112TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
112–593

SUNSHINE FOR REGULATORY DECREES AND SETTLEMENTS ACT OF 2012

JULY 11, 2012.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 3862]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3862) to impose certain limitations on consent decrees and settlement agreements by agencies that require the agencies to take regulatory action in accordance with the terms thereof, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

CONTENTS

19–006

The Amendment

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Sunshine for Regulatory Decrees and Settlements Act of 2012".

SEC. 2. CONSENT DECREE AND SETTLEMENT REFORM.

(a) APPLICATION.—The provisions of this section apply in the case of—

(1) a consent decree or settlement agreement in an action to compel agency action alleged to be unlawfully withheld or unreasonably delayed that pertains to a regulatory action that affects the rights of private parties other than the plaintiff or the rights of State, local or Tribal government entities—

(A) brought under chapter 7 of title 5, United States Code; or

(B) brought under any other statute authorizing such an action; and

(2) any other consent decree or settlement agreement that requires agency action that pertains to a regulatory action that affects the rights of private parties other than the plaintiff or the rights of State, local or Tribal government entities.

(b) IN GENERAL.—In the case of an action to be resolved by a consent decree or a settlement agreement described in paragraph (1), the following shall apply:

(1) The complaint in the action, the consent decree or settlement agreement, the statutory basis for the consent decree or settlement agreement and its terms, and any award of attorneys' fees or costs shall be published, including electronically, in a readily accessible manner.

(2) Until the conclusion of an opportunity for affected parties to intervene in the action, a party may not file with the court a motion for a consent decree or to dismiss the case pursuant to a settlement agreement.

(3) In considering a motion to intervene by any party that would be affected by the agency action in dispute, the court shall presume, subject to rebuttal, that the interests of that party would not be represented adequately by the current parties to the action. In considering a motion to intervene filed by a State, local or Tribal government entity, the court shall take due account of whether the movant—

(A) administers jointly with the defendant agency the statutory provisions that give rise to the regulatory duty alleged in the complaint; or

(B) administers State, local or Tribal regulatory authority that would be preempted by the defendant agency's discharge of the regulatory duty alleged in the complaint.

(4) If the court grants a motion to intervene in the action, the court shall include the plaintiff, the defendant agency, and the intervenors in settlement discussions. Settlement efforts conducted shall be pursuant to a court's mediation or alternative dispute resolution program, or by a district judge, magistrate judge, or special master, as determined by the assigned judge.

(5) The defendant agency shall publish in the Federal Register and by electronic means any proposed consent decree or settlement agreement for no fewer than 60 days of public comment before filing it with the court, including a statement of the statutory basis for the proposed consent decree or settlement agreement and its terms, allowing comment on any issue related to the matters alleged in the complaint or addressed or affected by the consent decree or settlement agreement.

(6) The defendant agency shall—

(A) respond to public comments received under paragraph (5); and

(B) when moving that the court enter the consent decree or for dismissal pursuant to the settlement agreement—

(i) inform the court of the statutory basis for the proposed consent decree or settlement agreement and its terms;

(ii) submit to the court a summary of the public comments and agency responses;

(iii) certify the administrative record of the notice and comment proceeding to the court; and

(iv) make that record fully accessible to the court.

(7) The court shall include in the judicial record the administrative record certified by the agency under paragraph (6).

(8) If the consent decree or settlement agreement requires an agency action by a date certain, the agency shall, when moving for entry of the consent decree or dismissal based on the settlement agreement—

(A) inform the court of any uncompleted mandatory duties to take regulatory action that the decree or agreement does not address;

(B) how the decree or agreement, if approved, would affect the discharge of those duties; and

(C) why the decree's or agreement's effects on the order in which the agency discharges its mandatory duties is in the public interest.

(9) The court shall presume, subject to rebuttal, that it is proper to allow amicus participation by any party who filed public comments on the consent decree or settlement agreement during the court's consideration of a motion to enter the decree or dismiss the case on the basis of the agreement.

(10) The court shall ensure that the proposed consent decree or settlement agreement allows sufficient time and procedure for the agency to comply with chapter 5 of title 5, United States Code, and other applicable statutes that govern rule making and, unless contrary to the public interest, the provisions of any executive orders that govern rule making.

(11) The defendant agency may, at its discretion, hold a public hearing pursuant to notice in the Federal Register and by electronic means, on whether to enter into the consent decree or settlement agreement. If such a hearing is held, then, in accordance with paragraph (6), a summary of the proceedings and certification of the hearing record shall be provided to the court, access to the hearing record shall be given to the court, and the full hearing record shall be included in the judicial record.

(12) The Attorney General, in cases litigated by the Department of Justice, or the head of the defendant Federal agency, in cases litigated independently by that agency, shall certify to the court his or her approval of any proposed consent decree or settlement agreement that contains any of the following terms—

(A) in the case of a consent decree, terms that—

(i) convert into mandatory duties the otherwise discretionary authorities of an agency to propose, promulgate, revise or amend regulations;

(ii) commit the agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question, or commit an agency to seek a particular appropriation or budget authorization;

(iii) divest the agency of discretion committed to it by Congress or the Constitution, whether such discretionary power was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties; or

(iv) otherwise afford relief that the court could not enter on its own authority upon a final judgment in the litigation; or

(B) in the case of a settlement agreement, terms that—

(i) interfere with the agency's authority to revise, amend, or issue rules through the procedures set forth in chapter 5 of title 5, United States Code, or any other statute or executive order prescribing rule making procedures for rule makings that are the subject of the settlement agreement;

(ii) commit the agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question; or

(iii) provide a remedy for the agency's failure to comply with the terms of the settlement agreement other than the revival of the action resolved by the settlement agreement, if the agreement commits the agency to exercise its discretion in a particular way and such discretionary power was committed to the agency by Congress or the Constitution to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties.

(c) ANNUAL REPORTS.—Each agency shall submit an annual report to Congress on the number, identity, and content of complaints, consent decrees, and settlement agreements described in paragraph (1) for that year, the statutory basis for each consent decree or settlement agreement and its terms, and any awards of attorneys fees or costs in actions resolved by such decrees or agreements.

SEC. 3. MOTIONS TO MODIFY CONSENT DECREES.

When a defendant agency moves the court to modify a previously entered consent decree described under section 2 and the basis of the motion is that the terms of the decree are no longer fully in the public interest due to the agency's obligations to fulfill other duties or due to changed facts and circumstances, the court shall review the motion and the consent decree de novo.

SEC. 4. EFFECTIVE DATE.

The provisions of this Act apply to any covered consent decree or settlement agreement proposed to a court after the date of enactment of this Act.

Purpose and Summary

H.R. 3862, the "Sunshine for Regulatory Decrees and Settlements Act of 2012," responds to a growing problem in regulatory litigation known as the "sue-and-settle" phenomenon. In sue-and-settle cases, pro-regulatory plaintiffs sue agencies that may be disposed to regulate but have delayed in doing so. The litigation typically is resolved by a consent decree or settlement agreement that is negotiated behind closed doors and sets accelerated deadlines for proposal and final issuance of new regulatory actions. These deadlines can reorder agency regulatory agendas, provide limited time for public notice and comment, and afford little or no opportunity for ordinarily required review of new proposed or final regulations by the White House's Office of Information and Regulatory Affairs (OIRA). As a result, under the cover of judicial decrees and settlement agreements that forcibly reorder their priorities, agencies can establish new regulations with less than usual scrutiny and even bind the regulatory discretion of succeeding administrations. H.R. 3862 addresses this problem with a number of common-sense measures, including provisions to increase transparency and judicial scrutiny of sue-and-settle decrees and settlements, improve fairness to the public and those affected by regulations, and assure that sue-and-settle rulemakings observe proper rulemaking procedure.

Background and Need for the Legislation

In litigation against Federal agencies, consent decrees and settlement agreements can be used to force agency action and bind executive discretion, including over successive administrations. This tendency has been concentrated in litigation against regulatory agencies over allegations that agency action has been unlawfully withheld or unreasonably delayed.

Over time, a cluster of tactics frequently used to obtain such decrees and settlements have evolved into an established litigation practice, known as "sue-and-settle" litigation. In sue-and-settle cases, defendant regulatory agencies, such as the U.S. Environmental Protection Agency, typically have failed to meet mandatory statutory deadlines for new regulations or are alleged to have unreasonably delayed discretionary action. Plaintiffs may have strong cases on liability in these matters, giving them substantial leverage over the defendant agencies. In addition, the agency actions at issue can be controversial, as is often the case with new, major regulations that impose high costs on regulated entities. The existence of controversy can give rise to a perverse agency incentive to cooperate with the litigation and negotiate a consent decree or settlement agreement. Once a decree or agreement is in place, the agency has a judicially-backed, litigation-based reason to expedite action in the face of controversy that otherwise would make action more difficult.[1]

[1] *See, e.g., Federal Consent Decree Fairness Act, and Sunshine for Regulatory Decrees and Settlements Act,* Serial No. 112–83, at 61 (Feb. 3, 2012) ("Hearing Transcript") (written statement of Andrew Grossman at 15 ("Grossman Statement")).

As a result of these factors, it is common in sue-and-settle cases for pro-regulatory plaintiffs to approach agencies with the threat of a lawsuit, and then negotiate consent decrees or settlement agreements in secret in advance of suit.[2] The decrees or settlements can be filed for the courts' consideration soon after or even contemporaneously with the filing of the plaintiffs' complaints.[3] The resulting decrees and settlements can come as a surprise to the regulated community and the general public and provide short timelines for agency action.[4] Inadequate advance notice and limited time for the proposal and promulgation of regulations can undercut the public participation and analytical requirements of the Administrative Procedure Act (APA),[5] the Regulatory Flexibility Act (RFA),[6] the Unfunded Mandates Reform Act (UMRA),[7] and other regulatory process statutes.[8] Similarly, accelerated timeframes for proposal and promulgation can short-circuit review of new regulations by the Office of Management and Budget's Office of Information and Regulatory Affairs under executive orders applicable to the rulemaking process, such as Executive Orders 12866 and 13563. The parties' incentives to avoid these requirements can be strong when the plaintiff and the agency agree on what the content of proposed and final agency action should be and prefer to effectuate that agreement with less opportunity for the public, regulated entities or OIRA to affect the regulatory process.

In addition, agencies in many cases may not be able to conclude controversial rulemakings before a succeeding administration—with potentially different views and priorities—takes office. That inability gives agencies a powerful incentive effectively to set the incoming administration's regulatory agenda through consent decrees and settlement agreements finalized before the new administration can assume its duties.[9] This is particularly true when agencies have failed to meet a number of mandatory rulemaking deadlines under a given statute. A current example of that phenomenon is the set of rulemakings required under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010). As of April 2012, it is estimated that agencies already have missed more than two-thirds (69.8%) of the Dodd-Frank legislation's rulemaking deadlines, and more than one-third of the rules required by the Act have not even been proposed yet.[10]

When pro-regulatory interest groups and regulatory agencies engage in sue-and-settle practices, the end result is rulemaking that can elevate the single-interest priorities of a given pro-regulatory advocate over the broader public interest, limit the discretion of succeeding administrations, and impose schedules that render required rulemaking procedures a formality, depriving regulated en-

---

[2] *See, e.g.,* Hearing Transcript at 24–31 (Statement of Roger R. Martella, Jr. ("Martella Statement")).

[3] *See, e.g., Defenders of Wildlife, et al. v. Jackson,* No. 10–01915 (D.D.C.) (complaint and consent decree filed Nov. 8, 2010); *Environmental Geo-Technologies, LLC, et al. v. EPA,* No. 10–12641 (E.D. Mich.) (complaint and settlement agreement filed July 2, 2010).

[4] *See, e.g.,* Hearing Transcript at 27 (Martella Statement at 4).

[5] 5 U.S.C. secs. 551, et seq.

[6] 5 U.S.C. secs. 601, et seq.

[7] 2 U.S.C. secs. 1501, et seq.

[8] *See, e.g.,* Hearing Transcript at 26–27, 61–62 (Martella Statement at 3–4; Grossman Statement at 15–16).

[9] *See, e.g.,* Hearing Transcript at 49 (Grossman Statement at 3).

[10] Davis Polk LLP, "Dodd-Frank Progress Report," Apr. 2012, *available at* http://www.davispolk.com/Dodd-Frank-Rulemaking-Progress-Report/(last accessed Apr. 24, 2012).

tities, the public and OIRA of sufficient opportunities to have a meaningful impact on the consideration of final rules.[11]

Under the Obama Administration, this phenomenon may be on the rise. Not only has the Administration generally increased the number of major rulemakings, but it has engaged in a flurry of sue-and-settle cases. For example, just two agencies, the Environmental Protection Agency (EPA) and the Department of the Interior, have been able to institute or pursue the following major policy changes in conjunction with sue-and-settle litigation:

- the Utility Maximum Achievable Control Technology rule on coal-fired electric utilities (*American Nurses Ass'n v. Jackson,* No. 1:08-cv-02198–RMC (D.D.C.) (filed Dec. 8, 2008; consent decree entered April 5, 2010));
- the Cement Maximum Achievable Control Technology rule on cement manufacturing (*Portland Cement Ass'n v. EPA,* No. 07–1046 (D.C. Cir.) (filed Feb. 16, 2007; consent decree entered April 22, 2009));
- the Stream Buffer Zone rule on coal mining (*National Parks Conservation Ass'n v. Kempthorne,* No. 1:09–cv–00115–HHK (D.D.C.) (filed Jan. 16, 2009; consent decree entered March 19, 2010));
- the Cooling Water Intake Structure regulations on electric utilities (*Riverkeeper v. EPA,* No. 1:06–cv–12987 (S.D.N.Y.) (filed Nov. 7, 2006; consent decree entered Nov. 22, 2010));
- revisions to the definition of solid waste under the Resource Conservation and Recovery Act (*Sierra Club v. Jackson,* No. 09–1041 (D.C. Cir.) (filed Jan. 28, 2009; settlement agreement entered into Sept. 10, 2010));
- numeric nutrient criteria for the State of Florida under the Clean Water Act (*Florida Wildlife Federation v. Jackson,* No. 4:08–cv–00324–RH–WCS (N.D. Fla.) (filed July 17, 2008; consent decree entered August 25, 2009));
- Federal implementation plans for regional haze in North Dakota and Oklahoma under the Clean Air Act (*WildEarth Guardians v. Jackson,* No. 4:09–CV–02453 (N.D. Cal.) (filed June 2, 2009; consent decree entered Feb. 23, 2010));
- New Source Performance, Maximum Achievable Control Technology and residual risk standards for oil and gas drilling operations (*WildEarth Guardians v. Jackson,* No.:09–cv–00089–CKK (D.D.C.) (filed Jan. 14, 2009; consent decree entered Dec. 3, 2009));
- first-ever greenhouse gas New Source Performance Standards for coal- and oil-fired electric utilities (*Coke Oven Environmental Task Force v. EPA,* consolidated into *New York v.*

[11] For example, the effectiveness of the public's rights to comment on proposed rules and challenge final rules in court can be undermined by sue-and-settle consent decrees and settlement agreements that prescribe the contents of proposed rules. This is because, under longstanding case law, final rules must represent "logical outgrowths" of proposed rules. *See, e.g., Small Refiner Lead Phase-Down Task Force v. EPA,* 705 F.2d 506 (D.C. Cir. 1983). When proposed rules are foreordained by decrees and settlement agreements to include or follow certain terms, that can effectively limit the range of final options agencies can adopt—excluding options advocated by the public or regulated entities that cannot be considered to be logical outgrowths of the predetermined proposed rules.

EPA, No. 06–1322 (D.C. Cir.) (filed Sept. 13, 2006; consent decree entered Dec. 23, 2010));

- first-ever greenhouse gas New Source Performance Standards for oil refiners (*Environmental Integrity Project v. EPA,* consolidated into *American Petroleum Institute v. EPA,* No. 08–1277 (D.C. Cir.) (filed Aug. 28, 2008; consent decree entered Dec. 23, 2010)); and
- a commitment to move forward with Endangered Species Act protections for over 250 candidate species (*In re Endangered Species Act Section 4 Deadline Litigation,* Misc. Action No. 10–377 (EGS), MDL Docket No. 2165 (D.D.C.) (filed Dec. 23, 2009; settlement agreement entered into May 10, 2011)).

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

- converted into mandatory duties the otherwise discretionary authorities of agencies to propose, promulgate, revise or amend regulations;
- committed agencies to expend funds that Congress had not appropriated and that had not been budgeted for the actions in question, or committed agencies to seek particular appropriations or budget authorizations;
- divested agencies of discretion committed to them by Congress or the Constitution when such discretionary power was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties; or
- otherwise afforded relief that courts could not enter on their own authority upon final judgment in litigation.[12]

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

- interfered with agencies' authorities to revise, amend or promulgate regulations through the procedures set forth in the Administrative Procedure Act or other statutes prescribing rulemaking procedures for rulemakings that were the subject of settlement agreements;
- committed agencies to expend funds that Congress had not appropriated and that had not been budgeted for the actions in question; or
- provided a remedy for agencies' failures to comply with the terms of settlement agreements other than the revival of the suits resolved by the agreements, if the agreements committed the agencies to exercise their discretion in particular ways and such discretionary power was committed to the

[12] Memorandum from Attorney General Edwin Meese III to all Assistant Attorneys General and United States Attorneys, *Department Policy regarding Consent Decrees and Settlement Agreements* at 3 (Mar. 13, 1986).

> agencies by Congress or the Constitution to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties.[13]

The Meese Memo was grounded in separation-of-powers concerns.[14] The Clinton Administration reviewed the questions addressed by the Memo and found that these policy concerns were sound. It did not, however, conclude that the Department was legally bound to respect the lines drawn in the Memo, and it relaxed the Department's policy in 1999.[15]

H.R. 3862 endeavors to solve these problems through several measures. First, it provides for greater transparency, requiring agencies publicly to post and report to Congress information on sue-and-settle complaints, decrees, settlements, and fee awards. Second, it provides that consent decrees and settlement agreements in sue-and-settle cases may be filed only after parties that will be affected by the disputed agency actions and relevant States, localities and Tribes have been able to intervene in the litigation and join settlement negotiations, and any proposed decrees or settlements have been published for public notice and comment. Third, it requires courts considering approval of decrees and settlements to account for public comments and compliance with the APA, RFA and other relevant administrative procedure statutes or executive orders, as well as needs to accommodate competing mandatory duties not within the litigation. Fourth, it requires the Attorney General or, where appropriate, the defendant agency's head, to certify to the court that he or she has approved of any proposed decree or settlement agreement that does not fully meet the Meese Memo's standards. Lastly, the bill prescribes a *de novo* standard of review for consideration of motions to modify consent decrees in light of changed facts or circumstances or competing duties.

H.R. 3862's provisions strike a balance that respects the rights and interests of plaintiffs and agency defendants to seek efficient consent decrees and settlement agreements, while also respecting the rights and interests of the public and entities that will be affected by regulatory actions. In addition, by improving the ability of all regulatory stakeholders to help shape decrees and settlements, and for courts to better consider them, the bill improves the likelihood that decrees and settlements in regulatory cases will produce longer lasting, more effective regulatory solutions, rather than regulations likely to be bogged down in lengthy judicial challenges after promulgation. The bill does not remove incentives to settle, but simply fosters greater use of good government practices of transparency, fairness and public participation by impacted stakeholders. In that respect, this legislation is consistent with the principles of public participation and accountability that underlie the regulatory process put in place by the Administrative Procedure Act. In so doing, the bill merely restores the balance that has existed in the regulatory process for decades.

---

[13] *Id.* at 3–4.
[14] *Id.* at 1.
[15] Memorandum from Randolph D. Moss, Acting Assistant Attorney General for Office of Legal Policy, to Associate Attorney General Raymond C. Fisher, *Authority of the United State to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion* (June 15, 1999).

Hearings

The Committee's Subcommittee on Courts, Commercial and Administrative Law held 1 day of hearings on H.R. 3862 and H.R. 3041, a separate bill addressing consent decree reform in institutional reform cases involving State and local defendants, on February 3, 2012. Testimony was received from Roger R. Martella, Jr., Sidley Austin LLP, former general counsel of the U.S. Environmental Protection Agency; Professor David Schoenbrod, New York Law School; Andrew M. Grossman, the Heritage Foundation; and John C. Cruden, president of the Environmental Law Institute and former Deputy Assistant Attorney General for the Department of Justice's Environment and Natural Resources Division, with additional material submitted by the Natural Resources Defense Council, the American Bar Association, and Kenny, Kenneth and Paula Cieplik.

Committee Consideration

On March 27, 2012, the Committee met in open session and ordered the bill H.R. 3862 favorably reported with an amendment in the nature of a substitute, by a rollcall vote of 20 to 10, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R.3862.

1. Amendment #1, offered by Mr. Conyers, to exempt from the provisions of the bill a consent decree or settlement agreement pertaining to the protection of privacy. Defeated 12 to 16.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.			
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Lungren		X	
Mr. Chabot		X	
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan			
Mr. Poe			
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino			
Mr. Gowdy		X	

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Amodei		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Cohen			
Mr. Johnson, Jr.	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu			
Mr. Deutch	X		
Ms. Sánchez	X		
Mr. Polis	X		
Total	12	16	

2. Amendment #2, offered by Mr. Nadler, to exempt from the provisions of the bill a consent decree or settlement agreement pertaining to nuclear reactor safety. Defeated 13 to 18.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.			
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Lungren		X	
Mr. Chabot		X	
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan		X	
Mr. Poe		X	
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino			
Mr. Gowdy		X	

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Amodei		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Cohen			
Mr. Johnson, Jr.	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez	X		
Mr. Polis	X		
Total	13	18	

3. Amendment #5, offered by Ms Waters, to exempt from the provisions of the bill a consent decree or settlement agreement pertaining to reduction of illness or death from exposure to toxic substances or hazardous waste in communities that are protected by Executive Order 12898. Defeated 13 to 15.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.			
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Lungren		X	
Mr. Chabot		X	
Mr. Issa			
Mr. Pence			
Mr. Forbes			
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan			
Mr. Poe		X	
Mr. Chaffetz			
Mr. Griffin		X	

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Marino			
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Amodei		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Cohen			
Mr. Johnson, Jr.			
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez	X		
Mr. Polis	X		
Total	13	15	

4. Amendment #3, offered by Ms. Jackson Lee, to exempt from the provisions of the bill a consent decree or settlement agreement intended to prevent birth defects in infants. Defeated 14 to 16.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.			
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Lungren		X	
Mr. Chabot		X	
Mr. Issa			
Mr. Pence			
Mr. Forbes			
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan		X	
Mr. Poe		X	
Mr. Chaffetz		X	
Mr. Griffin		X	

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Marino			
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Amodei			
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Cohen			
Mr. Johnson, Jr.	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez	X		
Mr. Polis	X		
Total	14	16	

5. Amendment #7, offered by Mr. Johnson, to exempt from the provisions of the bill a consent decree or settlement agreement that would create jobs. Defeated 7 to 11.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.			
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Lungren		X	
Mr. Chabot			
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan			
Mr. Poe		X	
Mr. Chaffetz			
Mr. Griffin		X	

ROLLCALL NO. 5—Continued

	Ayes	Nays	Present
Mr. Marino			
Mr. Gowdy			
Mr. Ross			
Ms. Adams		X	
Mr. Quayle		X	
Mr. Amodei			
Mr. Conyers, Jr., Ranking Member			
Mr. Berman			
Mr. Nadler			
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters			
Mr. Cohen			
Mr. Johnson, Jr.	X		
Mr. Pierluisi	X		
Mr. Quigley			
Ms. Chu	X		
Mr. Deutch			
Ms. Sánchez	X		
Mr. Polis			
Total	7	11	

6. Amendment #8, offered by Mr. Johnson, to exempt from the provisions of the bill a consent decree or settlement agreement that prevents or is intended to prevent discrimination based on race, religion, national origin, or any other protected category. Defeated 9 to 10.

ROLLCALL NO. 6

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.			
Mr. Coble		X	
Mr. Gallegly			
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Chabot			
Mr. Issa			
Mr. Pence			
Mr. Forbes			
Mr. King			
Mr. Franks			
Mr. Gohmert		X	
Mr. Jordan			
Mr. Poe		X	

ROLLCALL NO. 6—Continued

	Ayes	Nays	Present
Mr. Chaffetz			
Mr. Griffin		X	
Mr. Marino			
Mr. Gowdy			
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Amodei			
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler			
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters			
Mr. Cohen			
Mr. Johnson, Jr.	X		
Mr. Pierluisi	X		
Mr. Quigley			
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez	X		
Mr. Polis			
Total	9	10	

7. Amendment #9, offered by Mr. Johnson, to exempt from the provisions of the bill a consent decree or settlement agreement that protects minors from dangerous or defective products. Defeated 10 to 14.

ROLLCALL NO. 7

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.			
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Chabot			
Mr. Issa		X	
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks			
Mr. Gohmert		X	
Mr. Jordan			

ROLLCALL NO. 7—Continued

	Ayes	Nays	Present
Mr. Poe		X	
Mr. Chaffetz			
Mr. Griffin		X	
Mr. Marino			
Mr. Gowdy			
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Amodei			
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler			
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Cohen			
Mr. Johnson, Jr.	X		
Mr. Pierluisi	X		
Mr. Quigley			
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez	X		
Mr. Polis			
Total	10	14	

8. Motion to report H.R. 3862, as amended, favorably to the House. Approved 20 to 10.

ROLLCALL NO. 8

	Ayes	Nays	Present
Mr. Smith, Chairman	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Lungren	X		
Mr. Chabot	X		
Mr. Issa			
Mr. Pence			
Mr. Forbes	X		
Mr. King	X		
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Jordan	X		
Mr. Poe	X		

ROLLCALL NO. 8—Continued

	Ayes	Nays	Present
Mr. Chaffetz	X		
Mr. Griffin	X		
Mr. Marino	X		
Mr. Gowdy	X		
Mr. Ross	X		
Ms. Adams			
Mr. Quayle	X		
Mr. Amodei	X		
Mr. Conyers, Jr., Ranking Member			
Mr. Berman			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee			
Ms. Waters		X	
Mr. Cohen			
Mr. Johnson, Jr.		X	
Mr. Pierluisi		X	
Mr. Quigley		X	
Ms. Chu			
Mr. Deutch		X	
Ms. Sánchez		X	
Mr. Polis			
Total	20	10	

Committee Oversight Findings

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

New Budget Authority and Tax Expenditures

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

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 3862, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 25, 2012.

Hon. LAMAR SMITH, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3862, the "Sunshine for Regulatory Decrees and Settlements Act of 2012."

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

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 3862—Sunshine for Regulatory Decrees and Settlements Act of 2012.

As ordered reported by the House Committee on the Judiciary on March 27, 2012.

H.R. 3862 would modify the process of developing consent decrees and settlement agreements that require Federal agencies to take specified regulatory actions. Under the bill, complaints against Federal agencies, the terms of the consent decrees or settlement agreements, and the award of attorneys' fees would need to be published in an accessible manner, including electronically. The legislation would require that any proposed consent decree or settlement agreement be published in the Federal Register for 60 days of public comment prior to filing with the court.

H.R. 3862 also would require that other affected parties be afforded an opportunity to intervene prior to the filing of the consent decree or settlement agreement with the court. After a motion to intervene has been granted, the parties would be referred to a mediation program or magistrate judge.

Under the bill, agencies that submit certain consent decrees or settlement agreements to the court would be required to inform the court of the agency's other outstanding mandatory duties under current law and explain how the proposed consent decree or settlement agreement would further the public interest. The legislation would require the Attorney General (for cases litigated by the Department of Justice), or the head of any agency that independently litigates a case, to certify to the court his or her approval of certain types of settlement agreements and consent decrees. H.R. 3862 also would require courts to more closely review consent decrees when agencies seek to modify them.

Based on information provided by Department of Justice and assuming the appropriation of the necessary funds, CBO estimates that implementing H.R. 3862 would cost $7 million over the 2013–2017 period, primarily because litigation involving consent decrees

and settlement agreements would probably take longer under the bill as agencies would face new requirements to report more information to the public and other additional administrative costs.

Enacting H.R. 3862 could affect direct spending; therefore, pay-as-you-go procedures apply. Enacting the bill would not affect revenues. Under the Clean Air Act, the Clean Water Act, and other statutes, successful plaintiffs are entitled to repayment of attorneys' fees through the Treasury's Judgment Fund. Such payments have averaged about $2 million annually in recent years. By lengthening the process of developing consent decrees, H.R. 3862 could increase the amount of reimbursable attorneys' fees, thus increasing the payments from the Judgment Fund. However, the increased length of the process could deter future lawsuits and decrease the number of cases. On net, CBO estimates that enacting the legislation would increase direct spending by an insignificant amount in each year and over the 2013–2022 period.

H.R. 3862 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on State, local, or tribal governments.

The CBO staff contact for this estimate is Martin von Gnechten. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

Performance Goals and Objectives

The Committee states, pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, that H.R. 3862 improves the transparency and judicial scrutiny of consent decrees and settlement agreements in litigation brought to force new agency regulatory action; increases procedural and substantive fairness to the public, affected entities and relevant States, localities and Tribes in that litigation and administrative proceedings carried out pursuant to those consent decrees and settlement agreements; assures compliance with requirements of administrative procedure during the course of those administrative proceedings; and enhances flexibility for judicial modification of such consent decrees to account for changing facts and circumstances and competing agency duties.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 3862 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of rule XXI.

Section-by-Section Analysis

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

Sec. 1. Short Title. Section 1 sets forth the short title of the bill as the "Sunshine for Regulatory Decrees and Settlements Act of 2012."

Sec. 2. Consent Decree and Settlement Agreement Reform. Section 2(a) applies the bill to specific classes of consent decrees and settlements, as follows:

Sec. 2(a)(1)—consent decrees and settlement agreements in lawsuits under chapter 7 of title 5, United States Code, or any other

statute authorizing suit against the United States, to compel agency action alleged to be unlawfully withheld or unreasonably delayed that pertains to a regulatory action that affects the rights of private parties other than the plaintiff or the rights of State, local or tribal governments; and

Sec. 2(a)(2)—any other consent decree or settlement agreement that requires agency action that pertains to a regulatory action that affects the rights of private parties other than the plaintiff or the rights of State, local or tribal governments.

Section 2(b) of the bill sets forth the following requirements applicable to consent decrees and settlement agreements covered by the bill:

Sec. 2(b)(1)—consent decrees, settlement agreements, and their related complaints, legal bases and attorneys' fee awards must be made publicly available through readily accessible means, including electronic means;

Sec. 2(b)(2)—the opportunity for affected parties to intervene in the litigation must conclude before consent decrees and settlement agreements may be proposed to the court;

Sec. 2(b)(3)—in considering motions to intervene, the court must adopt a rebuttable presumption that an intervenor-movant's rights are not adequately represented by the plaintiff or defendant agency, and must take due account of whether the movant is a State, local or Tribal government that coadministers with the Federal Government the statutory provisions at issue in the litigation or administers State, local or Tribal regulatory authority that would be preempted by the defendant agency's discharge of the regulatory duty alleged in the complaint;

Sec. 2(b)(4)—if the court grants intervention rights, the court is to include the plaintiff, defendant agency and intervenors in court-administered settlement talks;

Sec. 2(b)(5)—the defendant agency must publish any proposed consent decree or settlement agreement for no fewer than 60 days of public comment before filing it with the court, allowing public comment on any issue related to the matters alleged in the complaint or addressed or affected by the consent decree or settlement agreement and specifying the statutory basis for the decree or settlement;

Sec. 2(b)(6)—the defendant agency must respond to public comments received, submit to the court a summary of the public comments and agency responses when it moves for entry of the consent decree or dismissal of the case based on the settlement agreement, inform the court of the statutory basis for the decree or settlement, certify the administrative record for the notice and comment proceeding to the court for inclusion in the judicial record, and make the administrative record fully accessible to the court;

Sec. 2(b)(7)—the court must include in the judicial record the administrative record certified by the agency under subparagraph (6);

Sec. 2(b)(8)—if a consent decree or settlement agreement requires agency action by a date-certain, the defendant agency must inform the court of any uncompleted mandatory agency duties the decree or agreement does not address, how the decree or agreement would affect the discharge of those duties, and why the decree's or agreement's effects on the order in which the agency discharges its mandatory duties is in the public interest;

Sec. 2(b)(9)—when it considers motions to participate as amicus curiae in briefing over whether it should enter or approve a consent decree or settlement, the court must adopt a rebuttable presumption that favors amicus participation by those who filed public comments on the decree or settlement during the agency's notice and comment process;

Sec. 2(b)(10)—the court must ensure that a proposed consent decree or settlement agreement allows sufficient time and procedure for the agency to comply with the APA and other applicable statutes that govern rulemaking, and, unless contrary to the public interest, any executive orders that govern rulemaking;

Sec. 2(b)(11)—the defendant agency may, at its discretion, hold a public agency hearing on whether to enter into the consent decree or settlement agreement. If such a hearing is held, then a summary of the proceedings must be made available to the court, the hearing record must be certified to the court as part of the administrative record and included in the judicial record, and full access to the hearing record must be given to the court;

Sec. 2(b)(12)—the Attorney General or, in cases litigated by agencies with independent litigating authority, the defendant agency head, must certify to the court that he or she approves of a proposed consent decree or settlement agreement that does not conform to Meese Memo standards.

Sec. 2(c) requires agencies to submit annual reports to Congress on the number, identity, and content of consent decrees and settlement agreements, including the statutory bases of the decrees and settlements, and the decrees' and settlements' related complaints and attorneys' fee awards.

Sec. 3. Motions to Modify Consent Decrees. The bill establishes a *de novo* standard of review for the courts' consideration of motions to modify covered consent decrees due to agency obligations to fulfill other duties or changed facts and circumstances.

Sec. 4. Effective Date. The bill becomes effective upon enactment and applies to any covered consent decree or settlement agreement proposed to a court after that date.

Dissenting Views

INTRODUCTION

As with most of the anti-regulatory bills that the Committee has considered this Congress, H.R. 3862, the "Sunshine for Regulatory Decrees and Settlements Act of 2012," is yet another solution in search of a problem. This ill-conceived bill imposes numerous new procedural burdens on agencies and courts with respect to consent decrees and settlement agreements in lawsuits to compel agency action that involve regulatory power, which affects the rights of non-parties to such lawsuits. Without any evidence, proponents of this legislation allege that it is needed to restrain agencies and interest groups from colluding to "sue and settle," whereby sympathetic Federal agencies enter into consent decrees or settlement agreements with public interest groups as a form of informal rulemaking that avoids compliance with the rulemaking procedures outlined in the Administrative Procedure Act[1] (APA) and other statutes. Procedures have long been in place to address this problem that circumscribe the ability of agencies to enter consent decrees and settlement agreements so as to avoid any potential "sue and settle" situations. By discouraging the use of consent decrees and settlement agreements, encouraging costly and protracted litigation over ambiguous and ill-defined terms, imposing unduly burdensome procedural requirements on agencies and courts, and providing increased opportunities for dilatory tactics by those opposed to the agency action at issue in the underlying litigation, H.R. 3862 will exponentially increase costs for American taxpayers. Finally, this bill improperly circumvents the rules enabling process with respect to third-party interveners and modifications of consent decrees and, more broadly, undermines the judiciary's traditional role in resolving disputes equitably and efficiently.

A broad coalition of 41 civil rights, environmental, consumer protection, and other public interest groups oppose H.R. 3862, including the Alliance for Justice, the American Association for Justice, the Center for Food Safety, the Center for Science in the Public Interest, Defenders of Wildlife, Earthjustice, the Natural Resources Defense Council, OMB Watch, Public Citizen, and the Sierra Club.[2]

We likewise strongly oppose H.R. 3862 and respectfully dissent from the Committee views on this legislation.

DESCRIPTION AND BACKGROUND

Representative Ben Quayle (R–AZ), together with Representatives Howard Coble (R–NC) and Dennis Ross (R–FL), introduced

[1] 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 5372, 7521 (2012).

[2] Letter to Rep. John Conyers, Jr. (D–MI), Ranking Member, H. Comm. on the Judiciary from 41 public interest groups (Mar. 19, 2012) (on file with the H. Comm. on the Judiciary, Democratic Staff).

H.R. 3862 on February 1, 2012. A mere 2 days later, the Subcommittee on Courts, Commercial and Administrative Law (CCAL or Subcommittee) held a hearing on the bill.[3] The Majority witnesses were: Roger Martella, Sidley & Austin LLP; Andrew Grossman, Heritage Foundation; and David Schoenbrod, New York Law School. The Minority witness was John Cruden, President, Environmental Law Institute.

A description of the bill's substantive provisions follows. Section 2(a) of the bill specifies that the legislation applies to a consent decree or settlement agreement in a lawsuit to compel agency action alleged to have been "unlawfully withheld or unreasonably delayed" that pertains to a regulatory action affecting "the rights of private parties other than the plaintiff" or the authority of state or local governments that was brought under: (1) the judicial review provisions of the APA; or (2) any other statute authorizing such action. The bill also applies to any other consent decree or settlement agreement that requires agency action pertaining to a regulatory action affecting private third party rights or the authority of a state or local government. It should be noted that H.R. 3862 fails to define the key terms "private parties" and "rights." As a result, the bill opens the door to litigation over the meaning of these threshold terms.

Section 2(b) imposes numerous new requirements on agencies and courts with respect to a consent decree or settlement agreement described in section 2(a) of the bill. First, it requires publication of the complaint, consent decree or settlement agreement, and any award of attorneys fees or costs, in a readily accessible manner. Second, a party may not file a motion for a consent decree or to dismiss the case pursuant to a settlement agreement until the "conclusion of an opportunity for affected parties to intervene in the action." H.R. 3862, however, does not define when an affected party's opportunity to intervene will have concluded, nor does it define what would constitute an "opportunity to intervene," thereby opening the door to litigation over the meaning of these critical terms. This provision could be read to prohibit early settlement of disputes in light of the ambiguity over when an "opportunity" to intervene has "concluded."

Third, where a third party moves to intervene on the basis that such party would be affected by the regulatory action alleged to be unlawfully withheld or unreasonably delayed, the court *must* presume (subject to rebuttal) that the interests of such party would not be adequately represented by the current parties to the action. This provision upends current law regarding the adequacy of legal representation under Federal Rule of Civil Procedure 24 by shifting the burden to establish adequacy of representation to the nonmovants.

---

[3] *The Federal Consent Decree Fairness Act and the Sunshine for Regulatory Decrees and Settlements Act: Hearing on H.R. 3041 and H.R. 3862 Before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary,* 112th Cong. (2012) [hereinafter "Subcommittee Hearing"]. We note that the Minority witness for this hearing did not comment on H.R. 3862 in his written testimony because he felt uncomfortable discussing a yet-to-be-introduced bill while preparing his written testimony, which had to be submitted to the Committee before introduction of H.R. 3862. We also note that while the Majority shared a draft of this bill with Minority staff about a week prior to the hearing, a draft bill is, by definition, always subject to change prior to introduction (as proved to be the case in this instance) and cannot be relied on by staff or witnesses when preparing for a hearing on that bill.

Fourth, if the court grants the motion to intervene, the court *must* refer the action to its mediation or alternative dispute resolution program or a district judge, magistrate judge, or special master to facilitate settlement discussions that must include the plaintiff, the defendant agency and the intervenors. This provision, combined with the rebuttable presumption that a third party's interest would not be represented adequately by the current parties to the action, allows third parties that oppose enforcement of the regulation at issue to obstruct and delay regulations. This provision also imposes unwanted mediation and other alternative dispute resolution costs on plaintiffs and defendant government agencies.

Fifth, the defendant agency must publish any proposed consent decree or settlement agreement in the Federal Register and make it available electronically for public comment for at least 60 days before filing it with the court. The agency must allow public comment on any issue related to the matters alleged in the complaint or addressed or affected by the consent decree or settlement agreement.

Sixth, the defendant agency must respond to any such public comments. In addition, such agency, when moving that the court enter the consent decree or dismiss the action pursuant to a settlement agreement, must: (1) inform the court of the statutory basis for the consent decree or settlement agreement and its terms; (2) submit to the court a summary of the public comments and agency responses; (3) certify the administrative record of notice and comment proceeding to the court; and (4) make that record fully accessible to the court.

Seventh, the court must include in the judicial record the administrative record certified by the agency, including its responses to public comments.

Eighth, if the consent decree or settlement agreement requires an agency action by a certain date, the agency *must* do the following when moving for the entry of such decree or dismissal based on such agreement: (1) inform the court of any uncompleted mandatory duties to take regulatory action that the decree or agreement does not address; (2) explain how the decree or agreement, if approved, would affect the discharge of those duties; and (3) explain why the decree's or agreement's effects on the order in which the agency discharges its mandatory duties is in the public interest. This requirement will be burdensome and time-consuming for agencies, with no clear limit on its vague requirements. For example, the meaning of the phrase "would affect the discharge of those duties" could be contested. As with other aspects of H.R. 3862, this provision opens the door to protracted litigation.

Ninth, the court must presume (subject to rebuttal) that it is proper to allow *amicus* participation by *any* party who filed public comments on the consent decree or settlement agreement during the court's consideration of a motion to enter such decree or dismiss the case on the basis of the agreement.

Tenth, the court must ensure that the proposed consent decree or settlement agreement allows sufficient time and procedure for the agency to comply with the APA's requirements and other applicable statutes that govern rulemaking as well as executive orders governing rulemaking, unless contrary to the public interest.

Eleventh, the defendant agency, at its discretion, may hold a public hearing on whether to enter into the consent decree or settlement agreement. If such hearing is held, then a summary of the proceedings and certification of hearing record must be provided to the court. The court must be given access to the hearing record and the full hearing record must be included in the judicial record.

H.R. 3862 incorporates the so-called "Meese Memo" beginning in section 2(b)(12). It is unclear why the Meese Memo needs to be codified in statute, as it is already codified in the Code of Federal Regulations [4] and H.R. 3862's proponents do not claim that the Meese Memo's requirements are not being followed. Section 2(b)(12) provides that the Attorney General, in cases litigated by the Department of Justice, or the head of the defendant Federal agency, in cases litigated independently by that agency, must certify to the court that his or her approval of any proposed consent decree or settlement agreement that does not contain certain specified terms. For consent decrees, these terms are that those that: (1) convert into mandatory duties otherwise discretionary duties of an agency to propose, promulgate, revise or amend regulations; (2) commit the agency to expend funds that Congress has not appropriated and that have not been budgeted for the action or commit an agency to seek a particular appropriation or budget authorization; (3) divest the agency of discretion committed to it by Congress or the Constitution, whether such discretionary power was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties; or (4) otherwise afford relief that the court could not enter on its own authority upon a final judgment in the litigation.

With respect to a settlement agreement, the terms are those that: (1) interfere with the agency's authority to revise, amend or issue rules pursuant to the APA or any other statute or executive order that prescribe rulemaking procedures; (2) commit the agency to expend funds that Congress has not appropriated and that have not been budgeted; or (3) provide a remedy for the agency's failure to comply with the settlement agreement other than the revival of the action resolved by such agreement, if the agreement commits the agency to exercise its discretion in a particular way and such discretionary power was committed to the agency by Congress or the Constitution to respond to changing circumstances to make policy or managerial choices, or to protect the rights of third parties.

Section 2(c) requires each agency to submit an annual report to Congress on the number, identity, and content of complaints, consent decrees and settlement agreements described in this section for that year and any awards of attorneys fees or costs in actions resolved by such decrees or agreements.

When a defendant agency moves that the court modify a previously entered consent decree described in section 2 and the basis of such request is that the terms of the decree are no longer fully in the public interest as a result of the agency's obligations to fulfill other duties or because of changed facts and circumstances, section 3 of the bill requires the court to review the motion and the consent decree *de novo.* This provision modifies the existing procedure

[4] 28 C.F.R. §§ 0.160–0.163 (2012).

for modification of consent decrees that is outlined in Federal Rule of Civil Procedure 60 and in Supreme Court precedent.[5]

CONCERNS WITH H.R. 3862

I. H.R. 3862 IS A SOLUTION IN SEARCH OF A PROBLEM

The purported justification for H.R. 3862—namely, that Federal agencies intentionally collude with public interest organizations and other similar types of plaintiffs in entering into consent decrees or settlements as a way of circumventing proper rulemaking procedures—is unsupported by any evidence other than the bald assertions of the Majority's witnesses at the Subcommittee hearing on this bill. In stark contrast, the Minority witness, John Cruden, a senior career official in the Justice Department's Environment and Natural Resources Division (ENRD) for more than two decades during two Republican and two Democratic Administrations, testified that he was unaware of any instance of this so-called collusive "sue and settle" activity occurring during his tenure.

Consent decrees and settlements generate many benefits by facilitating the enforcement of laws, ensuring judicial efficiency, and protecting the public fisc. Nevertheless, proponents of H.R. 3862 find much to be troubling about their use by Federal agencies. For example, Roger Martella testified before the CCAL Subcommittee that "certain groups increasingly are employing a 'sue and settle' approach to interactions with the government on regulatory issues."[6] According to Mr. Martella, under such arrangements, non-governmental organizations use consent decrees and settlements with agencies to dictate agency priorities and set timelines for rulemakings without transparency, opportunity for input from the to-be-regulated entities, or opportunity for judicial review of such agreements.[7]

There is, however, no evidence of so-called "sue and settle" collusion. As a Sierra Club representative noted, this theory is a "sad attempt to create a boogie man out of vital and broadly supported protections that have improved and saved millions of Americans' lives."[8] Likewise, David Goldston, on behalf of the Natural Resources Defense Council (NRDC), testified last year at a House Energy and Commerce subcommittee hearing that the "whole 'sue and settle' narrative is faulty."[9] In a letter to CCAL Subcommittee Chairman Howard Coble and Subcommittee Ranking Member Steve Cohen, three NRDC attorneys further elaborated on this point.

> The premise of [H.R. 3862] is unfounded and indeed unsubstantiated. The "sue and settle" allegations implicit in [the bill] and reflected in the [CCAL] hearing testimony on February 3rd amount to serious charges of intentional wrongdoing—that Federal agencies and third parties con-

---

[5] *See* Frew v. Hawkins, 540 U.S. 431 (2004) (holding unanimously that Rule 60(b)(5)'s procedure for modifying consent decrees does not offend state sovereignty).

[6] Subcommittee Hearing at 26 (written statement of Roger R. Martella, Jr.).

[7] *Id.* at 26–28 (written statement of Roger R. Martella, Jr.).

[8] John McCardle, *House Republicans Accuse EPA, Enviros of Collusion,* N.Y. TIMES, July 15, 2011, available at http://www.nytimes.com/gwire/2011/07/15/15greenwire-house-republicans-accuse-epa-enviros-of-collus-69925.html

[9] *Id*

> spire to settle litigation to advance untoward policy and legal objectives. Yet the written and oral testimony on these bills is devoid of any evidence whatsoever of intentionality. For example, majority witness Andrew Grossman of The Heritage Foundation asserts in his written testimony that "[i]n some cases, these [consent] decrees appear to be the result of collusion, where an agency shares the goals of those suing it and takes advantage of litigation to achieve those shared goals." Nowhere in his written testimony, however, does Mr. Grossman furnish evidence backing this claim; the most he can muster is the weak statement that this "appear[s]" to be the case to him. Similarly, no other witnesses or members at the hearing offered proof that rose above their subjective interpretation or speculation. Unsubstantiated charges from those with an anti-regulatory political agenda should not form the basis for legislation.[10]

Finally, John Cruden, who served as Deputy Assistant Attorney General and in other senior career positions for over 20 years at ENRD, stated in response to his fellow witness' "sue and settle" allegations as follows, emphasizing that agencies enter settlements only when they have failed to meet mandatory rulemaking obligations:

> In my long experience with the types of cases covered by H.R. 3862, [the Environmental Protection Agency or EPA] only agreed to settle when the agency had a mandatory duty to take an action, or to prepare a rule, based on specific legislation enacted by Congress. The settlement in those cases was straightforward: setting a date by which the agency would propose a draft rule and, quite often, a date for final action. Had there not been such a settlement, a Federal court would have issued an injunction setting the date for EPA to take action, since the agency's legal responsibility was quite clear.
>
> Because a proposed rule emerging from a settlement would provide the same notice-and-comment opportunities as any other rulemaking, and because the final rules still would be subject to challenge under the Administrative Procedure Act, this existing process obviously does not avoid public comment, and already allows interested parties their full range of substantive and procedural rights.
>
> . . .
>
> I am not aware of any instance of a settlement, and certainly none I personally approved, that could remotely be described as "collusive." Quite the opposite: in every case of which I am aware, the Department of Justice vigorously represented the Federal agency, defending the agency's

[10] Subcommittee Hearing at 118–119 (Letter to Rep. Howard Coble (R–NC), Chairman, Rep. Trey Gowdy (R–SC), Vice-Chairman, and Rep. Steve Cohen (D–TN), Ranking Member,, Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary from Jon P. Devine, Jr., *et al.* attorneys with the Natural Resources Defense Council (Feb. 14, 2012).

> legal position and obtaining in any settlement the best possible terms that were consistent with the controlling law.[11]

In the absence of actual evidence that Federal agencies collude with plaintiffs to circumvent proper rulemaking procedures by use of consent decrees and settlement agreements, H.R. 3862 simply addresses a phantom menace.

II. H.R. 3862 IS UNNECESSARY IN LIGHT OF THE JUSTICE DEPARTMENT'S "MEESE MEMO" AND OTHER EXISTING LEGAL MECHANISMS

H.R. 3862's proponents have never explained why, to the extent that "sue and settle" is an actual problem, the so-called "Meese Memo" is insufficient to address such a problem, nor have they offered evidence that the Department of Justice and Federal agencies are not complying with its requirements. The Meese Memo, codified in the Code of Federal Regulations,[12] specifies a process that already addresses the purported problem sought to be addressed by H.R. 3862's proponents. Moreover, H.R. 3862's proponents offer no rationale as to why the Meese Memo needs to be codified in statute, as this bill does. Finally, other legal mechanisms already exist for addressing the proponents' purported concerns about transparency and public input in consent decree and settlement negotiations.

In 1986, then-United States Attorney General Edwin Meese issued a set of guidelines for Department of Justice (DOJ) and other government attorneys in entering into consent decrees and settlement agreements in response to the following concerns:

> In the past . . . executive departments and agencies have, on occasion, misused [consent decrees] and forfeited the prerogatives of the Executive in order to preempt the exercise of those prerogatives by a subsequent Administration. These errors sometimes have resulted in an unwarranted expansion of the powers of [sic] judiciary—often with the consent of government parties—at the expense of the executive and legislative branches.[13]

The Meese Memo identified three types of potentially problematic provisions in consent decrees: (1) a department or agency agreed to promulgate regulations and may have relinquished its power to amend those regulations or promulgate new ones without court participation; (2) a consent decree may divest a department or agency of discretion committed to it by the Constitution or a statute where exercise of discretion is ultimately subject to court approval; and (3) a department or agency has agreed to use its best efforts to obtain funding from Congress in order to enforce the decree.[14]

---

[11] Subcommittee Hearing at 106–107 (Response to Post-Hearing Questions from John C. Cruden).

[12] 28 C.F.R. §§ 0.160–0.163 (2012).

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

[14] *Id.*

As a result, the Meese Memo states that departments and agencies should not enter into a consent decree that: (1) "converts into a mandatory duty the otherwise discretionary authority of the Secretary or agency administrator to revise, amend, or promulgate regulations"; (2) "commits the department or agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question, or commits a department or agency to seek a particular appropriation or budget authorization"; or (3) "divests the Secretary or agency administrator, or his successors, of discretion committed to him by Congress, or the Constitution where such discretionary power was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties." [15] The policy outlines similar restrictions on settlement agreements.[16] If special circumstances require departure from these guidelines, the Attorney General, the Deputy Attorney General, or the Associate Attorney General must authorize such a departure.[17] The Meese Memo ultimately was incorporated into the Code of Federal Regulations.[18]

H.R. 3862's proponents offer no evidence that DOJ and agencies are not complying with the Meese Memo. As Mr. Cruden noted, "I am personally unaware of any examples of the Department failing to comply with the existing C.F.R. provision [codifying the Meese Memo]; nor did the other witnesses present any such examples at the hearing." [19] Moreover, the Majority's witnesses at the legislative hearing on H.R. 3862 specifically praised the Meese Memo and offered no argument as to why it was insufficient to address the alleged "sue and settle" problem.[20]

In addition to the Meese Memo, there are other mechanisms available that already address the concerns of H.R. 3862's proponents. For example, parties whose interests may be affected by a consent decree or settlement may move to intervene in the case pursuant to Federal Rule of Civil Procedure 24, with the moving party bearing the burden of demonstrating that the parties to the case do not adequately represent the movant's interest.[21] Similarly, any rulemaking that is required pursuant to a consent decree or settlement agreement would still be subject to the APA's notice and comment procedures, and affected parties who are not parties to the consent decree or settlement agreement would still have the opportunity to weigh in on any negative impacts of a proposed rule.[22]

In sum, to the extent that the Federal Government is, in fact, tempted to use consent decrees and settlement agreements to do an end-run around the rulemaking procedures of the APA and other statutes, the Meese Memo already addresses such concerns, making H.R. 3862 unnecessary.

---

[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] 28 C.F.R. §§ 0.160–0.163 (2012).
[19] Subcommittee Hearing at 111 (Response to Post-Hearing Questions from John C. Cruden).
[20] *See id.* at 60 (Written Statement of Andrew M. Grossman) ("The Meese Policy was, and remains, notable for its identification of a serious breach of separation of powers, with serious consequences, and its straightforward approach to resolving that problem. By reducing the issue, and its remedy, to their essentials, the Meese Policy identifies and protects the core principles at stake. This explains its continued relevance.").
[21] Fed. R. Civ. P. 24(a)(2).
[22] 5 U.S.C. § 553 (2012).

III. H.R. 3862 WILL FAVOR INDUSTRY INTERESTS AT TAXPAYERS' EXPENSE

In addition to being unnecessary, H.R. 3862 threatens to impose tremendous financial costs on taxpayers. It would do so in several ways. First, it provides numerous new opportunities for opponents of regulation to engage in dilatory tactics to delay resolution of pending litigation, further increasing costs for agencies and courts and, ultimately, taxpayers. Second, many of its key terms are ambiguous, which will lead to confusion, litigation, and delay in any proposed consent decree or settlement negotiation. Third, it imposes numerous burdensome procedural requirements on agencies and courts when they are considering consent decrees and settlements concerning regulatory action, which will further add to the costs borne by those entities. Fourth, the bill's cumulative effect would be to discourage agencies from entering into consent decrees and settlement agreements when they might otherwise have done so, leading to unnecessarily protracted and costly litigation.

A. H.R. 3862 opens the door to dilatory tactics by industry and other opponents of agency action.

Various provisions of H.R. 3862 would give opponents of regulations opportunities to effectively stifle rulemaking by allowing them to slow down one of the processes by which agencies agree to abide by their legal obligations. As Mr. Cruden noted in his testimony, agencies enter into consent decrees and settlement agreements when they have a mandatory duty to act, including the requirement to promulgate a new rule.[23] By opening opportunities for industry to slow down this process, H.R. 3862 effectively makes it more expensive for agencies to do what Congress has mandated it to do.

Section 2(b)(3) of the bill, for example, mandates that a court presume, subject to rebuttal, that the interests of any third party affected by the agency action in dispute in the underlying litigation will not be represented by the parties to that litigation. This presumption upends current law, which places the burden of proving that the interests of a putative intervenor in a case are not represented by the parties in the case on the third party seeking to intervene in that case, not on the parties to the litigation.[24] Effectively, this shift in the burden of proof on the question of the representation of third-party interests is a way to make it much easier for any party not a party to the case to intervene in a case involving a consent decree or settlement agreement that seeks to compel agency action.

Hypothetically, under H.R. 3862, if the regulatory action at issue involved the Clean Air Act, a person who breathes air would have the right to intervene in a consent decree or settlement agreement, as would any affected industry entity, or anyone else in the United States, subject to a refutable presumption that the parties to the litigation do not adequately represent the third party's interest. If

[23] *See* Subcommittee Hearing at 106–107 (Response to Post-Hearing Questions from John C. Cruden) (discussing EPA's settlements).
[24] Fed. R. Civ. P. 24.

a court were to read section 2(b)(3) broadly, this provision could open the door to almost anyone intervening in such a case.

Section 2(b)(4) of H.R. 3862 also tilts the playing field sharply in favor of industry interests by giving them an opportunity to slow down agency compliance with Federal law. Under this provision, courts must delay entry of a consent decree or settlement agreement by referring settlement discussions to the court's mediation or alternative dispute resolution program, or to a district judge, magistrate judge, or special master. Such discussions must include the plaintiff, defendant agency, and any third party intervenors. In addition to delaying the settlement process, this provision would impose costs on plaintiffs and defendant agencies alike by forcing them to pay mediation and other dispute resolution costs beyond what they may have had to pay in the absence of this process.

H.R. 3862 provides other opportunities for industry to engage in dilatory tactics in sections 2(b)(5) and 2(b)(6), which require an agency to publish any proposed consent decree or settlement agreement and to allow at least 60 days for public comments. The agency must then respond to every comment. Pursuant to these provisions, any industry would be able to flood an agency with comments in an effort to stall resolution of the underlying dispute, which, as noted, is usually about enforcing rulemaking deadlines.

As if forcing an agency to respond to public comments on a consent decree or settlement proposal was not enough, section 2(b)(9) requires a court to presume *amicus* status for any member of the public that submits comments on a proposed consent decree or settlement agreement, subject to rebuttal, in any proceeding on a motion to enter such consent decree or settlement agreement. This provision would further allow industry and other regulatory opponents to delay resolution of the underlying dispute between the plaintiff and the defendant agency.

B. H.R. 3862 uses ambiguous language in many key provisions, opening the door to confusion, litigation, and delay in resolving disputes.

Many of H.R. 3862's key provisions are written in ambiguous, ill-defined language, which will foster costly litigation over their meaning and cause delay in resolving the underlying lawsuit against the Federal agency. For example, section 2(a) states that the bill applies to consent decrees and settlement agreements in an action to compel "agency action alleged to be unlawfully withheld or unreasonably delayed that pertains to a regulatory action."[25] It is unclear what the distinction is between "agency action" and "regulatory action," what the scope of the phrase "pertain to" is, or what "unlawfully withheld" and "unreasonably delayed" mean, opening the door to litigation over the meaning of these threshold terms.

Additionally, section 2(a) refers to "private parties" whose "rights" are affected by the regulatory action, but the bill fails to define what "private parties" or "rights" means.[26] As noted above, without a definition, almost any third party could, in theory, inter-

[25] H.R. 3862, 112th Cong. §§ 2(a)(1), 2(a)(2) (2012).
[26] *Id.*

vene in a consent decree or settlement discussion under this bill. As with other ambiguous language in this bill, confusion and a lack of clarity over the meaning of these terms will lead to litigation.

Section 2(b)(2), which prevents entry of a consent decree or dismissal order pursuant to a settlement agreement until "the conclusion of an opportunity for affected parties to intervene in the action,"[27] is inherently vague and thus will prompt extensive litigation. H.R. 3862 provides no clue as to what constitutes a "conclusion of an opportunity" for a party to intervene.

Finally, H.R. 3862's requirement that, under certain circumstances, agencies must create a catalog of all mandatory rulemaking duties and describe how a consent decree or settlement agreement "would affect the discharge of those duties," in addition to being burdensome, time-consuming, and a drain on limited agency resources, is also full of ambiguity.[28] The requirement, outlined in section 2(b)(8), does not define what "affect the discharge of those duties" means.

C. H.R. 3862 imposes several burdensome procedural requirements on agencies and courts with respect to entering into consent decrees and settlement agreements.

H.R. 3862 imposes several new procedural requirements on agencies and courts that are designed to slow down the resolution of litigation over an agency's failure to meet a statutory deadline or other regulatory obligation. These requirements include: (1) a limitation on when a party may file a motion for a consent decree or to dismiss the case pursuant to a settlement agreement, (2) a mandate requiring the court to presume that the interests of a third party seeking to intervene in settlement discussions is not adequately represented, (3) a requirement that the court refer consent decree or settlement discussions to mediation or another alternative dispute resolution mechanism, (4) a requirement that the defendant agency publish a proposed consent decree or settlement agreement, (5) allowing public comments to which the agency must respond, (6) a requirement that an agency submit to a court explanations of vaguely defined factors underlying a proposed consent decree or settlement agreement whenever such decree or agreement requires agency action by a date certain, and (7) a requirement that a court to allow *amicus* participation in any motion to enter a consent decree or settlement agreement by any party that submitted public comments on such decree or agreement.

Implementing any one of these new requirements, much less all of them, drains agency and judicial time and resources without adding to the fairness of any consent decree or settlement agreement. In times such as now when Federal agencies and the court system are facing budgetary shortfalls, we should be crafting legislation to streamline and improve efficiencies for all. Unfortunately, H.R. 3862 will have the opposite result.

---

[27] *Id.* at § 2(b)(2).
[28] *Id.* at § 2(b)(6).

D. The cumulative effect of H.R. 3862's provisions will be to discourage the use of consent decrees and settlement agreements, forcing expensive and time-consuming litigation.

By facilitating dilatory conduct by anti-regulatory forces, using vague language in key provisions, and imposing numerous and burdensome procedural requirements on agencies and courts with respect to consideration of consent decrees and settlement agreements, H.R. 3862's cumulative effect will be to discourage the use of consent decrees and settlement agreements and thereby delay or eliminate early resolution of litigation against the government. This legislation will ultimately increase costs for taxpayers, who must pay for the protracted litigation associated with fewer consent decrees and settlement agreements. Indeed, the Congressional Budget Office notes in its analysis of H.R. 3862 that the bill would impose millions of dollars in costs, "primarily because litigation involving consent decrees and settlement agreements would probably take longer under the bill as agencies would face new requirements to report more information to the public and other additional administrative costs." [29]

Consent decrees benefit both plaintiffs and defendants. For plaintiffs, consent decrees allow for meaningful and timely relief without the risks and costs associated with prolonged litigation. Governmental and other defendants can also avoid the burdens and costs of protracted litigation and the particular risk that a costly or cumbersome solution simply will be imposed on them should they lose the suit. Additionally, defendants can avoid judicial determination of liability and obtain flexibility in terms of how they implement needed reforms. This is why the use of consent decrees in Federal court litigation is a longstanding part of the judicial and Congressional policy of encouraging alternative dispute resolution.[30] H.R. 3862 flies in the face of this policy and will ultimately cost plaintiffs and governmental defendants more in litigation costs by making consent decrees and settlements more difficult to obtain. As Minority witness John Cruden explained:

> The judicially approved consent decree is a valuable settlement tool that promotes expeditious resolution of cases, saves transaction costs for all parties and for the judicial system, and achieves finality while protecting the parties to the agreement.
>
> . . .
>
> As compared to full-blown litigation, consent decrees allow for a faster and less expensive, but still comprehensive resolution of a dispute. Congress' underlying statutory objectives are satisfied, while at the same time, the [defendant] is able to exercise its sovereignty through the negotiation of binding contracts and the resolution of potentially onerous pending litigation. Indeed, the finality and certainty

[29] Congressional Budget Office, Cost Estimate for H.R. 3862, the Sunshine for Regulatory Decrees and Settlements Act of 2012, June 25, 2012, *available at* http://cbo.gov/publication/43351.

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

> afforded by the consent decree makes it far easier for a [defendant] to follow through on its commitments. . . .[31]

By making consent decrees and settlement agreements more difficult and costly to enter into, H.R. 3862 will ultimately cost the taxpayer more in litigation costs and, possibly, expensive judgments.

IV. H.R. 3862 SUBVERTS THE FEDERAL RULES OF CIVIL PROCEDURE AND JUDICIAL DISCRETION

H.R. 3862 overrides the Federal Rules of Civil Procedure, the courts' power to manage litigation in several respects, and their authority to consider equities in their decisionmaking. First, it undermines Federal Rule of Civil Procedure 24, which sets forth the process for determining when a third party can intervene in a pending case, placing the burden on the third party to show that its interests are not adequately represented by the plaintiff and the defendant. As already discussed, H.R. 3862 overrides this rule by requiring courts to presume the opposite, namely that the parties in the litigation do not adequately represent the interests of the third party.

Second, H.R. 3862 tampers with the process for modifying consent decrees under Federal Rule of Civil Procedure 60(b)(5). Under that provision, a court can modify a consent decree when "the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable."[32] Section 3(b) of H.R. 3862 attempts to skew the result of such a motion to modify by specifying that when a defendant agency moves to modify a previously entered consent decree, the court "shall" review the motion and consent decree *de novo* whenever the motion to modify is based on the grounds that the decree is "no longer fully in the public interest due to the agency's obligations to fulfill other duties or due to changed facts and circumstances." This provision clearly is intended to result in modification or revocation of an existing consent decree when a government agency moves to do so, regardless of the equities involved, which Rule 60 permits a court to consider.

Beyond overriding the civil procedure rules at issue, the bill hamstrings judicial discretion in matters concerning the management of litigation before a court. In addition to questions about intervention or modification of consent decrees, H.R. 3862 repeatedly requires courts to make certain presumptions (subject to rebuttal) on other similar litigation management issues such as when to permit *amicus* participation by third parties, when to enter a consent decree or settlement agreement, and when to refer matters to mediation, other alternative dispute resolution, a special master, or another judge. In short, H.R. 3862 seeks to dictate courtroom management issues that have traditionally been left to judges to decide. Such a lack of deference to courts is a troubling result for this Committee, in particular, to embrace.[33]

---

[31] Subcommittee Hearing at 108 (Response to Post-Hearing Questions from John C. Cruden).
[32] Fed. R. Civ. P. 60(b)(5).
[33] Congress long ago recognized the need to defer to courts on such questions of litigation and courtroom management when it enacted the Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2012), which instituted an extensive process whereby the courts themselves drafted rule amendments,

V. AMENDMENTS

To highlight the foregoing concerns with the bill, several Members offered a series of amendments illustrating the effect it would have on rules to protect public health and safety. All of these amendments exempted from H.R. 3862 consent decrees and settlement agreements concerning certain categories of potential rules.

For example, Representative John Conyers, Jr. (D–MI), the Committee's Ranking Member, offered an amendment that would have exempted from the bill any consent decree or settlement agreement concerning privacy protection. This amendment was defeated by a 12 to16 vote.

Similarly, Representative Jerrold Nadler (D–NY) offered an amendment that would have exempted from the bill any consent decree or settlement agreement concerning a potential rule regarding nuclear reactor safety. His amendment was defeated by a 13 to18 vote.

An amendment that would have exempted from the bill any consent decree or settlement agreement concerning a potential rule regarding environmental justice in low-income minority communities as defined by Executive Order 12898 was offered by Representative Maxine Waters (D–CA). This amendment was defeated by a 13 to 15 vote.

Representative Sheila Jackson Lee (D–TX) offered an amendment that would have exempted from the bill any consent decree or settlement agreement concerning a potential rule regarding the prevention of birth defects. Her amendment was defeated by a 14 to 16 vote.

Representative Hank Johnson (D–GA) offered four amendments. First, he offered an amendment that would have exempted from the bill any consent decree or settlement agreement concerning a potential rule regarding implementation of the Patient Protection and Affordable Care Act of 2010. This amendment was defeated by a 7 to 11 vote. Second, he offered an amendment that would have exempted from the bill any consent decree or settlement agreement concerning a potential rule that the Office of Management and Budget determines would result in net job creation. This amendment was defeated by voice vote. Third, he offered an amendment that would have exempted from the bill any consent decree or settlement agreement concerning a potential rule protecting against discrimination on the basis of race, sex, national origin, or other protected characteristic. This amendment was defeated by a 9 to 10 vote. Fourth, he offered an amendment that would have exempted from the bill any consent decree or settlement agreement concerning a potential rule regarding the protection of children from dangerous or defective products. This amendment was defeated by a 10 to 14 vote.

CONCLUSION

H.R. 3862 is deeply flawed for many reasons. This bill is truly a solution in search of a problem, as no evidence exists to support

---

subject to Congress's approval. That process involves participation by court experts, the public, and Congress and the Executive Branch, and has worked well for nearly 80 years. H.R. 3862 simply runs roughshod over that process.

the claim that agencies "collude" with plaintiffs to enter consent decrees or settlement agreements. Procedures, originally implemented during the Reagan Administration and carried forward to this day, along with other existing legal mechanisms, have been more than adequate to deal with any such problem. Other than unsupported allegations, H.R. 3862's proponents have failed to offer a convincing explanation as to why current law is insufficient in that regard. The legislation would also increase costs for taxpayers in multiple ways and give the private sector numerous opportunities to delay resolution of litigation intended to force agencies to meet their legal obligations. Whether purposely or as a result of sloppy drafting, the bill employs ambiguous terms in key provisions that will generate much litigation over their meaning. In addition, H.R. 3862 imposes numerous burdensome procedural requirements on agencies and courts, and, ultimately, will make it much harder for these entities to use a time-honored tool that helps to resolve litigation quickly and cost-effectively. Finally, H.R. 3862 undermines existing civil procedure rules and evinces disrespect for courts' authority.

For these reasons, we respectfully dissent and urge our colleagues to oppose this bill.

JOHN CONYERS, JR.
ROBERT C. "BOBBY" SCOTT.
MELVIN L. WATT.
ZOE LOFGREN.
SHEILA JACKSON LEE.
STEVE COHEN.
HENRY C. "HANK" JOHNSON, JR.
MIKE QUIGLEY.
JUDY CHU.
TED DEUTCH.
JARED POLIS.

○