

Testimony
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Indiana Department of Environmental Management
to
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Hearing on H.R. 1493, the "Sunshine for Regulatory Decrees and Settlements Act of 2013"
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I am Thomas Easterly, the Commissioner of the Indiana Department of Environmental Management and the Chair of the Environmental Council of the State's Compliance Committee. I thank Chairman Bachus and Ranking Member Cohen for inviting me to testify today. I am representing both ECOS and my own state. ECOS is the national non-partisan, non-profit organization of the state and territorial environmental agencies and their leaders. Today I will be commenting on our organization's position on the Environmental Protection Agency's use of "consent decrees," and the impact this has on the operations of state environmental agencies. I will present some examples from my own state, but no national statistics on the impacts because we have conducted no study on these as yet. I will explain why in my testimony.

States implement most of the national environmental statutes. States and EPA have a partnership in implementing the nation's environmental statutes. EPA's primary role is to provide national standards, conduct research, issue rules based on statutory authority, conduct oversight of states, and implement those programs not delegated to the states. The states' role is to implement the national acts (and each state's own statutes), to issue permits, conduct inspections, conduct enforcement, set standards, monitor the environment, and, in general, to be the "boots on the ground." According to data gather by ECOS, states now implement 96.5% of the federal programs that can be delegated to the states. State agencies conduct over 90% of the environmental inspections, enforcement, and environmental data collection, and issue a similar amount of all the environmental permits. States also supply most of the funding for the implementation of the delegated federal programs – typically 80% of the actual cost.

EPA and the states have a constant dialogue on how best to implement the national environmental statutes. This dialogue is a necessary part of our partnership. However, from time to time, EPA does not conduct this dialogue. Sometimes this is by choice, but sometimes this stems from its actions on court cases in which a state or the states as a body are not a party. Not every one of these cases presents a problem for states, but sometimes they may. These cases are often settled through the entry of "consent decrees." Consent decrees are between the plaintiff and EPA, and the state environmental agencies are not usually parties in them. However, we are often affected by them. These Consent Decrees can result in unexpected costs to states and cause difficulties in implementing environmental programs.

These Consent Decrees that EPA negotiates with parties sometimes impose requirements on states without notice to, or participation by, the impacted states. At times, these requirements are beyond those clearly articulated in rule or statute. While the states' goals are clean air, clean water and clean land, the reality is that neither Congress nor the state legislatures have provided sufficient funds for states to meet every requirement of each federal environmental statute.

When Consent Decrees between EPA and plaintiffs require states to change their rules to incorporate new requirements – often without the input of states on either the substance or timing of those changes – states must necessarily adjust their programs to meet the new requirements and deadlines. In Indiana, and in other states, diverting resources to meet these unexpected federal requirements often comes at the expense of other pressing environmental priorities the state would like to achieve.

I will provide information on three examples where EPA Consent Decrees have adversely impacted Indiana. These examples are the regional haze requirements, and the Startup, Shutdown, and Malfunction emissions SIP call¹, where EPA committed to a regulatory timeframe that does not give the states sufficient time to properly follow their own administrative processes and meet the deadlines committed to, and subsequently required by, EPA. In my other example, the ozone air quality designations, EPA committed to a schedule that did not allow sufficient time for EPA to perform a reasoned rulemaking with the necessary input from states.

In the case of the regional haze requirements, in early 2009, EPA published a notice of failure to submit SIP revisions incorporating the regional haze requirements for thirty seven states including Indiana. These SIP revisions were originally required to be submitted by the states by December 17, 2007. The reason Indiana, and a number of other states were not in a position to submit their SIPs is the continuing confusion over whether the requirements of the Clean Air Interstate Rule (CAIR), which was initially vacated and then remanded by the DC Circuit Court of Appeals, and the replacement Cross States Air Pollution Rule (CSAPR) also vacated by the same court could be relied upon to meet the visibility SIP requirements for the sources covered by the rule. While EPA has made formal proposals to allow the reliance on the emissions reductions from those regulations since 2005, there has not been a time of judicial finality long enough to allow states, like Indiana, to process rulemakings and SIP revisions through the public notice and environmental rulemaking process. Without a state regulation to implement any proposed limitations as part of the visibility SIP, the proposed SIP is not approvable (because there are no enforceable state regulations). Since the SIP process must necessarily follow the state rulemaking process which needs to follow the judicial finality on the regulation of power plant emissions under the yet to be proposed CAIR replacement rule, this settlement imposed a requirement on many states (those with electrical generating units subject to CAIR) that those states simply cannot meet. However, the EPA settlement did not give states

¹ A "SIP call" occurs when EPA instructs a state to revise its Clean Air Act plan for attainment of a national ambient air quality standard. "SIP" means "state implementation plan."

sufficient time to complete the required SIP revisions in light of the continuing uncertainty over the regulation of emissions from electrical generating units. Instead, the EPA notice to meet the terms of the Consent Decree required state submission of SIP revisions under an abbreviated time frame.

The regional haze (visibility) requirements also provide an example of a federal action detracting from more important environmental regulations necessary to protect human health. The regional haze requirements are a welfare-based standard with a target date of 2064. Indiana has been making progress on the standard, but when EPA published its notice for failure to make SIP submittals, and required states to make submissions with an abbreviated timeframe, it took important resources away from more pressing matters. In this case the more pressing matter is that Indiana and other states must also constantly revise their air pollution control programs to meet the ever tightening National Ambient Air Quality Standards or NAAQS, which is a health-based standard. The requirements to meet these health based standards must also be adopted through the state rulemaking process so that they are enforceable and can be incorporated into permits. Given the specialized technical and legal expertise required to process a regulation into the Indiana Administrative Code, arbitrary new deadlines and adjustment of historical timeframes by EPA often detracts from and thus slows down more pressing matters such as the development of rules to incorporate new NAAQS that protect public health.

Similarly, the recent SIP call related to Startup, Shutdown, and Malfunction emissions provides only eighteen months for the states to complete their submissions to EPA. Indiana's rulemaking process cannot be completed in this limited window. Indiana has mandatory notice and comment periods, as well as public hearings and review process for the final rule that must be completed before its rules can be changed. While this process normally can be completed in about 18 months, it cannot be started until Indiana has reached some informal agreement with EPA on what would satisfy the SIP call. In the case of the Startup, Shutdown and Malfunction rule, we have not yet received any guidance on what would be acceptable to resolve any actual deficiency in our existing previously approve SIP.

A third example of the impact of consent decree deadlines on Indiana is in the designations for the 2008 ozone NAAQS. As a result of a citizens' suit, EPA agreed to finalize ozone designations by a date certain but allowed submission of data for determining the designations up to three months before that deadline. In Indiana's case, EPA sent the Governor the required 120 day letter stating that only a small portion of the state near Cincinnati Ohio would be nonattainment and the rest of the state would be attainment. After sending the 120 day letter, EPA received data from Illinois in December of 2011 that EPA believed required the creation of a new nonattainment area in Indiana only a few months before the designation deadline. Due to the Consent Decree deadline, EPA informed the state about this new data in March of 2011 and proposed a nonattainment area that included four Indiana counties. In spite of additional information and objections filed by Indiana, EPA signed a final rule designating additional Indiana counties as nonattainment for the ozone standard in May of 2011 depriving

Indiana of the 120 day consultation required by the Act, but meeting EPA's Consent Decree obligation. Indiana believes the abbreviated schedule EPA had committed to did not include sufficient time for either the states to respond to the new data provided by Illinois or for EPA to properly review the arguments and data presented by Indiana. As a result, Indiana believes the boundaries of a new nonattainment area and the inclusion of the Indiana counties were made in error. Indiana and several other states are currently challenging the 2008 ozone designations before the DC Circuit Court of Appeals.

Roughly two years ago, ECOS expressed its concerns about EPA's use of consent decrees to the agency's leadership and asked that the agency provide us a list of suits it has received that may affect our operations. We excluded many consent decrees from our request, such as those used to settle enforcement cases. What we wanted to focus on were the cases that would be most likely to affect the manner in which one or more states implemented the various environmental statutes. EPA ultimately agreed to provide such a list, but this took well over a year. We finally got the list last year, but the contents were already a year old and were simply a copy of material that had been presented to Congress in 2011. While we were glad to get the list, it was of limited value to us.

Finally, the impact of the consent decrees adversely impacting states happened often enough to enough states that ECOS drafted a resolution regarding our opinion on their use. We considered and passed that resolution at our recent March 2013 national meeting. This resolution presents our knowledge and opinion about the need for reform and state participation in EPA's consent decrees which settle citizen suits. I have attached our resolution as an appendix to this testimony, along with a comparison of ECOS' resolution's findings to the contents of HR 1493.

Overall, the bill provides more judicial oversight and increases court processes around settling notice requirements and participation opportunities for non-parties before allowing EPA to settle citizens groups' lawsuits. In general, the greater legal process that the bill requires benefits states in that we would have more notice of lawsuits and settlements that affect us. This would afford states more time to consider intervening in the lawsuits, or, at a minimum, more time to prepare for how we will deal with the settlement terms. However, for those cases where the state actually intervenes, more court legal process would also mean more resource expenditure for states. So, we have to balance the benefit of more formalized notice with the cost associated with those cases that we are a party to.

While ECOS generally does not endorse specific bill language, we find that the bill and our resolution are not in conflict. Our resolution is, of course, not written in the format of a law. The ECOS resolution and HR 1493 as currently written appear to have the same intent and consequence – that affected parties in lawsuits against federal agencies have more notice of the lawsuit and proposed settlement agreements. The bill formalizes this process which our resolution does not - but they are not in conflict.

In my role as Commissioner of the Indiana Department of Environmental Management, I do endorse this bill as a good approach to addressing the unintended consequences of the current use of Consent Decrees to settle litigation between EPA and interested plaintiffs.

Now I will move to the comparison in more detail. The items in bold are quotations from the current (May 31 2013) version of the bill. The items in italics are our comments, based largely on the contents of our resolution.

Purpose: To impose certain limitations on consent decrees and settlement agreements by agencies that requires the agencies to take regulatory action.

Definition:

“Covered Civil Action” – a civil action seeking to compel agency action; alleging that the agency is unlawfully withholding or unreasonably delaying an agency action relating to a regulatory action that would affect the rights of (1) private persons other than those bringing the action; or (2) state, local or tribal government.

Requirements:

- 1. In any covered civil action, the agency against which the covered civil action is brought shall publish the notice of intent to sue by making it available online not later than 15 days after receiving the notice.**

In the case where EPA is sued, this would be helpful to states, in that as long as they monitored the EPA website, they would have immediate notice of a third party’s intent to sue EPA, and therefore, they could have time to assess, early in the process, whether they are affected and whether they should intervene.

- 2. A party may not make a motion for entry of a covered consent decree or to dismiss a civil action pursuant to a settlement agreement until after the end of proceedings.**

This provision seems to discourage quick/early settlement in favor of longer court proceedings. If a state agency was an intervenor to the suit, the danger is greater resources spent in court. The benefit would be that issues raised by intervening parties might have a better chance of being heard before a settlement is reached (getting at the issue of regulatory burden being placed on states through settlements without states’ input).

- 3. Efforts to settle a covered civil action or otherwise reach an agreement shall (1) be conducted pursuant to the mediations or alternative dispute resolution program of the court; and (2) include any party that intervenes in the action.**

Part one of this provision forces the parties to use the court system. The second piece is favorable to state agencies who intervene in cases, but would also benefit other parties in their intervention (whose interests may be adverse to the state’s) and could delay settlement.

- 4. Not later than 60 days before the date on which a consent decree or settlement agreement is filed with a court, the agency seeking to enter one of these shall publish in the Federal Register and online (A) the proposed consent decree or settlement agreement; and (B) a statement providing (1) the statutory basis; and (2) a description of the terms of the agreement.**

This would benefit other agencies and parties in that they would be assured that they could see the proposal and possibly voice concern or intervene.

- 5. An agency seeking to enter a consent decree or settlement agreement shall accept public comment on any issue relating to the matters alleged in the complaint and an agency shall respond to any comment received.**

As far as states are concerned, if a federal agency wanted to enter into a settlement agreement, this would ensure that state agencies have a chance to comment without having to formally intervene (and incur the attorney costs of doing so). This would generally delay proceedings though, which may or may not be in a state agency's interest.

- 6. When moving that the court enter a consent decree or settlement agreement or for dismissal pursuant to one of these, an agency shall (1) inform the court of the statutory basis, (2) submit to the court a summary of the comments received and the agency's response and (3) submit to the court a certified index of the notice and comment proceeding and make the record available to the court.**

This provision ensures a complete record for the court. The benefit to intervenors and public commenters is that it could mean that a court would not approve a settlement that significantly burdens states based on reading states' comments. Basically, this would allow the court to take a more active role in the settlement proceedings if it chose to. A more active role could benefit or burden a state depending on the circumstances.

- 7. Each agency shall submit to Congress an annual report that, for the year covered by the report, includes the number, identity and content of civil actions brought against and consent decrees or settlement agreements entered against or into by the agency.**

This provision would benefit state agencies in that each year they could look at a comprehensive list of the federal lawsuits and the settlements reached. If the states had been unaware of the suits and settlements as they progressed, at least they would see them in a comprehensive list once per year instead of requesting them from EPA.

Conclusions

States are in the best position to determine how to allocate their scarce resources to advance the interests of clean air, clean water and clean land. Addressing requirements imposed upon the states by consent decrees or settlement agreements entered into by EPA with a citizens group on a single issue diverts state resources from their larger goals – and actually can slow states' progress in improving our environment.

Thus, states urge reform and state participation in EPA's consent decree process which settles citizen suits. In general, greater legal process would benefit states in that we would have more notice of lawsuits and settlements that affect us. This would afford states more time to consider intervening in the lawsuits, or, at a minimum, more time to prepare for how we will deal with the settlement terms.

Appendix

ECOS Resolution Relevant to H.R. 1493

Resolution 13-2
March 6, 2013
Scottsdale, Arizona
As certified by
R. Steven Brown
Executive Director

THE NEED FOR REFORM AND STATE PARTICIPATION IN EPA'S CONSENT DECREES WHICH SETTLE CITIZEN SUITS

WHEREAS, federal environmental programs may be, and generally are, authorized or delegated to states;

WHEREAS, in addition to authorization and delegation, states are provided certain stand alone rights and responsibilities under federal environmental laws;

WHEREAS, the United States Environmental Protection Agency (U.S. EPA) may be sued in federal court by citizens over the alleged failure to perform its nondiscretionary duties, such as taking action on state environmental agency submissions, promulgating regulations, meeting statutory deadlines, or taking other regulatory actions;

WHEREAS, state environmental agencies may have information that would materially benefit the defense of a citizen suit or the reaching a settlement, and may have interests that should be considered in the evaluation of a settlement;

WHEREAS, state environmental agencies are not always notified of citizen suits that allege U.S. EPA's failure to perform its nondiscretionary duties, are often not parties to these citizen suits, and are usually not provided with an opportunity to participate in the negotiation of agreements to settle citizen suits;

WHEREAS, the agreements U.S. EPA negotiates to settle citizen suits may adversely affect states;

NOW, THEREFORE, BE IT RESOLVED THAT THE ENVIRONMENTAL COUNCIL OF THE STATES:

Affirms that states have stand alone rights and responsibilities under federal environmental laws, and that the state environmental agencies are co-regulators, co-funders and partners with U.S. EPA;

Urges the U.S. EPA to devote the resources necessary to perform its nondiscretionary duties within the timeframes specified under federal law, especially when required to take action on a state submission made under an independent right or responsibility (e.g., State Implementation Plans under the Clean Air Act).

Specifically calls on U.S. EPA to notify all affected state environmental agencies of citizen suits filed against U.S. EPA that allege a failure of the federal agency to perform its nondiscretionary duties;

Believes that providing an opportunity for state environmental agencies to participate in the negotiation of citizen suit settlement agreements will often be necessary to protect the states' role in implementing federal environmental programs and for the administration of authorized or delegated environmental programs in the most effective and efficient manner;

Specifically calls on U.S. EPA to support the intervention of state environmental agencies in citizen suits and meaningful participation in the negotiation of citizen suit settlement agreements when the state agency has either made a submission to EPA related to the citizen suit or when the state agency either implements, or is likely to implement, the authorized or delegated environmental program at issue;

Believes that no settlement agreement should extend any power to U.S. EPA that it does not have in current law;

Believes that greater transparency of citizen suit settlement agreements is needed for the public to understand the impact of these agreements on the administration of environmental programs;

Affirms the need for the federal government to publish for public review all settlement agreements and consider public comments on any proposed settlement agreements;

Encourages EPA to respond in writing to all public comments received on proposed citizen suit settlement agreements, including consent decrees.

Comparison of H.R. 1493 to ECOS Resolution

H.R. 1493 defines the following terms:

A “covered civil action” is a civil action seeking to compel agency action and alleging that the agency is unlawfully withholding or unreasonably delaying an agency action relating to a regulatory action that would affect the rights of private persons other than the person bringing the action or a State, local, or tribal government.

A “covered consent decree” or a “covered settlement agreement” is a consent decree or settlement agreement entered into a covered civil action and any other consent decree or settlement agreement that requires agency action relating to such a regulatory action that affects the rights of private persons other than the person bringing the action or a State, local, or tribal government.

ECOS’s Resolution “Asks”	H.R. 1493 Changes
Affirms that states have stand alone rights and responsibilities under federal environmental laws, and that the state environmental agencies are co-regulators, co-funders and partners with U.S. EPA;	The bill does not address this directly.

ECOS's Resolution "Asks"	H.R. 1493 Changes
<p>Urges the U.S. EPA to devote the resources necessary to perform its nondiscretionary duties within the timeframes specified under federal law, especially when required to take action on a state submission made under an independent right or responsibility (e.g., State Implementation Plans under the Clean Air Act).</p>	<p>The bill does not address this directly. However, it would require the agency to consider how the decree or agreement would impact its ability to perform its other duties: "If a proposed covered consent decree or settlement agreement requires an agency action by a date certain, the agency shall... inform the court of— (A) any required regulatory action the agency has not taken that the covered consent decree or settlement agreement does not address; (B) how the covered consent decree or settlement agreement, if approved, would affect the discharge of [those] duties...; and (C) why the effects of the covered consent decree or settlement agreement on the manner in which the agency discharges its duties is in the public interest" (Section 3(d)(4)).</p> <p>The bill also requires that the decree or agreement "allows sufficient time and incorporates adequate procedures for the agency to comply with... applicable statutes [and] the provisions of any Executive order that governs rulemaking" (Section 3(f)(2)).</p>
<p>Specifically calls on U.S. EPA to notify all affected state environmental agencies of citizen suits filed against U.S. EPA that allege a failure of the federal agency to perform its nondiscretionary duties;</p>	<p>Agencies would be required to make such notification online. "In any covered civil action, the agency against which the covered civil action is brought shall publish the notice of intent to sue and the complaint in a readily accessible manner, including by making [them] available online not later than 15 days after" receiving them (Section 3(a)(1)).</p>

ECOS's Resolution "Asks"	H.R. 1493 Changes
<p>Believes that providing an opportunity for state environmental agencies to participate in the negotiation of citizen suit settlement agreements will often be necessary to protect the states' role in implementing federal environmental programs and for the administration of authorized or delegated environmental programs in the most effective and efficient manner;</p>	<p>States may intervene in relevant cases. "In considering a motion to intervene in a covered civil action or a civil action in which a covered consent decree or settlement agreement has been proposed that is filed by a State, local, or tribal government, the court shall take due account of whether the movant— (A) administers jointly with an agency that is a defendant in the action the statutory provisions that give rise to the regulatory action to which the action relates; or (B) administers an authority under State, local, or tribal law that would be preempted by the regulatory action to which the action relates" (Section 3(a)(2)).</p>
<p>Specifically calls on U.S. EPA to support the intervention of state environmental agencies in citizen suits and meaningful participation in the negotiation of citizen suit settlement agreements when the state agency has either made a submission to EPA related to the citizen suit or when the state agency either implements, or is likely to implement, the authorized or delegated environmental program at issue;</p>	<p>However, any affected and inadequately represented entity may also intervene. "In considering a motion to intervene in a covered civil action... that is filed by a person who alleges that the agency action in dispute would affect the person, the court shall presume, subject to rebuttal, that the interests of the person would not be represented adequately by the existing parties to the action" (Section 3(b)(1)).</p> <p>Settlement negotiations "include any party that intervenes in the action" (Section 3(c)(2)).</p> <p>Additionally, amicus participation by "any person who filed public comments or participated in a public hearing" is presumed, subject to rebuttal, to be properly allowed (Section 3(f)(1)).</p>

ECOS's Resolution "Asks"	H.R. 1493 Changes
<p>Believes that no settlement agreement should extend any power to U.S. EPA that it does not have in current law;</p>	<p>The bill does not limit the extension of agency power, but does require approval by the Attorney General or agency head, if the agency is litigating a matter independently, for:</p> <p>A consent decree if it “converts into a nondiscretionary duty a discretionary authority of an agency to propose, promulgate, revise, or amend regulations; commits an agency to expend funds that have not been appropriated and... budgeted [or] to seek a particular appropriation or budget authorization; divests an agency of discretion committed to the agency by statute or the Constitution...; or otherwise affords relief that the court could not enter under its own authority...”</p> <p>Or a settlement agreement if it “provides a remedy for a failure by the agency to comply with the terms of the covered settlement agreement other than the revival of the civil action resolved by the covered settlement agreement” and “interferes with the authority of an agency to revise, amend, or issue rules...; commits the agency to expend funds that have not been appropriated and... budgeted...; or ...commits the agency to exercise in a particular way discretion which was committed to the agency by statute or the Constitution...” (Section 3(e)).</p>

ECOS's Resolution "Asks"	H.R. 1493 Changes
<p>Believes that greater transparency of citizen suit settlement agreements is needed for the public to understand the impact of these agreements on the administration of environmental programs;</p>	<p>The bill states: "Each agency shall submit to Congress an annual report that... includes—(1) the number, identity, and content of covered civil actions brought against and covered consent decrees or settlement agreements entered against or into by the agency; and (2) a description of the statutory basis for— (A) each covered consent decree or settlement agreement...; and (B) any award of attorneys fees or costs in a civil action resolved by a covered consent decree or settlement agreement..." (Section 3(g)).</p>
<p>Affirms the need for the federal government to publish for public review all settlement agreements and consider public comments on any proposed settlement agreements;</p>	<p>Transparency would be greatly increased. A party "may not make a motion for entry of a covered consent decree or to dismiss a civil action pursuant to a covered settlement agreement" until at least 60 days after the agency has published online and in the Federal Register the proposed covered consent decree or settlement agreement, a statement providing the statutory basis for the decree or agreement, and a statement of the terms covered in the decree or agreement (including whether it awards attorney's fees) (Section 3(a)(2) and Section 3(d)(1)). The agency must accept and respond to public comments during this period, and may hold a public hearing as well (Section 3(d)(2)). When moving that the court enter a proposed consent decree or settlement agreement, the agency must inform the court of the statutory basis and terms of the proposed decree or agreement, submit a summary of the comments received and the agency's responses, and "submit to the court a certified index of the administrative record of the notice and comment proceeding" (Section 3(d)(2)(C)).</p>
<p>Encourages EPA to respond in writing to all public comments received on proposed citizen suit settlement agreements, including consent decrees.</p>	