years. When I first started practicing environmental law, it was during the early days of the Reagan administration. And what I've heard here today is complaints about how environmental regulation, which had long been a bipartisan issue, is killing jobs and killing the economy.

Every time a new major program was being implemented, the feature of environmental law in the United States that has so distinguished us is the fact that we have citizen participation. We allow for citizen suits, and virtually every major program had to be implemented only because the agencies were forced by citizen suits to implement it.

As Congresswoman Speier indicated, most lawsuits brought against the EPA are actually brought by industry groups. That's part of the system. We allow ordinary citizens to go into court to make sure that EPA abides by the law.

When the Reagan administration proposed to phase lead out of gasoline, there were cries of doom, we were going to have gasoline shortages. It has been one of the most successful environmental regulations in the world, adopted by virtually every country in the world.

We had a very healthy economy until the global economic problems in 2008. At the same time we had environmental law that made us the envy of the world. All you have to do is go to China, as I do fairly regularly, and you see these young public-interest lawyers in China who would love to have a system like we have where they can hold their government accountable.

And what I have heard today is that illegal regulations are being adopted, that the public is being cut out of the process because of these settlements. Similar charges were investigated way back in the Reagan administration in 1986, when Attorney General Edwin Meese came up with the Meese Memorandum to provide guidelines for what agencies could agree to when they reached settlements. And as I indicated in my testimony, settlements are a prominent feature of the U.S. legal system, and they're expressly favored by public policy because they have so many benefits.

The characterization of collusive litigation and sue and settle, I believe, is simply a fantasy. To be sure, agency policies are going to change when there is a change in Presidential administration. Administrations have the ability to change course, and if we have a new Republican administration coming into office in January, you may see a situation where EPA is more frequently reaching settlements with industry groups.

But there has not been any change in EPA that has in any way cut out the public from the process. There are already very important safeguards that prevent that; standing requirements that require concrete adverseness among litigants, the need to obtain judicial approval of settlements, and, most importantly, the requirements of the Administrative Procedure Act that preclude agencies from making commitments concerning the substance of rules.

The D.C. circuit and other U.S. courts of appeal have not been shy about striking down EPA regulations, as Mr. Martella well knows, if they are, in fact, illegal, or if the Administrative Procedure Act has been violated. But the charge that EPA is out of control and as a result acting illegally I think was quite well refuted on Tuesday when the D.C. circuit came down with its Coalition for Responsible Regulation v. EPA decision upholding EPA's greenhouse gas regulations, saying that everything EPA did essentially was correct.

So I simply am not on board with the notion that we need to do more to discourage settlements. I think that will only make it more difficult for agencies to benefit the public, whether it's in a Democrat administration or a future Republican administration.

Thank you.

Mr. LANKFORD. Thank you, Mr. Percival.

[Prepared statement of Mr. Percival follows:]

My name is Robert V. Percival. I am the Robert F. Stanton Professor of Law and the Director of the Environmental Law Program at the University of Maryland Francis King Carey School of Law. Thank you for inviting me to testify today. A copy of my c.v. is attached to this testimony as Appendix A. As indicated on the c.v., I have long taught Environmental Law, Constitutional Law, and Administrative Law. I also have written extensively in these areas, including research on the specific focus of this hearing, which is attached as Appendix C to this testimony ("The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making," 1987 University of Chicago Legal Forum. 1987 U. Chi. Legal F. 327 (1987)).

I. U.S. ENVIRONMENTAL LAW IS THE ENVY OF THE WORLD

In recent years I have devoted much of my academic work to global environmental law. I have lectured in 26 countries on six continents and at more than 20 academic institutions in the People's Republic of China. During the spring semester 2008 I taught as a J. William Fulbright Distinguished Lecturer at the China University of Political Science and Law in Beijing. Based on these experiences, I can testify that the U.S. legal system is the envy of the world. A major reason for this is because we authorize citizen suits, heard by an independent judiciary, that allow ordinary citizens and businesses to hold government agencies accountable.

U.S. environmental law generally authorizes two types of citizen suits against government agencies. First, the Administrative Procedure Act (5 U.S.C. §702), and the judicial review provisions of the federal environmental laws (see, e.g., §509 of the Clean Water Act, 33 U.S.C. §1369) authorize judicial review of agency action to assess its conformity to legal and procedural requirements. Second, the

environmental laws authorize citizen suits against agencies for failure to perform non-discretionary duties (see, e.g., §505(A)(2) of the Clean Water Act, 33 U.S.C. §1365). We enjoy much cleaner air and water today than countries like China because citizen groups were able to go to court to compel agencies to implement the ambitious promises Congress made in our environmental laws. These laws have produced enormous net benefits to society and the economy that make U.S. environmental law the envy of the world.

II. SETTLEMENTS ARE DESIRABLE AND FAVORED BY PUBLIC POLICY

Settlements are a prominent feature of the U.S. legal system, both civil and criminal, because they provide important benefits to litigants and to society. They avoid the time and expense of protracted litigation, free up valuable judicial resources and enable both parties to reduce the risk of unfavorable litigation outcomes. Thus, as courts have recognized, there is a "broad public interest favoring" settlement. Southern Union Gas Co. v. Fed. Energy Regulatory Comm'n, 840 F.2d 964 (D.C. Cir. 1988). In most cases where agencies are sued for failing to perform a non-discretionary duty, such as missing a statutory deadline, liability is clear and the primary issue is when the violation will be cured by the agency performing its mandatory duty. An agency will only enter into a settlement when it believes that the settlement will leave it better off than it would have been had the litigation continued to judgment.

III. EXISTING LEGAL SAFEGUARDS PRECLUDE COLLUSIVE LITIGATION

The characterization of settlements of environmental litigation against agencies as collusive "sue and settle" to bypass normal statutory and rulemaking

requirements is simply a fantasy. Such litigation does not exist because existing legal safeguards preclude it. Agencies must comply with the law as written by Congress, including the requirements for notice and comment rulemaking provided in the Administrative Procedure Act (APA) (5 U.S.C. §553). Courts must approve agency settlements and they are directed by the APA to reverse agency actions that are contrary to law or undertaken without observance of legally required procedures (§5 U.S.C. §706). While agencies can commit to a schedule for performing their mandatory duties, agencies cannot settle litigation by making commitments concerning the substance of final regulations they will issue.

To be sure, agencies policies may change, particularly when there is a change in presidential administrations. Agencies have inherent authority to reconsider prior regulatory decisions so long as they have a reasoned basis for doing so. Motor Vehicle Mfrs. Ass'n v. State Farm Automobile In. Co., 463 U.S. 29, 56-57 (1983). Thus, it should surprise no one if the Obama administration's EPA finds it easier to reach settlement agreements with environmental groups than with industry. Nor should it surprise anyone if, for example, a future Romney administration's EPA found it easier to settle litigation with industry. This does not mean that collusion is occurring. Nor does it mean that statutory and rulemaking requirements are being bypassed. Settlements approved in cases such as *American Nurses Association v. Jackson* and *National Pork Producers v. EPA* commit EPA to propose regulations, but they make no commitments concerning the substance of any final rules the agency may adopt. These will be subject to notice and comment rulemaking in which all

members of the public can participate. Any regulations EPA ultimately adopts can be challenged in court to assess their legality.

There already are substantial safeguards built into the legal system to preclude collusive settlements. These safeguards include: (1) standing requirements that require concrete adverseness among litigants, (2) the need to obtain judicial approval of settlements, and (3) requirements of the Administrative Procedure Act (APA) that preclude agencies from making commitments concerning the substance of future rules. Moreover, the U.S. Department of Justice, whose Environment and Natural Resources Division (ENRD) has operated with the greatest integrity in a non-partisan fashion throughout Democratic and Republican administrations, has undertaken to provide its own additional safeguards. The ENRD now posts proposed consent decrees online and solicits public comment on them prior to their entry (see http://www.justice.gov/enrd/Consent_Decrees.html).

In March 1986 Attorney General Edwin Meese issued a memorandum restricting the scope of permissible settlement commitments by executive agencies and the circumstances under which consent decrees can be employed by them. Memorandum from Edwin Meese III to All Assistant Attorneys General and All United States Attorneys, Department Policy Regarding Consent Decrees and Settlement Agreements, March 13, 1986. Even this memorandum recognized that settlement is "a perfectly permissible device" that "should be strongly encouraged." It noted that consent decrees are beneficial "for ending litigation without trial, providing the plaintiffs with an enforceable order, and insulating the defendant from the ramifications of an adverse judgment."

In the article appended to this testimony, I concluded that the "Meese Memorandum" was unwise as a policy matter but clearly within the discretion of the Attorney General. Although the Meese Memorandum was premised on the notion that it was constitutionally mandated, I argued that it was not, a position that has withstood the test of time. See "Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion," Memorandum from Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, for Raymond C. Fisher, Associate Attorney General (June 15, 1999) available online at: http://www.justice.gov/olc/consent_decrees2.htm.

The Meese Memorandum was motivated largely by the Reagan administration's efforts to persuade courts to vacate consent decrees entered into during previous administrations. The one environmental consent decree targeted by the Reagan administration was the "Flannery Decree," which was upheld by the D.C. Circuit in Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117 (D.C. Cir. 1983). In that case the EPA had fallen hopelessly far behind statutory deadlines for implementing a detailed regulatory program covering virtually all industrial sources of water pollution. Faced with multiple lawsuits, EPA agreed to a detailed timetable to carry out its nondiscretionary duties to promulgate effluent limits and performance standards under the Clean Water Act for sixty-five pollutants discharged by twenty-one industries. The settlement was largely ratified by Congress in the 1977 Amendments to the Clean Water Act. In a subsequent challenge to the consent decree, the D.C. Circuit upheld it, emphasizing that it was consistent with the purposes of the Act, fairly resolved the controversy, and did not

prescribe the content of the regulations that EPA would promulgate. Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117 (D.C. Cir. 1983). The decree has produced significant results.

Contemporary consent decrees in environmental cases again involve situations where EPA has clearly violated a statutory duty mandated by Congress. The consent decree approved in 2010 in *American Nurses Association v. Jackson* resolved litigation charging that EPA was more than a decade late in issuing standards to control hazardous air pollutants required by the 1990 Amendments to the Clean Air Act. EPA's failure to meet the statutory deadline was undisputed. The question addressed by the settlement agreement was how much time the agency should be allowed to cure this violation. While industry intervenors argued that the schedule EPA had agreed to for issuing the regulations was too rapid, the court approving it noted that "[s]hould haste make waste, the resulting regulations will be subjected to successful challenge. If EPA has correctly estimated the speed with which it can do the necessary data gathering and analyses, harmful emissions will be sooner reduced." American Nurses Association v. Jackson, Civil Action No. 08-2198 (D.D.C. April 15, 2010).

In fashioning relief courts generally have been deferential to agency representations concerning the amount of time needed to complete rulemakings. Yet given EPA's track record of repeatedly missing deadlines, occasionally a court will lose patience with the agency. In a very rare case where a court refused to give EPA more time to meet deadlines for performing long overdue mandatory duties, see Sierra Club. V. Jackson, 2011 WL 181097 (D.D.C. Jan. 20, 2011), EPA issued the

regulations, 76 Fed. Reg. 15,608 (Mar. 21, 2011), while simultaneously publishing a notice of its intent to reconsider them. 76 Fed. Reg. 15,266 (Mar. 21, 2011).

IV. CONCLUSION

The ability of citizen groups and businesses to go to court to hold agencies accountable is one of the most important features of our legal system that makes it the envy of the world. It has been absolutely critical to ensuring that our federal environmental laws are implemented and enforced in a manner consistent with statutory directives. Settlement of litigation has long been a prominent feature of our legal system that is expressly encouraged by public policy because of the substantial benefits it provides. The notion that collusive settlements are being used by agencies to expand their powers beyond existing legal authorities or to bypass procedures for promulgating rules is a fantasy. Existing legal safeguards preclude collusive litigation and settlements cannot be used to make commitments concerning the substance of future regulations. Congress should not further burden federal courts and agencies with new obstacles to settlements that will result in more protracted litigation and less efficient implementation of the law.

APPENDIX A

C.V. for ROBERT V. PERCIVAL
University of Maryland Francis King Carey School of Law
500 W. Baltimore Street
Baltimore, Maryland 21201
Phone: (410) 706-8030 Fax: (410) 706-2184
rpercival@law.umaryland.edu

UNIVERSITY OF MARYLAND SCHOOL OF LAW, Baltimore, Maryland *1987-present*
Robert F. Stanton Professor of Law
Director, Environmental Law Program
Developed and manage one of the nation's top-rated environmental law programs. Created the program's environmental law clinic in 1987. From 1987-89 served as director of the university-wide Coastal and Environmental Policy Program. Appointed full professor in 1994 and Robert F. Stanton Professor in 2004. Selected as "Teacher of the Year" for the University of Maryland Baltimore in 2007.

Courses taught: Environmental Law, Environmental Law Clinic, Torts, Constitutional Law, Administrative Law, Environmental/Administrative Law Workshop, Seminars in Toxic Torts, Risk Assessment and Regulation, Management of Global Fisheries, Transboundary Pollution & the Law, Tobacco Control and the Law, and interdisciplinary seminars on Lead Poisoning Control and Comparative Environmental Law and Politics (winner of the 2005 University of Maryland Board of Regents' Award for Collaboration in Teaching for course co-taught with the Department of Government and Politics).

Summer teaching: Comparative U.S./China Environmental Law at Vermont Law School, South Royalton, Vermont (Summer 2012), Principles of Environmental Law at Shandong University, Jinan, China (Summer 2012), Comparative Environmental Justice at University of British Columbia/Southwestern University School of Law, Vancouver, Canada (Summer 2006, Summer 2009), Environmental Law at Lewis & Clark College of Law in Portland, Oregon (Summer 1995), Comparative Environmental Law at the University of Aberdeen in Aberdeen, Scotland (Summer 1994, Summer 2000).

GEORGETOWN UNIVERSITY LAW CENTER, Washington, D.C.
Visiting Professor of Law *Fall Semester 2011*
Taught Environmental Law

HARVARD LAW SCHOOL, Cambridge, Massachusetts *Spring Semester 2009*

Mr. LANKFORD. Mr. Yeatman.

STATEMENT OF WILLIAM YEATMAN

Mr. YEATMAN. Chairman Lankford, distinguished members of the subcommittee, thank you very much for inviting me to testify this morning. My name is William Yeatman. I work at the Competitive Enterprise Institute. We are a free-market think tank here in Washington, D.C.

Wonderful. I am getting a visual aid.

I am here this morning to speak to you about how EPA is using the sue-and-settle—so-called sue-and-settle consent decrees to usurp the States' rightful authority on regional haze.

First a short primer on the regional haze regulation. It's a Clean Air Act regulation, and its purpose is to improve the view at national parks and wilderness areas. This point bears repeating. It's an aesthetic regulation, not a public health regulation. Due to this fact, the Congress intended for the States to be the lead decision-makers on regional haze policy, on visibility improvement policy.

Despite State primacy, the Environmental Protection Agency has already imposed three Federal implementation plans for regional haze on Oklahoma, New Mexico and North Dakota over the staunch objection of State officials. EPA's plans would cost almost $400 million per year more than the States' plans, which were crafted with all due process over the course of years. Sue and settle featured prominently in EPA's actions in these Federal implementation plans, and I'll briefly sketch out how it worked for each of these States.

In a northern California court, EPA agreed to deadlines on regional haze as part of a settlement agreement with Wild Earth Guardians. The States were not notified and were not part of this agreement. They were notified after the fact, but were not part of the agreement.

On the eve of the consent decree deadline, EPA objected to the process used by States for their regional haze determinations. They didn't take on the determinations directly due to State primacy accorded by the Clean Air Act on regional haze policy. Instead, they objected to the process. Usually it was the State's cost-effectiveness analysis. That's what they went after. This didn't reject the State's plan outright; rather, it held it in abeyance, sort of holding pattern. Then EPA claimed that, pursuant to the consent decree, it had no choice but to run roughshod over the State and impose its own preferred plan, Federal implementation plan.

So that is how it has worked in each of these three States, this three-part strategy, already, and as I mentioned, Oklahoma, New Mexico and North Dakota, $400 million per year of cost over what the States had determined was necessary to comply with the regional haze rule. EPA's proposed fix for Wyoming and Nebraska, these would cost $120 million per year more than the States' plans. Utah and Arkansas are likely next.

And for what? What is the ultimate benefit of these Federal implementation plans? Thanks to Colorado State University professors, they have actually created software that allows us to visualize visibility impairment. It is known as WinHaze. It is available on the Internet for free. I downloaded that software. I input the EPA's

own data, its own baseline data, and its own visibility improvement data. What I found was rather striking. I have two images to convey what I did find.

On the left here, this is Oklahoma, Wichita Mountains National Park. This is the most affected Class 1 area of the EPA's Federal implementation plan for Oklahoma. This is the result. This is the putative benefits of the regulation right here.

On the left we've got the State's controls. On the right we've got EPA's controls. Notably, this is the largest disparity between State and EPA controls. This is the biggest improvement engendered by any of EPA's actions on regional haze today. This improvement, quote/unquote, was worth $282 million per year in control costs, in compliance costs. So this is a side-by-side photo.

Up on the monitor—aww jeepers, we had it there right before, but perhaps it's the not there anymore. We'll get it back.

Up on the monitor, in addition to side-by-side images, WinHaze, the aforementioned software, allows us to do split images, so it's, in essence, a melding of two. On the left half, those are the State controls. On the right half, right 50 percent, those are EPA's controls. The split image is meant to accentuate any difference between the two visibility results.

As you can tell, or at least certainly to my eyes, there is no difference. Even the split image, which is supposed to accentuate the difference, is invisible. I cannot tell the difference. Last night at the Competitive Enterprise Institute, I lined up my colleagues and had them each look at this placard. None of them could distinguish a difference. So in essence, it appears to be all pain and no gain with respect to this regional haze regulation.

That concludes my testimony. I look forward to taking your questions. Thank you very much.

Mr. LANKFORD. Thank you.

[Prepared statement of Mr. Yeatman follows:]

Testimony of William Yeatman
Assistant Director, Center for Energy and Environment
Competitive Enterprise Institute
on
"Mandate Madness: When Sue and Settle Just Isn't Enough"
before the
Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform
Committee on Oversight and Government Reform
U.S. House of Representatives

June 28, 2012

Chairman Lankford, Ranking Member Connolly, Members of the Subcommittee, thank you for inviting me to testify before you today about the Environmental Protection Agency's Regional Haze program. I am William Yeatman, assistant director of the Center for Energy and Environment at the Competitive Enterprise Institute. We are a non-profit public policy organization dedicated to advancing the principles of limited government, free enterprise, and individual liberty. CEI specializes in regulatory policy. We accept no government funding and rely entirely on individuals, corporations, and charitable foundations for our financial support.

My testimony addresses whether the Environmental Protection Agency is infringing on the States' rightful authority on visibility improvement policy pursuant to the Clean Air Act. So-called "sue and settle" consent decrees—among other regulatory maneuvers described below—have figured prominently in Regional Haze Federal implementation plans imposed by EPA on Oklahoma, New Mexico, and North Dakota, over the staunch objections of State leaders. EPA's imposed Regional Haze plans would cost almost $400 million per year more than the State plans.[1]

In addition to the aforementioned Regional Haze plans imposed on Oklahoma, New Mexico, and North Dakota, EPA has proposed Federal implementation plans for visibility improvement on Nebraska and Wyoming, at an estimated cost above the States' plans of $24 million per year[2] and $96 million per year,[3] respectively. Moreover, the Agency is poised to propose a Regional Haze Federal implementation plan for the Navajo Generating Station in the Navajo Nation, which, according to a Federal study, could raise water rates in Southern Arizona by 15 percent.[4] Regional Haze State implementation plans submitted by Arkansas and Utah were rejected by EPA. Finally, in Minnesota, EPA has signaled its intention to impose the same Regional Haze requirement twice, at the same time, in order to address the same visibility impairment. This regulatory "double dip"—a seemingly flagrant violation of President Barack Obama's Executive Order 13563 asking Federal agencies to eliminate duplicative regulation—would cost ratepayers almost $30 million annually.[5]

The costs of EPA's imposed Regional Haze plans are significant; the benefits, however, are suspect. According to peer-reviewed research, the visibility improvement achieved by EPA's Regional Haze plans is imperceptible to the average person.

Regional Haze: The Basics

In 1977 and 1990, Congress passed amendments to the Clean Air Act providing that States work together to improve visibility at Federal National Parks and Wilderness Areas. Together, these amendments are known as the Regional Haze provision.

A defining characteristic of the Regional Haze program is that States—and not EPA—are the lead decision-makers. In floor debate in 1977, the Congress unequivocally indicated that States should have the authority to decide how much value to assign to an aesthetic benefit[6], and the resulting language of the Clean Air Act reflects this fact.[7]. According to EPA's 2005 Regional Haze implementation guidelines, "[T]he [Clean Air] Act and legislative history indicate that Congress evinced a special concern with insuring that States would be the decision-makers"[8] on visibility-improvement policy making. The courts, too, have interpreted the Clean Air Act such that states have primacy on Regional Haze decision making. In the seminal case *American Corn Growers v. EPA* (2001), which set boundaries between the States and EPA on Regional Haze policy, the D.C. Circuit Court remanded EPA's 1999 Regional Haze implementation guidelines for encroaching on States' authority.

The important points about Regional Haze are: (1) it is an aesthetic regulation, and not a public health regulation; and (2) the program accords States a unique degree of authority.

How EPA Trumped State Authority on Regional Haze

In New Mexico, Oklahoma, and North Dakota, EPA and State officials disagreed over which controls were required at a number of coal-fired power plants for compliance with the Regional Haze provision of the Clean Air Act. However, the legal and regulatory record is clear: States get to make visibility policy. In order to trump State primacy on Regional Haze, EPA has relied on a mixed bag of regulatory maneuvers, which are explained in the subsections below.

1. Procedural Second Guessing

Before EPA can impose a Federal implementation plan, it must first disapprove the Regional Haze State implementation plan submitted by the States. Due to the primacy accorded States on visibility improvement policy by the Clean Air Act, EPA could not simply reject the emissions controls selected by the States. Instead, EPA only has the authority to object to process used by State's in the course of selecting controls for compliance with Regional Haze.

For example, in the course of reviewing Regional Haze implementation plans submitted by New Mexico,[9] Oklahoma,[10] and North Dakota,[11] EPA hired an independent contractor to vet the States' cost-effective analysis. In Nebraska, EPA audited the State's analysis using this same

contractor's previous Regional Haze work in Oklahoma.[12] In fact, this independent contractor is a paid consultant who routinely serves as a witness for the very same environmental groups who sued to obtain the Regional Haze consent decrees.[13] Unsurprisingly, the cost-estimates of controls at coal fired power plants calculated by this independent contractor/paid environmental consultant were hundreds of millions of dollars lower than those performed by New Mexico, Oklahoma, North Dakota, and (by extension) Nebraska. EPA then predicated its disapproval of these States' Regional Haze strategies based largely on these analyses.

EPA also issued questionable objections to Regional Haze visibility modeling used by the States. For example, North Dakota accounted for the significant interstate emissions originating in neighboring Canada that impact visibility in the States. However, EPA determined that such a real world approach was "inappropriate."[14] In New Mexico, EPA relies on a metric for cumulative visibility improvement, as if a two National Parks, hundreds of miles apart, could be viewed at the same time.[15]

2. Sue and Settle

As is explained above, EPA could not object to the final Regional Haze determinations rendered by the States, due to the unique primacy accorded States *vis-à-vis* EPA on visibility improvement policy. Instead of directly taking on the emissions controls selected by States in order to comply with Regional Haze, EPA disapproved the process by which the States rendered those determinations.

However, even if EPA does have the authority to object to the state's cost-effectiveness analyses and visibility modeling (the courts will decide), it is doubtful whether EPA could impose a preferred alternative, due to the State's prerogatives under the statute.

Enter "sue and settle." Beginning in 2009, a group of nonprofit environmental advocacy organizations—Sierra Club, WildEarth Guardians, Environmental Defense Fund, National Parks Conservation Association, Montana Environmental Information Center, Grand Canyon Trust, San Juan Citizens Alliance, Our Children's Earth Foundation, Plains Justice, and Powder River Basin Resource Council—filed lawsuits against EPA alleging that the agency had failed to perform its non-discretionary duty to act on State submissions for regional haze. Rather than litigate these cases, EPA simply chose to settle. In five consent decrees negotiated with environmental groups[16]—and, importantly, without notice to the States that would be affected[17]—EPA agreed to commit itself to various deadlines to act on all States' visibility improvement plans.

Like a one-two, left-right boxing combination, EPA first objects to the process used by the States to comply with Regional Haze, and then the Agency claimed it has no choice but to impose its preferred controls in order to comply with the consent decree.[18] Thus, EPA has trumped the States rightful authority on Regional Haze.

In New Mexico, EPA went even further. After years of deliberations, State regulators in New Mexico formulated a Regional Haze State implementation plan that met all Federal and State laws and requirements. Simply put, there were no grounds for objection.[19] EPA, however, refused to even consider the State's plan. According to EPA, it had no choice but to ignore the New Mexico's submission—despite State primacy on Regional Haze—because the Agency had to comply with a consent decree that had been filed in an Oakland court.[20]

3. Hybridization of Provisions of the Clean Air Act

In the course of imposing Regional Haze Federal implementation plans on New Mexico, Oklahoma, and North Dakota, EPA claimed an additional, independent source of authority to improve visibility under the Clean Air Act. In addition to the Regional Haze provision, the EPA also claims to have authority under the Good Neighbor provision of the Clean Air Act, [21] which provides that States demonstrate they have implemented adequate measures to ensure that their emissions do not "interfere with measures required to be included in the applicable implementation plan for any other state...to protect visibility."

In 1997, EPA tightened national ambient air standards for two criteria pollutants—particulate matter and ozone. Accordingly, the Good Neighbor provision requires that States must ensure that their emissions of these two pollutants do not interfere with compliance in downwind States of the 1997 revisions. Now, however, EPA claims that the 1997 revisions to health-based standards for particulate matter and ozone requires the Agency to ensure that emissions of other regulated pollutants from upwind States do not interfere with downwind States, in addition to particulate matter and ozone. Specifically, the Agency alleges that the Regional Haze plans submitted by New Mexico, North Dakota, and Oklahoma are insufficient to ensure that these States do not adversely affect visibility protection in downwind States.

This is a dubious legal reasoning, because the Regional Haze provision explicitly mandates that states control emissions of haze-causing pollutants that significantly diminish visibility in all Federal National Parks and Wilderness Areas, not just ones within their own borders. That is, the Regional Haze provision effectively requires States to meet the Good Neighbor provision. It makes no sense for Congress to create a program requiring States to work together to reduce visibility impairment in the Regional Haze provision, and then to also create a vague, amorphous, ill-defined separate source of authority with one phrase in the Good Neighbor provision, an altogether different section of the law.

More importantly, at the time that EPA imposed Federal implementation plans on New Mexico, Oklahoma, and North Dakota, the Agency had yet to fully approve a single Regional Haze plan. How could the Agency know whether one state is adversely affecting other States' visibility improvement programs that do not yet exist? Indeed, this is the exact reasoning used by EPA in 2006, when it published implementation rules for the Good Neighbor provision. In those rules, EPA said that, "is not possible at this time to assess whether there is any interference with

measures in...another State designed to 'protect visibility'...until regional haze [plans] are submitted and approved."[22]

4. Regulatory "Double Dip"

There is a common misperception that Regional Haze is a Western problem. This is because EPA has proposed to allow States to meet the preponderance of their Regional Haze commitments by participating in the Cross State Air Pollution Rule (CSAPR),[23] which is confined largely to Eastern States. Thus, EPA proposed to approve 20 Regional Haze plans in January and February 2012.[24]

CSAPR states are not, however, in the clear; in fact, they may be worse off than non-CSAPR States. They face a "double dip" of redundant 1999 and 1980 Regional Haze regulations, being implemented by EPA as "phase one" and "phase two" of a larger Regional Haze plan. This power grab is a result of the phased approach EPA has used in implementing the Regional Haze program. EPA first issued Regional Haze regulations in 1980.[25] At that time, computing was nascent and complex atmospheric modeling was non-existent. As a result, EPA largely deferred requiring States to act, because attributing visibility impairment to a specific source was impossible. Nineteen years later, in 1999, atmospheric modeling had advanced to the point whereby EPA could support a regulatory regime to improve visibility, and the Agency issued a second set of Regional Haze regulations.[26] For whatever reason, EPA never repealed the 1980 regulation (known as "Reasonably Attributable Visibility Impairment" or "RAVI") despite the fact that its most significant requirements were virtually identical to the 1999 Regional Haze Program. As such, both regulations remain on the books, even though they are essentially duplicates.[27]

Now, EPA is claiming the authority to impose both of these copycat Regional Haze regulations, one on the heels of the other. On January 25, 2012, EPA proposed to approve Minnesota's preferred Regional Haze controls for the 2,025-megawatt Sherburne County Generating Plant ("Sherco Plant") operated by Xcel Energy. EPA predicated its proposed approval based on the state's participation in the CSAPR.[28]

However, in the same notice, EPA warned that it would soon be issuing further Regional Haze requirements for the Sherco Plant, pursuant to the 1980 "RAVI" regulations.[29] In discussions with the Minnesota Pollution Control Agency, EPA has indicated that it will press for $250 million in "double dip" controls, specifically SCR technology.[30] As is demonstrated in the Minnesota Case Study later in this paper, EPA's preferred "RAVI" controls would achieve an imperceptible benefit in visibility improvement. The Minnesota example makes clear that there is no refuge from EPA's visibility regulations.

Dubious Benefits

By employing the regulatory machinations above, EPA has usurped the State's rightful authority on Regional Haze, and imposed hundreds of millions of dollars of emissions controls on New Mexico, Oklahoma, and North Dakota. And for what? The visibility improvements achieved by EPA's imposed controls are invisible to the average eye.

EPA uses a metric known as a "deciview" to measure the amount of haze as it relates to the amount of light that is scattered and absorbed. A deciview value of 0 represents the clearest possible visibility, *i.e.*, the view is unaffected by haze. As the deciview number increases, visibility becomes progressively poorer.

In New Mexico, Oklahoma, and North Dakota, EPA's controls would improve visibility over the state plans by 1.12 deciviews,[31] 2.89 deciviews,[32] and .061 deciviews[33] (respectively). According to peer-reviewed research, however, a 2-4 deciview change gives a 67 percent maximum probability of detecting the improvement.[34] As a result, EPA's Regional Haze program is imposing significant costs on utilities in several States—costs that will ultimately be borne by ratepayers—in order to achieve visibility improvements that are imperceptible to most people.

---

[1] For Oklahoma, annual costs taken from Oklahoma Department of Environmental Quality Air Quality Division BART Application Analysis for the Muskogee Generating Station (Table 10: Economic Cost for Units 4 and 5 – Dry FDG – Spray Dryer Absorber, p 17); the Sooner Generating Station (Table 10: Economic Cost for Units 4 and 5 – Dry FDG – Spray Dryer Absorber, p 17); and the Northeastern Power Plant (Table 11: Economic Cost for Units 4 and 5 – Dry FDG – Spray Dryer Absorber, p 14). These were three separate BART analyses that were completed in January 2010.
For New Mexico, annual costs taken from New Mexico Environment Department Air Quality Bureau BART Determination for San Juan Generating Station, Units 1-4, 28 February 2011, Table 10, "Impact Analysis and Cost-Effectiveness of Additional NOx Control Technologies,"
For North Dakota, annual costs taken from 76 FR 58603 and 76 FR 586266

[2] For Nebraska, Annual cost achieved by multiplying emissions reductions at Gerald Gentleman Station required to meet EPA's "presumptive limits" for BART (39,185 tons per year of sulfur dioxide; see 77 FR 12780) time EPA's estimated 2012 price for a ton of sulfur dioxide on the emissions market established by the Cross State Air Pollution Rule ($600).

[3] For Wyoming, Annual cost data compiled from 77 FR 33022: Table 9—Summary of Jim Bridger Units 3 and 4 NOx BART Analysis—Costs per Boiler; Tables 28-30, Summaries of Basin Electric Laramie River Units 1-3 NOx BART Analysis; Table 31—Summary of Dave Johnston Unit 3 NOx BART Analysis; Table 32—Summary of Jim Bridger Units 1 and 2 NOx BART Analysis—Costs per Boiler; Table 33—Summary of Wyodak Unit 1 NOx BART Analysis

[4] Hurlbut et al., Navajo Generating Station and Air Visibility Regulations: Alternatives and Impacts, National Renewable Energy Laboratory technical report, January 2012

[5] Annual costs for Minnesota based on Minnesota Pollution Control Agency BART Determination for Xcel Energy's Sherburne County Generating Plant, October 2009

[6] The House and Senate versions of the 1977 Amendments to the Clean Air Act differed on the balance of federalism for the Regional Haze provision. In Conference, Members of Congress came to agreement whereby States would have a distinctly high degree of primacy vis a vis EPA. Consider this floor exchange between Sens. James A. McLure (Idaho) and Edmund Muskie (Maine):

> Mr. McLure: "Under the conference agreement, does the State retain the sole authority for identification of sources for the purpose of visibility issues under this section?"
>
> Mr. Muskie: "Yes; the State, not [EPA] Administrator, identifies a source that may impair visibility and thereby falls within the requirement of [Regional Haze]."
>
> Mr. McLure: "And does this also hold true for determination of "Best Available Retrofit Technology" [a primary control required by the Regional Haze program]?"
>
> Mr. Muskie: "Yes. Here again it is the State which determines what constitutes "Best Available Retrofit Technology"..."

See Congressional Record-1977-0804-26854

[7] *See* 42 U.S.C. § 7491(b)(2)(A), which stipulates that States determine both which sources are subject to Best Available Retrofit Technology and what constitutes BART; *see also id.* at § 7491(A)(g)(2), which states that BART determinations can be made only after consideration of costs.

[8] 70 FR 39137

[9] *See* "Revised BART Cost-Effectiveness Analysis for Selective Catalytic Reduction at the Public Service Company of New Mexico San Juan Generating Station," Final Report, prepared by Dr. Phyllis Fox, Ph.D. (November 2010).

[10] 76 Fed. Reg. 16183, at n.24.

[11] 76 Fed. Reg. 58599, at n.22.

[12] *See* Appendix A, "EPA's evaluation of cost of Flue Gas Desulfurization (FGD) controls Nebraska Public Power District (NPPD) Gerald Gentlemen Station (GGS), Units 1,2," to EPA Region 7 Technical Support Document, *available at* www.regulations.gov, Document ID No. EPA-R07-OAR-2012-0158-002.

[13] *See* "Dr. Fox Resume," 25 February 2011, *available at* www.regulations.gov, Document ID No. EPA-R06-OAR-2010-0190-0070.

[14] 76 FR 58603

[15] 76 FR 52395

[16] The five consent decrees:

- *National Parks Conservation Ass'n, et al. v. Jackson*, Civil Action No. 1: 11-cv-01548 (D.D.C. Dec. 2, 2011);
- *Sierra Club v. Jackson*, No. 1-10-cv-02112-JEB (D.D.C. Aug. 18, 2011);
- *WildEarth Guardians v. Jackson*, No. 4:09-CV-02453 (N.D. Cal. Feb. 23, 2010);
- *WildEarth Guardians v. Jackson*, No. 1:11-cv-00743-CMA-MEH (D. Col. June 16. 2011); and
- *WildEarth Guardians v. Jackson*, No. 1:10-cv-01218-REB-BNB (D. Col. Oct. 28, 2010).

[17] *See, e.g.*, Comments submitted by Sue Kidd, Director, Environmental Policy and Programs, Arizona Public Service, Document ID EPA-HQ-OGC-2011-0929-0013, available at www.regulations.gov ("Finally, APS is concerned that Arizona was not properly consulted by EPA prior to entering into the proposed consent decree with the environmental plaintiffs. Given the lead role and considerable discretion given to states by Congress under the regional haze provisions of the CAA, it is axiomatic that EPA should have discussed with ADEQ the terms of the proposed consent decree *before* signing it.").

[18] In North Dakota, where EPA tried to ignore a major component of the State's Regional Haze submission (namely, North Dakota Department of Environmental Quality's Best Available Control Technology determination for the Milton R. Young power plan. EPA said, "Given our September 1, 2011 deadline to sign this notice of proposed rulemaking under the consent decree discussed in section III.C, we lack sufficient time to act on or consider this aspect of Amendment No. 1. Under CAA section 110(k)(2), EPA is not required to act on a SIP submittal until 12 months after it is determined to be or deemed complete. We have considered some of the documents related to the State's BACT determination for Milton R. Young Station and have included those documents in the docket for this proposed action." 76 Fed. Reg. 58579.

In promulgating a federal implementation plan for Regional Haze on Oklahoma, EPA stated, "We also are required by the terms of a consent decree with WildEarth Guardians, lodged with the U.S. District Court for the Northern District of California to ensure that Oklahoma's CAA requirements for 110(a)(2)(D)(i)(II) are finalized by

December 13, 2011. Because we have found the state's SIP submissions do not adequately satisfy either requirement in full and because we have previously found that Oklahoma failed to timely submit these SIP submissions, we have not only the authority but a duty to promulgate a FIP that meets those requirements." 76 Fed. Reg. 81732

[19] For more, see William Yeatman, EPA's Shocking New Mexico Power Grab, Competitive Enterprise Institute/Rio Grande Foundation joint white paper, October 2011

[20] In New Mexico, EPA used a putatively non-discretionary consent decree deadline to actually ignore the State's Regional haze submission. "We did receive a New Mexico RH SIP submittal on July 5, 2011, but it came several years after the statutory deadline, and after the close of the comment period on today's action.3 In addition, because of the missed deadline for the visibility transport, we are under a court-supervised consent decree deadline with WildEarth Guardians of August 5, 2011, to have either approved the New Mexico SIP or to have implemented a FIP to address the 110(a)(2)(D)(i) provision. It would not have been possible to review the July 5, 2011 SIP submission, propose a rulemaking, and promulgate a final action by the dates required by the consent decree." 76 Fed. Reg. 52390.

[21] Section 110(a)(2)(D)(i)

[22] Memorandum to Regional Air Division Director, Regions 1-10, August 15, 2006, p. 9, http://www.epa.gov/ttn/oarpg/t1/memoranda/section110a2di_sip_guidance.pdf

[23] 76 Fed. Reg. 82219.

[24] New Jersey (proposed approval 3 January 2012); Minnesota, Virginia, Ohio (proposed approval 25 January 2012); Illinois, Delaware (proposed approval 26 January 2012); Alaska (proposed approval 26 February 2012); Georgia (proposed approval 27 February 2012); Rhode Island, New Hampshire, Maryland, North Carolina, Michigan, South Carolina, Vermont, Wisconsin, Alabama, Missouri, Iowa (proposed approval 28 February 2012)

[25] 40 C.F.R. §§ 51.302-51.306.

[26] 64 Fed. Reg. 35714

[27] Both Regional Haze and RAVI require Best Available Retrofit Technology. The difference between the two programs is that States get to decide which units are subject to Regional haze BART, whereas Interior Department officials and EPA officials determine which units are subject to RAVI BART. Unfortunately, the Interior Department has proved that it won't be a responsible check on EPA. In 2009, it decided to subject the Sherco Units 1 and 2 to RAVI BART, despite the fact Minnesota, at the time, was crafting a Regional Haze BART determination for the power plant. As such, the only thing that stands in the way of EPA "double dipping" on Regional Haze is the Department of the Interior, which is to say that the only thing preventing the Obama administration from imposing the same regulation twice on coal fired power plants is the Obama administration.

[28] 77 Fed. Reg. 3681.

[29] 77 Fed. Reg. 3689 ("Therefore, this proposed rule only addresses satisfaction of regional haze requirements and does not address whether Minnesota's plan addresses requirements that apply as a result of the certification of Sherco as a RAVI source. EPA will act on RAVI BART in a separate notice").

[30] *See* Xcel Energy, Resource Plan Update, Docket No E002/RP-10-825 before the Minnesota Public Utilities Commission, at 45, 46 (Dec. 1, 2011) ("In its June 2011 preliminary review of the MPCS's BART assessments, EPA Region 5 indicated that it believes BART for [Sherco] Units 1 and 2 should include "Selective Catalytic Reduction...Plant specific estimates for Sherco Unites 1 and 2 demonstrate that SCRs would cost customers upwards of $250 million.").

[31] Visibility improvement data for New Mexico taken from Table 6, "NMED Modeled Maximim Impacts of the 98th Percentile Delta-dv Impacts from 2001-2003," 76 FR 502

[32] Visibility improvement data for Oklahoma taken from EPA's proposed Regional Haze federal implementation plan for Oklahoma, Table 9, "EPA Modeled Maximum Impacts Due To Dry Scrubbing of the 98th Percentile Delta-DV Impacts from 2001-2003," 76 FR 16186

[33] Visibility improvement data for North Dakota taken from North Dakota Regional Haze BART submittal by Great River Energy for Coal Creek Stations 1, 2 (GRE's modeling data was approved by North Dakota) Table 7-4 "Year 2000 Modeling Results"; Visibility improvement data for Antelope Valley Station was taken from State of North Dakota, Comments on U.S. EPA Region 8 Approval and Promulgation of Implementation Plans; North Dakota Regional Haze State Implementation Plan; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Regional Haze," p 67.

[34] Henry, Ronald C., Estimating the Probability of the Public Perceiving a Decrease in Atmospheric Haze, Journal of Air & Waste Land Management Association, 55: 1760-1766, 2005

Mr. LANKFORD. Thanks to all of you.

I now recognize myself for 5 minutes, and we will begin some rounds of questions here.

Mr. Martella, you've dealt with this in the past. Tell me what is typical in the EPA for a consent decree and working through the process, because you had mentioned it's not inappropriate, and I would agree with you that not all settlements are inappropriate. But you also outlined a couple key statements. You said that we have to deal with the actual public policy and make sure the public is engaged in that.

What would you set as a policy for this? Mr. Percival mentioned the Meese memo on it in the past. Is there a certain process that you would look at for that?

Mr. MARTELLA. Sure, and thank you for the question. I would like to clarify that. I fully support settlements and consent decrees in every opportunity. In an ideal world, all litigation would be settled. I was a Justice Department attorney before EPA, and my incentive was always to settle over going to trial, as it is today.

I think, though, you have to look at a number of factors, the first being the merits of the case that's coming in. It's not in the government's interests to be settling frivolous cases. And so for the group, whether it's an industry group or an NGO group, I am not trying to, you know, preference one over another, any group that comes to the EPA and says, we are going to assert this frivolous claim to get you to do something, will you settle it with us, the agency should be comfortable standing up in court and telling the court, this is frivolous; we are not going to be giving up our discretionary obligations just because somebody wants us to.

I think, unfortunately, that is my gripe is that I'm seeing a lack of willingness to defend cases I think are frivolous, or at least where legitimate arguments could be made to defend them, and the result is it's shifting resources. All of a sudden EPA is now adopting the folks who are coming in, their policies and their priorities as opposed so what the Agency's priorities are.

Mr. LANKFORD. Let me ask you about that then. The citizen suits that are set up there are really designed to force EPA to do its mandatory responsibilities. Am I correct on that?

Mr. MARTELLA. That's exactly what the intent should be, yes.

Mr. LANKFORD. Correct. So if a citizen suit pushes them to do a discretionary responsibility, has that extended their—the NGO's ability to be able to then take something as uniquely EPA's responsibility?

Mr. MARTELLA. I think that's, you know, fundamentally kind of transforming the purpose of the citizen suits. A citizen suit, as you point out, is the government was required to do something, it didn't do it. When you now enter the realm of we're going to make you do something you're not required to do because we think it is important even if you don't think it is important, the government has limited resources, and that becomes a fundamental reallocation of resources.

Mr. LANKFORD. Can a citizen suit also create a new policy; change previous policy and create a new policy off a citizen suit?

Mr. MARTELLA. Right, and we saw that in the New Source Performance——

Mr. LANKFORD. Is that appropriate? Is that an appropriate use of a consent decree?

Mr. MARTELLA. I don't believe that's what Congress intended.

Mr. LANKFORD. So we've got some basics here. If it is a mandatory responsibility, and it doesn't extend to new policy, then you would suggest that is a better policy; that if a consent decree creates new policy or expands an existing policy, or if it mandates something for future administrations of something that's clearly discretionary, then it's also expanded beyond its bounds.

Mr. MARTELLA. I would agree with that.

Mr. LANKFORD. Are you familiar with the Meese memorandum Mr. Percival mentioned before?

Mr. MARTELLA. Yes, sir.

Mr. LANKFORD. I would ask unanimous consent to submit the Meese memorandum for the record. Without objection.

This highlights three areas. It says the department or agency should not enter into a consent decree that converts into a mandatory duty otherwise discretionary authority.

The second aspect of this is departments or agencies should not enter into a consent decree that either commits the department or agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question.

And the third thing, the department or agency should not enter into a consent decree that 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 with the changing circumstances.

Any issues with those three?

Mr. MARTELLA. I think those are principles that I would hope would be vigorously applied to today. They are sound principles both intended to preserve the government's own ability to set its own policies, but also avoid an infinite loop where people are constantly forcing the government to new obligations that it can't meet, and people go back to court, and it ends up being less efficient for the courts.

Mr. LANKFORD. Right. This is currently not what we're doing now, right?

Mr. MARTELLA. I would argue we've given examples today of things that are inconsistent with those principles.

Mr. LANKFORD. This is really about process. This is not about trying to throw out all citizen suit possibilities. This is about trying to see if process is being followed through correctly, and if we are achieving the end result or if we are creating new legislation in a way that is outside of this Congress.

Mr. MARTELLA. It's about public participation, it's about transparency, it's about affirming the principles of the Administrative Procedure Act that Professor Percival referred to.

Mr. LANKFORD. I was very interested in the fact that when the consent decree was formed dealing with Oklahoma, when that decree was formed, there were some timelines that were set on those, and for those timelines to change or to get an extension of those timelines, the State of Oklahoma would have to return to the environmental groups to request permission for an extension of the timeline.

Do you see that being appropriate, that a State would go to an environmental group to request permission to have an extension with the EPA? Does that seem like an appropriate extension to you?

Mr. MARTELLA. I don't want to speak for the Attorney General, but I would imagine that States would be very concerned about their sovereignty being intruded upon.

Mr. LANKFORD. That seems just a little odd to me that in a consent decree that's been signed off on, that we don't come back to the EPA for an extension permission, we go back to environmental groups to acquire permission for that.

With that, I would like to recognize Ms. Speier for 5 minutes.

Ms. SPEIER. Mr. Chairman, thank you.

And let me say at the outset, I have a great deal of respect for the chairman. I think there are some issues here that could really be looked at, and I'm willing to do them. But I must say that doing it in this manner doesn't get us to a constructive resolution.

To Mr. Martella, you suggest that maybe sometimes we should be defending cases. I think one of the questions we need to ask is is there enough staff to defend these cases? If you don't have enough staff to defend the cases, then sue and settle is exactly where we're going to go.

To Mr. Kovacs, your comments about regulation and how it's a job killer is something that is articulated over and over again. But I look to the deregulation of the financial services industry with the Gramm-Leach-Bliley Act and with the number of laws that were passed by this Congress after that act, and we now have 50 million people out of work in this country because the financial service industry came to a shutdown, and this government had to bail out that industry to the tune of over $1 trillion. So in terms of jobs lost, I think you can make the case that when you deregulate, sometimes there is greater job loss.

Now, to you, Dr. Percival, I'm going to turn over the rest of my time to you, because I believe this hearing is, frankly, not as constructive as it could be. I would like to do a whole hearing on the haze in Oklahoma, because if, in fact, that is what is presented by Mr. Yeatman, then we should look at it, and we shouldn't have third parties dictating to States whether or not there's an extension. Those are legitimate issues we should be talking about. But I'm not interested in kangaroo hearings, and that's what I think this is.

So, Professor, please make any comments you would like to make about what everyone else has said.

Mr. PERCIVAL. Thank you.

I still, you know, come back to the point that this is not a situation where third parties are dictating what regulations are adopted. That still has to be done through the Administrative Procedure Act. Now, it is true that EPA, when it fails to perform a mandatory duty, then can be hauled into court, and a schedule is negotiated for how you're going to cure this violation of law.

The Meese memorandum, which I wrote the Law Review article that I submitted with my testimony about, I thought was unwise policy because it was designed essentially to say that the only remedy for the government not carrying out the commitments we make

in a settlement should be reviving the litigation rather than having an enforceable consent decree that actually increased the value of the government's work.

Now, you say if it's true that the haze rules are outrageous and illegal, the tenth circuit steps in, you get them overturned in court. We have that open process, and EPA will have wasted a whole lot of time doing something illegal. People said that's what they were doing with respect to greenhouse gas emissions, but the D.C. circuit has confirmed that that certainly wasn't the case.

The argument that somehow this private group is going to be able to dictate whether or not there could be an extension of time, if EPA feels it needs an extension of time, it can ask the court for an extension of time, and its word is probably going to be given some deference. But what we have seen in case after case is a situation where rules that Congress mandated be adopted a decade ago still have not been promulgated, and deadline after deadline passes, and sometimes courts say, enough is enough, and the rule ends up getting promulgated, but, as I mentioned in my testimony, even then the agency is free to reconsider them if they think that the rules are not adequately supported.

Ms. SPEIER. You have more time.

Mr. PERCIVAL. Oh, okay.

So what I would like to emphasize is that this is well-trod territory. Since 1986, when there was the big kerfluffle over the Meese memorandum, this charge was made that somehow environmental groups were dictating the priorities of EPA. When everyone looked into it, it turned out it wasn't true then. There is absolutely nothing that has fundamentally changed about EPA during the Obama administration. It's not a situation where the Agency is being dictated to by a group of environmental groups.

If, in fact, it's true that the agency is being sued in a situation where it does not have a mandatory duty, then the plaintiffs don't have a leg up in court. They don't have any possibility of winning that lawsuit. And that can be challenged when the court is trying to approve a consent decree if, in fact, they're trying to say this is a mandatory duty and it's not.

So I'm saying the system works pretty well for both industry and environmental groups. EPA unfortunately gets beat up on by all sides, has its budget cut and the like, and the result is that you see a situation where the Agency is always the bogeyman, and occasionally, because our judiciary functions so well, you see a decision like the decision on Tuesday upholding the greenhouse gas regulations that tells the Agency, you are doing something that, in fact, complies completely with the law.

Ms. SPEIER. Thank you.

Mr. LANKFORD. I would like to recognize Mr. Kelly for 5 minutes.

Mr. KELLY. I thank the chairman.

I do believe this is—I would not use the term "kangaroo court." I really am interested, Mr. Martella, I've watched this. Coming from Pennsylvania, I am watching now what's going on. If we could go to just a little bit of background.

We're having coal plants shut down, all right? I know that there's 11 plants in Pennsylvania just shutting down. Slide number 3, if you could just go to that, please, for a minute. This is the

President before he became President: "So if somebody wants to build a coal-powered plant, they can; it is just that it will bankrupt them because they're going to be charged a huge sum for all that greenhouse gas that's being emitted."

Now, I watched another clip this morning of the President explaining how cap and trade would work because some people just don't get it, so you have to force feed them into this, which I think is kind of an unusual take on things. I think there's a much better way to do it.

With New Source Performance Standards, let me ask you, what was the Sierra Club—what was their involvement in the New Source Performance Standards?

Mr. MARTELLA. Well, what we know is December of 2008, the Sierra Club wrote an article that was public saying that their goal for the administration was to set a New Source Performance Standard that would make sure that no new coal-powered power plant could be built. Two years after that, the administration entered into a settlement with them setting a deadline for proposing such a standard. That agreement was entered into. It affected both the utilities and refineries, but no one ever consulted with the utilities and refineries in setting the schedule.

Just a couple months ago in March, the EPA enacted the very proposal that looked identical to what the Sierra Club had written in 2008, and, again, without any prior consultation with the industries actually impacted by the substance of the proposal.

Mr. KELLY. Without objection, Mr. Chairman, I wanted to enter into the record the newsletter from the Sierra Club.

Mr. LANKFORD. Without objection.

Mr. KELLY. I am interested, because this process that takes place, you call it an off-ramp decision, and so for those of us that come from the normal world, the regular world, the commonsense—and I don't mean to in any way diminish people that come from the legal world where they use—things don't have to make sense to you, commonsense, you have to have a law decree to understand some of it.

I believe that if you're not at the table, you're on the menu. So when we have these decisions being made by groups, and it comes forward like that, would you have—in your former position at EPA, would you have litigated the New Source Performance Standards?

Mr. MARTELLA. I believe, you know, I would have liked to have seen the government stand up in court and explain why it should not be forced to do this. And, in fact, Congress has given EPA a process that would have solved this for everybody without having invoked this impact. EPA could have done an Advanced Notice of Proposed Rulemaking. That would have allowed it to study the issue. Everyone could have been at the table. I share your point, everyone should be at the table. But it wouldn't have had the immediate impact of shutting down coal-fired power plants.

So there was clearly was an option before EPA that I would have advocated for to go with an Advanced Notice of Proposed Rulemaking that would not have had the immediate impact while shutting folks out.

Mr. KELLY. Okay. So was there a mandatory duty?

Mr. MARTELLA. I would have been—if I was back at the Justice Department, I would have been very happy to stand up in the court and argue to the court there was no mandatory duty here. I would have felt very comfortable with that argument.

Mr. KELLY. And I think—listen, I don't think there's anybody in this country that doesn't want clean air and clean water. I think we are all serious in that. But there is also a factor of our economic freedom. And as we continue to take a look at this—I'm just trying, coming out of the private sector, understanding as we continue to turn on our back on things that are very abundant, accessible and affordable, which I believe in the fossils, we are turning our back on those and going in another direction that really costs the American consumer, which is who we represent, the American people, not just Republicans or Democrats, but everybody. Their costs of living under some of these new regulations are going to skyrocket because energy costs are going off the board.

As I said, in Pennsylvania we see power plants shutting down all the time. The trend is, okay, well, fine, we're going to go to natural gas. And now we are finding out, you know what? Well, you know what, that's a little bit better than coal, but we're finding problems with that, too. So sometimes you can mandate yourself into a situation where it's so untenable.

Mr. Kovacs, because I do believe it's about jobs, I really do, and if we're going to turn this thing around that we're in right now, this decline that we're in, it's going to be about getting people back to work and having more people being able to obtain the standard of living that makes sense and they can support a family on.

There's a slide. If we can go to slide number 4. I think this is really something that we need to take a look at.

This is a statement that was made by Curtis Spalding. He says, "Lisa Jackson has put forth a very powerful message to the country. Just 2 days ago, the decision on greenhouse gas performance standards and saying basically gas plants are the performance standard, which means if you want to build a coal plant, you got a big problem. This was a huge decision. You can't imagine how tough that was, because you got to remember if you go to West Virginia, Pennsylvania, and all those places, you have coal communities who depend on coal. And to say that we just think those communities should just go away, we can't do that. But she has to do what the law and the policy suggested, and it's painful. It's painful every step of the way."

Now, this is about jobs, and you mentioned some metrics about the numbers of jobs that were being walked away from.

Mr. KOVACS. Sure. The Bureau of Labor Statistics does this displaced worker survey, and it's 7 million. So this isn't a random survey. It's 7 million for long-term unemployed. If you take long-term/short-term, it's 15 million. So we're talking about whoever is unemployed and displaced. And what it finds is that the workers who lose a job, the long-term workers, the coal miners, the person who works in the utility plants, does not get a job within the survey period, which is a 3-year period. And after the survey period, 51 percent of those long-term workers who were unemployed—and this is going to a regulation that takes an industry out—51 percent of

those still did not have jobs afterwards. And of the 49 percent who got jobs, 55 percent were below what they made before.

So that's the impact. And of the jobs that are created, if you take a job out of Pennsylvania or West Virginia, and you build a battery plant in Michigan or California, they're different workers. So you have a real-life impact on the workers where the displacement occurs, and you have a theoretical or modeled worker somewhere else.

But the second point, which is, I think, more important, is that since 1977, Congress imposed a very—mandated a duty on EPA—the language is "shall"—mandated that when they do a major regulation, that they do a jobs analysis and a shift in employment analysis. And that was specifically to find out what is the impact of these major economic regulations. And EPA has never done that, and that is mandatory.

And what I think, and this is my last point, as I listen to this, we're talking about mandatory duties and discretionary duties and how you convert them, but here is a clear example of a mandatory duty that EPA has never attempted even to do, and that's really where I think the disgrace is, because they had the opportunity to link up what they were doing, what the Bureau of Labor Statistics were doing, and to find out what the impact of the regulations are. And if there was true public participation, and they truly cared about jobs, then they would be doing that analysis.

Mr. KELLY. Thank you.

Mr. LANKFORD. I'd like to recognize the ranking member Mr. Connolly.

Mr. CONNOLLY. Mr. Chairman, I know at the full committee we have descended into the bad habit of prejudging the outcome of a hearing in the selection of the title. I had hoped we would not do that in this subcommittee. To have a hearing entitled "Mandate Madness: When Sue and Settle Just Isn't Enough" kind of gives away the game. I don't think it's an intellectually honest pursuit. I don't think this hearing is an intellectually honest pursuit.

I'm glad, I guess, you have provided a forum for folks who don't like the Environmental Protection Agency or don't like environmental regulation to have a forum. And I can't express enough my disappointment in the structure of this hearing and in the title itself.

I'm all for an honest intellectual pursuit of the issue of unfunded mandates or burdensome mandates that may, in fact, be unproductive. I come from local government, where we had a struggle with that ourselves. I'm not unsympathetic. But to basically simply provide a forum for ranting about the EPA and its mission with very little empirical evidence to back it up is very troubling to this Member of Congress.

Mr. CONNOLLY. I had hoped we would continue, or try to continue, a tradition in this subcommittee where we actually pursue issues in as neutral and objective a way as possible. I don't think that's going to happen here, and I register my disappointment.

I yield back.

Mr. LANKFORD. I would—I would say that it might be good to go through some of the notes in the testimony and such that is here to be able to examine the process and how things have significantly

changed in the process of this, because there has been a significant change. This issue is a process issue, and that has shifted, and it needs to be an appropriate process so the citizens have the opportunity to hear and be heard.

Mr. CONNOLLY. Mr. Chairman, may I ask, is it your contention that the title of a hearing called "Mandate Madness" is an objective title? That's just an objective, honest pursuit of public policy?

Mr. LANKFORD. You know, the hearing itself deals with the policy issues. This is not a hearing about a title. This is a hearing about the facts in the case.

Mr. CONNOLLY. Titles—titles matter, Mr. Chairman.

Mr. LANKFORD. Yes, they do, but the facts matter even more.

Mr. CONNOLLY. Well, I think the facts get skewed when the title clearly channels those facts in a certain direction.

Mr. LANKFORD. Well, fortunately, this is not a court. This is a case where we have to bring things to light, and it has been done by——

Mr. CONNOLLY. It most certainly is not a court; otherwise a fair hearing on both sides would, in fact, be provided.

Mr. LANKFORD. We would be glad to have a fair hearing for all people involved since we have consent decrees that don't give a fair hearing to all involved. That would be wonderful.

Mr. CONNOLLY. That's your opinion, sir. That's not my opinion.

Mr. LANKFORD. I recognize Mr. Labrador.

Mr. LABRADOR. Mr. Chairman, that's actually the purpose of a hearing is to share both opinions, but apparently one side only wants their opinion heard and not the other. And we've actually been holding a hearing so we can give the other side the opportunity for them to actually state their opinions, but instead they want to just make statements about the fairness or unfairness of this hearing, which is rather shameful.

Mr. Kovacs, I just have two questions for you, and then take as much time as you want, and then I'll yield the rest of my time to the chairman. But I just heard Professor Percival state that there has been no change between the Bush administration and the Obama administration with respect to the EPA. Can you recall who in the Bush administration said that there was a plan to crucify regulated industries? Do you know what I am referring to?

Mr. KOVACS. Yes, sir.

Mr. LABRADOR. Can you explain what the change has been between the Bush administration and the Obama administration?

Mr. KOVACS. Well, certainly the—let's take a step back as I answer this. And to make it very clear, we're not here to argue that we want to eliminate citizen suits or what is mandatory and what is discretionary. We're here to say that as the EPA begins to exercise its discretion as to whether to sue or not, that the impacted parties need a seat at the table. And by a seat, we don't mean sitting there and negotiating, but when the environmental group and the EPA come to that understanding, before it is filed with the court and has a court order attached to it, did it go out for comment. And if there is an impact on the—on the regulated community, that they have a right to use intervention within that court.

Right now the regulated community is locked out of that process. And so what happens, as I explained in my opening statement, is

once the decision is made, the chances—and there is a court order, the chances of reversing that are virtually nil through the process. That decision has been made.

So when you get into asking the question, how have things been different, the issue of sue and settle has been around for decades, and that's why you have the Meese memo. The Reagan administration looked at it and said, this is not a process that the government should be actively involved in because it's—it's ceding the discretion of the agency to private groups, who then, because of the consent decree, literally have an involvement in that issue forever. And just the comment was made before where you have to go back to the environmental group to change the deadlines.

The private party actually by contract gets a right. Let me repeat this. The private party by contract gets a right to be part of the supervision, not the regulator community, and, frankly, EPA cedes its authority.

So what has changed is although you had sue-and-settle agreements going on for decades, right now you have, as the chairman mentioned in his opening, somewhere around 60 of them. And they're filed—like in regional haze that William Yeatman was talking about, the States of Oklahoma, North Dakota, and New Mexico were involved, but the lawsuit was brought in Oakland, California.

And so the first notice that they—that the States and the attorney generals and the Governor had was when the settlement agreement was actually entered and approved by the courts, and then they got notice. So what's changed is it's gone from a few a year to being the policy of the administration. That's the change. And that's the 60 of them that you have.

And in some of these instances, to give you an idea of how broad they are, there was one in Oakland, California—seems to be a popular court—where there are actually 28 rules that were subject to 1 consent decree regulating two-thirds of the industries in the United States.

Mr. LABRADOR. Excellent. And I liked some of your comments. You said that the decision has already been made, that there has been no opportunity to be heard, but yet this hearing has been called a kangaroo court. I find that really fascinating.

As you know, the Endangered Species Act is often the premise to these sue-and-settle rulemakings. Last week I was in a different hearing, Natural Resources hearing, and we heard testimony that the EP—that the ESA actually creates jobs. And in your experience, how does the ESA actually create jobs?

Mr. KOVACS. Well, I always go back to Milton Friedman's comment when he was—he was in China one time, and he was asking why they were building a dam with shovels, and the Chinese replied, well, that's what the regulations call for, because we are trying to create jobs through—in essence through regulation. And Friedman's remark was, well, if that's the case, why don't you just use spoons? You'll create more.

So the purpose of a regulation should be to undertake and to achieve what Congress intends of the—the public interest. And in, for example, the Endangered Species, I think, you know, you do have a situation where you are going to have more boots on the ground, you're going to have more inspectors, you're going to have

more government paperwork, you're going to have more petitions for protection. You're going to create jobs there, but the key is you lose; you lose jobs because the land that's impacted, and if you go into some of the energy issues, in many instances is so vast that you've taken large areas of the United States out of development.

And that's why I keep on going back to the Bureau of Labor Statistics displaced workers. When a regulation comes in, it impacts a specific industry. Whether it be coal, cement, logging, we've got a lot of instances of that. And maybe jobs are created in Washington, D.C., but the jobs that are lost in Pennsylvania or New Mexico are not the same, are not—are not—these people do not get the jobs in Washington, D.C. And it's the community that's displaced. And I keep on coming back. These are real workers who are really displaced, whose families are displaced, whose communities are harmed. And that doesn't mean that jobs aren't created somewhere else. They might be. But that community has been harmed by that regulation.

Mr. LABRADOR. Thank you.

Mr. Chairman, I—it has been my experience as a practicing attorney for 15 years, and just watching and observing, you know, debates, that when you can't debate the facts, you resort to ad hominem attacks.

You're one of the people I respect the most here in Congress. You've been one of the most fair individuals. And to come here this morning and listen to two different members of the minority attack you personally has been pretty distasteful. I thought I was just coming to a regular hearing, actually a pretty boring hearing, I thought that it was going to be. But maybe what we should do is see if the opinions of the chairman or the opinions of the ranking member prevail after having a full and fair hearing this morning.

I yield back.

Mr. CONNOLLY. Mr. Chairman.

Mr. LANKFORD. This is—just a moment. I will definitely yield to you.

This is what makes America a great country is that we do have divergent opinions, and all opinions are open here. Of all places, in the House of Representatives, every opinion should be heard on that one. And with that, I'd be honored to yield to the ranking member.

Mr. CONNOLLY. Mr. Chairman, I want to directly respond to my colleague.

No ad hominem attack was made against Mr. Lankford. My remarks were strictly limited to the nature of this hearing.

Mr. LABRADOR. He is the chairman.

Mr. CONNOLLY. He may be. I am the ranking member of the committee. I still don't like the hearing, and I am entitled to not like the hearing.

I have never cast a negative word about Mr. Lankford. In fact, we have worked well together. I consider him a friend. And I would ask you to withdraw those words, because no ad hominem attack was ever made against Mr. Lankford in this hearing.

Mr. LABRADOR. Before you got here, Mr. Connolly, this was called a kangaroo court by a member of your party. You came in, and you

had some pretty distasteful statements about this. So I—I came this morning to hear both sides and——

Mr. CONNOLLY. Mr. Labrador, I can't, any more than you can—you can't take responsibility for other members of your party. I can take responsibility for my remarks. I think you would agree, since you pointed out you practiced law for 15 years, so pretend you're in a courtroom.

What you heard from the ranking member of this subcommittee was a critique of the intellectual foundation of this hearing and a critique of the nature of the title of this hearing that I consider to be intellectually dishonest. None of that had anything to do with Mr. Lankford as a person or as the chairman of the committee other than I don't—I don't like the judgment exercised. But it's not about him personally. Would you not agree?

Mr. LABRADOR. We can agree to disagree. Thank you.

Mr. CONNOLLY. Mr. Chairman, I would have hoped my colleague would have given me the courtesy of acknowledging no ad hominem attack was made against you by this Member.

Mr. LABRADOR. I have no further comments. I just made my comments because I—I was surprised by the nature of the attacks from your side. But we don't need to debate this.

Mr. CONNOLLY. Well, Mr. Chairman, a charge was made that an ad hominem attack was made. I would point out to Mr. Labrador there are actually rules in the House of Representatives about ad hominem attacks.

Mr. KELLY. Mr. Chairman, could I ask for regular order, please?

Mr. LANKFORD. We do need to move on, Mr. Connolly. I am going to do a quick round here and would be honored to be able to yield you time in that time just to be able to allow all voices to be heard, all opinions to be heard.

Mr. CONNOLLY. I would have thought a point of personal privilege would have been respected, Mr. Chairman.

Mr. LANKFORD. Well, it has been.

I would like just to do a 3-minute round here of questions so we can do some follow-up on it and get a chance to pull some things together.

I would also like to submit for the record, ask unanimous consent, a letter from the Association of Builders and Contractors. They make a statement in this letter. With that, so ordered.

It says, when settlements are agreed to, they're often—they often mandate that rulemakings go forward and frequently establish arbitrary timeframes for completion without stakeholder review or public comment. And they continue on from there.

Where this originated from was over the past year and a half, and multiple hearings and multiple settings that I have been in, I have heard members in leadership and individuals who work with the EPA say to me, we have to do that because the court ordered us to do that. They couldn't point to a specific piece. It was a court order that mandated us to do that.

So it started me on a journey to go back and start to pull some of these court orders and to say, where did that court order come from, and exactly what did they order? What I found is many of these consent decrees did not order them directly to take a specific action; it ordered them to review policy, as is appropriate, if it had

not been reviewed, and it was a mandatory responsibility. But then they took that statement of it has to be reviewed and greatly expanded where it would go and then hid behind the statement, "We were ordered by a court to do that."

We were also—new policies were created. The NSPS, as Mr. Kelly mentioned before, where it went from new construction to now existing construction, that's entirely new policy that's been created by—without public comment, without input in the stakeholders. That's something uniquely different than we're just creating some sort of regulation, running it through the Administrative Procedures Act; now we're creating new policy based on the consent decree. That's a giant shift in what has occurred.

There are also moments where outside litigants are placed in authority over States, or States are not given primacy to make a decision. Now they have to request permission of a litigant, and the States were not given the opportunity to be at the table. What we have is a situation where the people that are affected by it do not have the opportunity to actually address their grievance. They don't have an opportunity to be able to express that unless they have a court case, unless they go through a process and try to reverse something, which is difficult to do. As Attorney General Pruitt mentioned before we are currently in the tenth circuit in Oklahoma and just had a stay because it was extended too far. It was a case gone too far.

Now, that is very difficult when you're planning for a power plant construction that is incredibly expensive and very capital intensive, now you don't know what the rules are. And at any moment they could shift, and you have to sue and countersue and try to work through the process, all the time planning on a billion-dollar construction project. This creates instability.

We have a stable process for this, and the concern is that we're shifting away from that stable process, and we're now creating regulations based on preferences and based on a consent decree without the appropriate people at the table. And I'm simply asking the question, who sets the timelines, who comes up with this, who has the opportunity to actually speak and comment into these issues, and shouldn't it be the people that are affected.

With that, I would like to recognize Mr. Connolly for 3 minutes.

Mr. CONNOLLY. Mr. Chairman, I have no questions for this panel.

Mr. LANKFORD. Mr. Kelly.

Mr. KELLY. I thank the chairman.

And, Mr. Martella, I want to go back to this, because I think what the chairman is hitting on is something that's very critical here. Of course, it looks—the court's only accepting the parties' agreement to settle and not adjudicating whether the EPA's legal position is correct, and I think that goes to the crux of the problem.

Now, we can tap dance around all of the other issues, but the truth of the matter is when we change, and there's a new administration that comes in, they also have the ability to appoint to these different agencies the structure of it and how it's going to go forward. So if I have an agenda in place, what I do is I place into effect people who are going to go along with my agenda, and then I tell them, you know what, we got a problem, we can't legislate

it, could you possibly take us to court, sue us, and then we'll settle out of court, and then it will become law without the judiciary system? So please explain that to people, because I think that's where we're missing the point today.

Mr. MARTELLA. And I think, you know, that' the contrast between what our democratic system, you know, wants and then what is happening in some cases. Our system is all about transparency, that—the notion that government leaders are not going into back rooms with a subset of folks who are interested by things. It's all about public participation, that everyone has an equal role to play in a process, and it's about having an opportunity to challenge things in court.

I think some of the examples you've heard today, again, we're not here to say settlements are bad things. What we're worried about is when we don't have that level playing field of transparency and public participation.

And just to give you one more example, back to NSPS, when EPA entered the consent decree with NGOs, there were other parties in the litigation. Trade associations had intervened, and in order to intervene in a case, it's not automatic. You have to prove to a court that you're adversely impacted, you could be adversely impacted by this case. And then the court says, okay, you could be harmed here, so I'm going to give you a right to participate.

The concern with the NSPS is despite the fact the court had already found those parties could be adversely impacted, they were at no point part of the settlement discussions. They were never brought into the room. And that's what, to me, I think, is kind of the fundamental flaw I have with our notion of transparency and public participation.

Mr. KELLY. And I've got to tell you, when I'm back home in western Pennsylvania—the thing about the American people, they trust us so much with the process, and they have great faith in the process until they find out they've been gamed.

Mr. MARTELLA. Right.

Mr. KELLY. And so if I can effectively structure a situation to come out with the answer that I need or that I want and somehow do an end run, it's not what made America great. And I think that's the thing that frustrates us all. And when we look at why people are losing faith in the way the Federal Government works, it is because we have been able to take what was there and available to us, and tools that were supposed to be there for all people, and we have gamed them by people who know how to maneuver.

And I got to tell you, it is deeply disappointing to me to sit and watch this and have it come down to something that it was never supposed to. It has morphed into something entirely different than what the American people believe, what they have faith in, and what the Founders started off with to begin. And that's where it comes to—the wheels come off of it.

And I appreciate what you have done. And I know that this agreement came about because it was legislation that was defeated. So when the legislation went down, we found a way to game it and do a settlement that becomes law without everybody being at the table. As I said earlier, if you're not at the table, you're on the menu. And I'm telling you right now that we are being gamed to

a point where no wonder the American people are losing faith in the people they have sent to represent them. So I thank you.

I yield back, Mr. Chairman, and I thank you for your patience. And thank you for calling this hearing. It is essential that the people of the United States—not the people who are in the Beltway understand how to game it, but the people of the United States understand that they do have their day in court, and they should have been heard. And when they find out there was an out-of-court settlement made, that just rubs them the wrong way. And you know what? It doesn't pass the smell test.

Mr. LANKFORD. I would like to thank the witnesses for being here today. This is a very important issue, and this is something that has to be resolved.

One of the things this committee has responsibility for is process, make sure process is followed. We also have a responsibility of dealing with the relationship between the States and cities, counties and the Federal Government. And it is essential that the States, cities, counties do their responsibility and the Federal Government does theirs. And you do bring things to light, and I appreciate all opinions coming out and being able to be shared today. And we will continue on a process of this Congress checking into these issues to make sure that we continue to follow through. So, thank you.

With that, the committee stands adjourned.

[Whereupon, at 10:20 a.m., the subcommittee was adjourned.]

Opening Statement
Rep. Jackie Speier

Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform
Hearing on "Mandate Madness: When Sue and Settle Just Isn't Enough"

6/28/12

Thank you, Chairman Lankford.

The focus of today's Subcommittee hearing is on consent decrees and settlement agreements – two commonplace court procedures that give parties in lawsuits the opportunity to settle their differences while avoiding prolonged trials and mounting legal expenses. These procedures help parties in court cases reach compromises that bring advantages to both sides.

In lawsuits against the Environmental Protection Agency – whether brought by state or local governments, private companies, environmental groups or local citizens – a consent decree often leads to a timelier and less expensive resolution for all involved. Consent decrees and settlements provide resolution and certainty, while allowing the EPA to do its job and protect the public interest.

That is the common sense, noncontroversial context for today's hearing, or at least it should be. Unfortunately, the Republican majority has chosen to break with its historic support for these environmental protections, which are overwhelmingly popular with the public and which they once helped create, in order to push a false narrative to fit a pro-deregulation and pro-pollution agenda.

Terms to describe consent decrees like "Mandate Madness" and "Sue and Settle" are catchy political slogans, but they are based on a flawed understanding of how our environmental laws work. Accusations that environmental groups are somehow dictating government policy through court settlements ring just as hollow.

In fact, an August 2011 GAO report covering the years 1995 to 2010 found no discernible trend in lawsuits against the EPA – however, it did note that private companies and industry trade associations accounted for 48 percent of those lawsuits, while local and national environmental and citizens groups collectively accounted for 30 percent.

The reality is that EPA gets sued a lot – not just by green groups, but more often than not by polluting industries, which are better funded and choose to fight their violations in court instead of cleaning up their act. "Sue and Settle" is a manufactured term and a distraction from the real "Sue and Pollute" strategy that these corporations prefer.

Existing law already provides ample means for parties to comment on and seek changes to consent decrees that they don't like. However, partisan attempts to rewrite those rules that have served the courts and the American people so well for decades is a solution in search of a problem.

I would like to thank our witnesses for appearing before the Subcommittee today, and I look forward to your testimony.

I yield back.

Draft Remarks for Chairman Lankford
Mandate Madness:' When Sue and Settle Just Isn't Enough
June 28, 2012

The Oversight and Government Reform Committee has focused a significant amount of attention this Congress on the red tape that is strangling economic growth and holding us back from prosperity.

At today's hearing, we will continue this inquiry by examining the highly questionable practice perfected by the Environmental Protection Agency – known as "Sue and Settle," which has emboldened the Administration to pursue an aggressive green agenda while escaping political accountability for the cost and burdens these regulations impose on job creators.

The process is rather simple: environmental groups will sue the EPA, demanding the agency issue a regulation on an accelerated timeframe. Rather than fighting the lawsuit, EPA quickly agrees to the special interest demands.

These settlement agreements are reached after closed-door negotiations between EPA and environmental groups where other interested parties are excluded.

Once the settlement is approved by a federal court in a consent decree, the EPA is legally bound to engage in the rulemaking.

It is important to note that when a court approves a consent decree, it does not consider the merits – the court is merely accepting and ratifying what the parties agreed to.

In the past 3 years, the Administration has concluded approximately 60 settlements with special interest – 29 of these agreements bound EPA to make major policy changes. The plaintiffs in these cases are often the very same reoccurring players – the Sierra Club, NRDC, Defenders of Wildlife, Wild Earth Guardians, and Center for Biological Diversity.

These special interest groups not only hold a special seat at the table with Obama's EPA – EPA effectively pays them to sue the agency! In 2011 alone, taxpayers reimbursed these groups millions to participate in cozy sue and settle arrangements.

In addition to examining this outrageous practice, we will hear today about two particularly egregious cases where EPA defied all norms of transparency, sidelined interested parties, and is now in the process of imposing extraordinarily burdensome regulations.

These two case studies are EPA's Regional Haze Regulations and its' Greenhouse Gas Standards for Power Plants.

In the case of Regional Haze – Congress was crystal clear that this purely aesthetic visibility program is to be administered by the states and not by EPA. Through Sue and Settle, EPA is

attempting to federalize the program; and imposing costs well beyond what the state had determined was necessary or justified. Ultimately, EPA's proposal will costs billions of dollars for visibility improvements that are undetectable to the human eye.

In the second case study – New Source Performance Standards (NSPS) for Electric Utilities, EPA concluded settlement negotiations on December 23, 2010, and agreed to promulgate NSPS for greenhouse gases for BOTH new and existing electric generating units under Sections 111(a) and 111(d) of the Clean Air Act.

At the time the settlement was reached, EPA was not in violation of any mandatory duty and as such, the litigants didn't have a legal leg to stand on. And yet the agency settled, committing the agency to make major policy changes, without interested parties at the table, and rewarding litigants with a cash prize they never were entitled to.

These two case studies are but two examples of the dozens of policy changes EPA has committed to in sweetheart sue and settle arrangements with special interests. Time and again, when EPA is criticized for the excessive burden imposed by their agency – whether it be Utility MACT, Boiler MACT, Florida Water Quality Standards, Regional Haze, NAAQS or NSPS – EPA's response is suspiciously similar – The agency has no discretion to extend the timeline to hear additional points of view – it is under court order to finalize the regulations by a date certain.

But let us be clear – What EPA claims the law requires them to do is nothing more than what EPA has agreed to do in a collusive arrangement with special interest allies. These arrangements are fundamentally unfair, lack transparency, are designed to circumvent other regulatory checks Congress has put in place. Environmental regulations only work when they are made in an open process that involves all stakeholders. Sue-and-settle rulemaking is an affront to that process.

Finally, I want to note that I very much wanted a representative from the EPA to be here today to respond to the concerns that our panelists will be raising. However, despite adequate notice, EPA has refused to provide a witness for today's proceedings. I am hopeful that we can find a date in the near future when they can make an appropriate witness available to respond and add detail.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 2 8 2012

OFFICE OF CONGRESSIONAL AND INTERGOVERNMENTAL RELATIONS

The Honorable James Lankford
Chairman
Subcommittee on Technology, Information Policy,
Intergovernmental Relations and Procurement
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your June 26, 2012, letter regarding an upcoming hearing that your Subcommittee is planning on holding. The Administrator asked that I respond to your letter.

As I said in my letter on June 22, 2012, and reiterated in e-mails and phone conversations with your staff, the Agency remains willing to testify in front of your Subcommittee, provided that accommodations can be reached on scheduling. Please let me be clear, Mr. Chairman. This is not a matter of refusing to testify on this topic, this is simply a request to begin discussions on when we can testify, based on availability of appropriate witnesses and the Subcommittee's schedule.

Specifically, to your questions regarding scheduling, the Agency does not believe that Michael Goo, Associate Administrator of the Office of Policy is an appropriate witness to testify at hearing entitled "Mandate Madness: When Sue and Settle Just Isn't Enough," because Mr. Goo's office does not interact with litigants – either from industry or from stakeholder groups. His office provides policy analysis, manages the internal process for regulatory development, and has other functions which are wholly unrelated to any settlement activities with external parties. A summary of his office's functions can be found at: http://www.epa.gov/aboutepa/opei.html.

Holding a hearing where the allegation of "sue and settle" appears to be a central theme is wholly inconsistent with Mr. Goo's portfolio in the Agency. As such, the Agency does not believe he is an appropriate witness for the topic that has been noticed.

One of the ways that the Agency believed we could accommodate the hearing scope was to send multiple witnesses: Gina McCarthy, the head of the Office of Air and Radiation, and Nancy Stoner, the head of the Office of Water. However, Ms. McCarthy is slated to prepare for a hearing in front of the Energy and Commerce Committee on Friday morning, June 29th, at 9:00 a.m. That hearing was scheduled prior to receiving notification of your Subcommittee's hearing. Testimony in front of all Congressional committees is highly important to the Agency, so time for preparation is crucial. Despite

Ms. McCarthy's unavailability, and the fact that both witnesses would be required to testify on the topic outlined by the Subcommittee, the Agency nonetheless consulted the schedule of Ms. Stoner. Unfortunately, Ms. Stoner is participating in an Urban Waters grant announcement in Boston, Massachusetts on June 28th. Initially, when the Agency responded to the Subcommittee's request, Ms. Stoner was slated to be on personal travel. Subsequently, she confirmed her attendance at the Urban Waters grant announcement. We also consulted the schedule of other potential witnesses. Bob Perciasepe, EPA's Deputy Administrator, is on international travel this week, and Lisa Jackson, EPA Administrator, had been scheduled to appear before the House Committee on Science, Space and Technology at the time of your hearing until that Committee cancelled the hearing just last night. That hearing had also been scheduled prior to receiving notification regarding your Subcommittee's hearing.

This is not a matter of shirking the Agency's obligation to be held accountable to Congress. The Agency has testified 80 times just this Congress, including 15 times by the Administrator and 10 times in front of your Committee.

Again, please let me be clear. The Agency holds the oversight functions of Congress in high regard and would be pleased to present testimony on this topic at a future date that works for the Subcommittee and for the appropriate Agency witness.

Sincerely,

Arvin Ganesan
Associate Administrator

cc: The Honorable Gerry Connolly
Ranking Minority Member

Office of the Attorney General
Washington, D. C. 20530

13 March 1986

MEMORANDUM

TO: All Assistant Attorneys General
All United States Attorneys

FROM: EDWIN MEESE III
Attorney General

SUBJECT: Department Policy Regarding Consent Decrees and Settlement Agreements

The following policy is adopted to guide government attorneys involved in the negotiating of consent decrees and settlements. Adopted pursuant to the Attorney General's litigation and settlement authority, these guidelines are designed to ensure that litigation is terminated in a manner consistent with the proper roles of the Executive and the courts. They are to be followed in all cases tried by counsel under the direction of the Attorney General.

I. General Policy on Consent Decrees and Settlement Agreements

Consent decrees are negotiated agreements that are given judicial imprimatur when entered as an order of the court. Because of their unique status as both contract and judicial act, consent decrees serve as a useful device for ending litigation without trial, providing the plaintiff with an enforceable order, and insulating the defendant from the ramifications of an adverse judgement. In the past, however, executive departments and agencies have, on occasion, misused this device 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 judiciary -- often with the consent of government parties -- at the expense of the executive and legislative branches.

The executive branch and the legislative branch may be unduly hindered by at least three types of provisions that have been found in consent decrees:

1. A department or agency that, by consent decree, has agreed to promulgate regulations, may have relinquished its power to amend those regulations or promulgate new ones without the participation of the court.

2. An agreement entered as a consent decree may divest the department or agency of discretion committed to it by the Constitution or by statute. The exercise of discretion, rather than residing in the Secretary or agency administrator, ultimately becomes subject to court approval or disapproval.

3. A department or agency that has made a commitment in a consent decree to use its best efforts to obtain funding from the legislature may have placed the court in a position to order such distinctly political acts in the course of enforcing the decree.

In Section II these guidelines address each of these concerns and limit authority to enter into consent decrees that would require the Secretary or agency administrator to revise, amend or promulgate regulations; that would require the Secretary or agency administrator to expend funds which Congress has not appropriated, or to seek appropriations from Congress; or that would divest the Secretary or the agency administrator of discretion granted by the Constitution or by statue.

These limitations on entry into consent decrees that might include such provisions are required by the executive's position, that it is constitutionally impermissible for the courts to enter consent decrees containing such provisions where the courts would not have had the power to order such relief had the matter been litigated.

The limitations in Section II.A. of the guidelines are not intended to discourage termination of litigation through negotiated settlements. The Attorney General has plenary authority to settle cases tried under his direction, including authority to enter into settlement agreements on terms that a court could not order if the suit were tried to conclusion. Settlement agreements -- similar in form to consent decrees, but not entered as an order of the court -- remain a perfectly permissible device for the parties and should be strongly encouraged. Section II.B., however, places some restrictions on the substantive provisions which may properly be included in settlement agreements. For example, Section II.B.1. allows a department or agency to agree in a settlement document to revise, amend, or promulgate new regulations, but only so long as the department or agency is not precluded from changing those regulations pursuant to the APA. Similarly, under Section II.B.2. the Secretary or agency administrator may agree to exercise his discretion in a particular manner, but may not divest himself entirely of the power to exercise that discretion as necessary in the future. The guidelines further provide that in certain circumstances where the agreement constrains agency discretion, a settlement agreement should specify that the only sanction for the government's failure to comply with a provision of a settlement agreement shall be the revival of the suit. Revival of the suit as the sole remedy removes the danger of a judicial order

awarding damages or providing specific relief for breach of an undertaking in a settlement agreement.

Finally, it must be recognized that the Attorney General has broad flexibility and discretion in the conduct of litigation to respond to the realities of a particular case. Such flexibility can be exercised by the Attorney General in granting exceptions to this policy.

II. Policy Guidelines on Consent Decrees and Settlement Agreements

A. Consent Decrees

A department or agency should not limit its discretion by consent decree where it would assert that a similar limitation imposed by injunction unduly or improperly constrains executive discretion. In particular, the Department of Justice will not authorize any consent decree limiting department or agency authority in the following manner:

1. The department or agency should not enter into a consent decree that converts into a mandatory duty the otherwise discretionary authority of the Secretary or agency administrator to revise, amend, or promulgate regulations.

2. The department or agency should not enter into a consent decree that either 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.

3. The department or agency should not enter into a consent decree that 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.

B. Settlement Agreements

The Department of Justice will not authorize any settlement agreement that limits the discretion of a department or agency in the following manner:

1. The department or agency should not enter into a settlement agreement that interferes with the Secretary or agency administrator's authority to revise, amend, or promulgate regulations through the procedures set forth in the Administrative Procedure Act.

2. The department or agency should not enter into a settlement agreement that commits the Department or agency to

expend funds that Congress has not appropriated and that have not been budgeted for the action in question.

In any settlement agreement in which the Secretary or agency administrator agrees to exercise his discretion in a particular way, where such discretionary power was committed to him by Congress or the Constitution to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties, the sole remedy for the department or agency's failure to comply with those terms of the settlement agreement should be the revival of the suit.

C. Exceptions

The Attorney General does not hereby yield his necessary discretion to deal with the realities of any given case. If special circumstances require any departure from these guidelines, such proposed departure must be submitted for the approval of the Attorney General, the Deputy Attorney General, or the Associate Attorney General at least two weeks before the consent decree is to be entered, or the settlement agreement signed, with a concise statement of the case and of reasons why departure from these guidelines will not tend to undermine their force and is consistent with the constitutional prerogatives of the executive or the legislative branches. Written approval of the Attorney General, the Deputy Attorney General, or the Associate Attorney General will be required to authorize departure from these guidelines.

OnEnergy

State Energy Efficiency Rankings Released

Earlier this month the American Council for an Energy Efficient Economy (ACEEE) revealed its state rankings on energy efficiency. The 2008 State Energy Efficiency Scorecard rates and ranks state-level action on model energy efficiency policies, programs, and practices.

Below are the top ten US states "employing energy efficiency to grow their economies while meeting electricity demand, combating global warming, and contributing to U.S. energy security:"

1. California
2. Oregon
3. Connecticut
4. Vermont
5. New York
6. Washington
7. Massachusetts
8. Minnesota
9. Wisconsin
10. New Jersey

Utah tied with New Mexico for 25th place. Both states received fifteen points; by comparison California received fifty points. Each state is given points in eight categories including building codes, combined heat and power, and appliance standards. Utah got 6.5 points in the utility and public benefits efficiency programs and policies category but 0 in the appliance standards category. The executive summary of the report is on line at: http://www.aceee.org/pubs/e086_es.pdf.

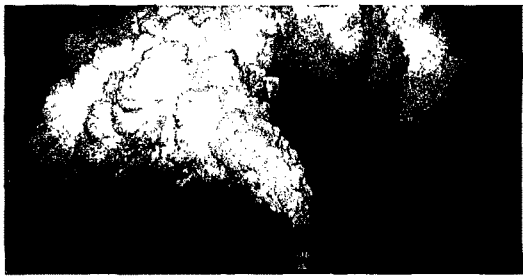
Unfortunately this issue puts some people to sleep; it shouldn't. The cheapest and most reliable source of energy is energy efficiency and conservation, but because traditional pricing and regulation models punish utilities, such as Rocky Mountain Power, when their customers conserve energy, there have been few large institutions promoting it.

Energy efficiency and conservation is both more and less than turning down one's thermostat in winter. It includes everything from passive solar in school construction to more efficient motors in industry to more efficient refrigerators in houses.

This article was compiled from a Sierra Club press release and local sources.

What Does the Bonanza Decision Mean?

by David Bookbinder, Chief Climate Counsel for Sierra Club



Rule #1 when you're in a hole is to stop digging. And in the climate hole we've dug for ourselves, that means not building any more coal-fired power plants, the leading source of carbon dioxide emissions both in the U.S. and worldwide. We know that carbon dioxide is the largest component among human-source emissions contributing to destabilizing the earth's climate. Thanks to the Bonanza decision on Thursday, November 13, 2008, from the Environmental Protection Agency's Environmental Appeals Board (EAB), we appear to have put down the shovel. (And maybe a little bit more.)

Hallelujah.

Technically, all EAB did was vacate the PSD permit for a relatively small (110 megawatt) proposed power plant and send it back to the permit writers for further consideration. But that would be kind of like saying that Marbury v. Madison was all about whether William Marbury got to be a District of Columbia justice of the peace. That is because the exact same rationale EPA used in refusing to impose carbon dioxide emission limits on the Bonanza plant has been used by EPA and state permitting authorities in virtually every one of the dozens of other coal-ruth PSD permits we're challenging across the country. And by rejecting (eviscerating is more like it) this rationale, every one of those other permits faces the same fate: remand for the agencies to try and come up with a more plausible excuse for not imposing carbon dioxide limits, or, better still, take a different position.

Agency action will take months. Many months. Perhaps up to a year or two. For all of them. Which means we have a de facto moratorium on building new coal-fired generation. And the timing could not be better, because it gives the Obama Administration both a blank slate to write on and plenty of breathing room as they will not have to be rushing around from Day 1 reacting to individual permit decisions. (To preserve this hiatus, the Lords of Transition would be advised to make it very, very clear that any new state-issued PSD permit coming out either before or after January 20 will be vacated by EPA using its authority under Section 167 of the Clean Air Act.)

So what next? Logically, I think the answer is New Source Performance Standards for fossil-fuel fired power plants. Just such a rulemaking is sitting in limbo at EPA, and it is the appropriate vehicle for limiting new power plant emissions to 800 lb. CO2/MWh.

This would permit new gas-fired plants but would effectively stop any new coal-fired ones that did not employ carbon capture and sequestration (CCS). Perhaps this rulemaking could also contain a second phase, effective 2016 or so, tightening the standard to approximately 250 lb. CO2/MWh. This would be achievable via either combined gas/solar or gas/wind generation or 90% CCS. And then they could start thinking about how to deal with existing power plants under Section 111(d) of the Act. But one thing at a time.

Right now we have a de facto moratorium on new coal-fired power plants, a blank slate on which the Obama Administration can begin writing its global warming policy and some breathing room in which to write it.

Associated Builders and Contractors, Inc.

June 28, 2012

The Honorable James Lankford
Chairman
Technology, Information Policy, Intergovernmental Relations and Procurement Reform Subcommittee
on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20510

The Honorable Gerald Connolly
Ranking Member
Technology, Information Policy, Intergovernmental Relations and Procurement Reform Subcommittee
on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20510

Chairman Lankford and Ranking Member Connolly:

On behalf of Associated Builders and Contractors (ABC), a national association with 74 chapters representing 22,000 merit shop construction and construction-related firms, I am writing in regards to the Oversight and Government Reform Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform hearing titled, "Mandate Madness: When Sue and Settle Just Isn't Enough." ABC supports increased transparency and opportunities for public feedback in situations where agencies promulgate rulemakings via consent decrees and settlement agreements.

The practice of regulation through litigation (or "sue and settle" as it is sometimes described) is used and often abused by advocacy groups in order to initiate rulemakings when they feel federal agencies are not moving quickly enough to draft and issue these policies. Organizations routinely file lawsuits against federal agencies claiming they have not satisfied particular regulatory requirements, at which point agencies can opt to settle. When settlements are agreed to, they often mandate that rulemakings go forward and frequently establish arbitrary timeframes for completion—without stakeholder review or public comment. These settlements are agreed to behind closed doors and their details kept confidential. Agencies release their rulemaking proposals for public comment after the settlement has been agreed upon, but this is often too late for adequate and meaningful feedback.

ABC is opposed to regulation through litigation and supports H.R. 3862, the "Sunshine for Regulatory Decrees and Settlements Act of 2012." H.R. 3862 would promote enhanced openness and transparency in the regulatory process by requiring early disclosure of proposed consent decrees and regulatory settlements. In addition, H.R. 3862 would require agencies to solicit public comment prior to entering into a consent decrees with courts, which would provide affected parties proper notice of proposed regulatory settlements, and would make it possible for affected industries to participate in the actual settlement negotiations.

Thank you for your attention on this important matter and we urge the House to pass the "Sunshine for Regulatory Decrees and Settlements Act of 2012."

Sincerely,

Kristen Swearingen
Senior Director, Legislative Affairs

June 26, 2012

The Honorable Lisa Jackson
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Administrator Jackson:

On Thursday, June 28, 2012, the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform is holding a hearing entitled "Mandate Madness: When Sue and Settle Just Isn't Enough." I am in receipt of a letter from Associate Administrator Arvin Ganesan informing the Committee that the Environmental Protection Agency (EPA) will not provide a witness to the hearing. EPA has reached this decision despite the fact that Committee staff provided EPA with an appropriate notice of the Committee's request. I am troubled by this outcome and believe that EPA has acted in a manner that is deficient in accommodating the needs of a co-equal branch of government. I write to you today in an effort to resolve this matter.

Committee staff provided EPA notice of this hearing on June 14, 2012.[1] At this time, my staff informed EPA of my desire to have EPA represented at the hearing and suggested that four separate EPA officials would be appropriate to testify.[2] On Monday June 18, 2012, an EPA employee declared that "after checking, due to travel schedules and other hearings we don't have an appropriate witness available."[3] Within an hour, Committee staff replied to this email asking whose schedule EPA had checked and the reason for each individual's inability to appear before the Committee.[4] Two days later, EPA finally responded, stating that the Agency believes the only appropriate witnesses are Nancy Stoner, Gina McCarthy, and Bob Perciasepe, all of whom the agency asserted are not available.[5] Committee staff immediately responded, repeating the original request for Associate Administrator for Policy Michael Goo, and also suggesting Senior Policy Counsel Bob Sussman as individuals who would also be acceptable to the Committee. This request was dismissed by EPA without substantive explanation.[6]

---

[1] Email from Committee Staff to Tom Dickerson, Legislative Counsel Unit, Office of Congressional and Intergovernmental Affairs (June 14, 2012).
[2] *Id.*
[3] Email from Steven Kinberg, Legislative Counsel Unit, Office of Congressional and Intergovernmental Affairs to Committee Staff (June 18, 2012).
[4] Email from Committee Staff to Steven Kinberg (June 18, 2012).
[5] Email from Tom Dickerson to Committee Staff (June 20, 2012)
[6] Email from Tom Dickerson to Committee Staff (June 21, 2012).

In a further effort to resolve the situation, Committee staff, via a telephone conversation with EPA staff, explained in detail that the hearing will fundamentally be about the regulatory process – a topic for which Associate Administrator Goo is certainly an appropriate witness. EPA responded to the additional attempt to resolve the matter with a letter sent on Friday, June 22, 2012, at 4:46 p.m., wherein EPA reiterated the unavailability of Stoner, McCarthy, and Perciasepe.[7] In this letter, EPA presented a distorted view of the facts and failed to acknowledge that staff also identified other appropriate witnesses for the hearing, both of whom appear to be available at the designated time.

In light of these facts, and the apparent availability of an acceptable witness, I am forced to conclude that EPA is not operating in good faith to satisfy its obligation to participate in Congressional oversight. As such, I must insist that EPA reconsider its position and either make yourself or Associate Administrator Goo available to testify at Thursday's hearing. In addition, I request that EPA provide to the Committee a detailed explanation of why each individual is unable to appear before the Committee. This explanation should include a description of the conflict, when the conflict arose, and why EPA was unable to alter plans to make the individual available to the Committee. I request that this information be delivered to the Committee no later than 9:00 a.m., Thursday, June 28, 2012.

The Committee on Oversight and Government Reform is the principal oversight Committee in the House of Representatives and has broad oversight jurisdiction as set forth in House Rule X.

If you have any questions regarding this request, please contact Kristina Moore of the Committee staff at 202-225-5074. Thank you for your prompt attention to this matter.

Sincerely,

James Lankford
Chairman
Subcommittee on Technology, Information Policy,
Intergovernmental Relations and Procurement Reform

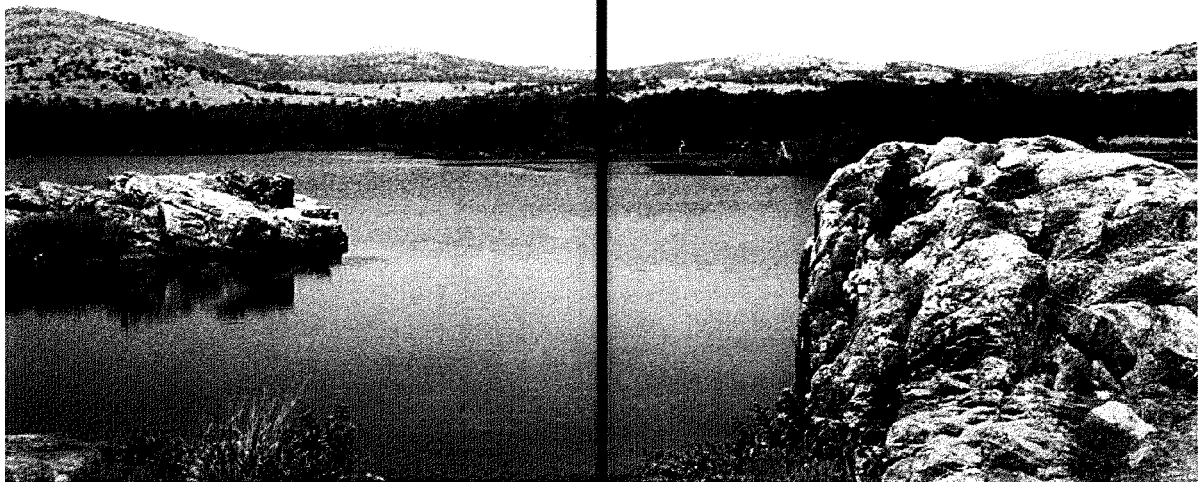
cc: The Honorable Gerald Connolly, Ranking Minority Member
Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform

[7] Letter from Arvin Ganesan, Associate Administrator, EPA to the Honorable James Lankford, Chairman, Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement (June 22, 2012).

Can You Spot the $1.5 Billion Difference?

Oklahoma's Haze Plan

EPA's Haze Plan



"So if somebody wants to build a coal-powered plant, they can; it's just that it will bankrupt them because they're going to be charged a huge sum for all that greenhouse gas that's being emitted." – Candidate Barack Obama, February 2008

"Lisa Jackson has put forth a very powerful message to the country. Just two days ago, the decision on greenhouse gas performance standard and saying basically gas plants are the performance standard which means if you want to build a coal plant you got a big problem. That was a huge decision. You can't imagine how tough that was. Because you got to remember if you go to West Virginia, Pennsylvania, and all those places, you have coal communities who depend on coal. And to say that we just think those communities should just go away, we can't do that. But she has to do what the law and policy suggested. And it's painful. It's painful every step of the way."

– EPA Region 1 Administrator Curtis Spalding,

March 30, 2012