Statement of the U.S. Chamber of Commerce

ON: LEGISLATIVE HEARING ON H.R. 1493, THE "SUNSHINE FOR REGULATORY DECREES AND SETTLEMENTS ACT OF 2013"

TO: HOUSE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

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More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 business people participate in this process.

BEFORE THE COMMITTEE ON THE JUDICIARY OF THE U.S. HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

Legislative Hearing on H.R. 1493, the "Sunshine for Regulatory Decrees and Settlements Act of 2013"

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Good morning, Chairman Bachus, Ranking Member Cohen, and distinguished Members of the Subcommittee. My name is William L. Kovacs and I am senior vice president for Environment, Technology and Regulatory Affairs at the U.S. Chamber of Commerce. My statement provides an overview of the Chamber's May 2013 report, *Sue and Settle: Regulating Behind Closed Doors*. The report provides detailed information on the extent of the sue and settle problem, as well as the public policy implications of having private parties exert direct influence on the regulatory priorities of federal agencies through agreements negotiated behind closed doors, without public participation. To address the sue and settle problem described in our report, the House should pass H.R. 1493, the "Sunshine for Regulatory Decrees and Settlements Act of 2013." The bill provides for vital transparency and stakeholder/public participation in critical regulatory actions by federal agencies.

Background

Over the past several years, the business community has expressed growing concern about interest groups using lawsuits against federal agencies and subsequent settlements approved by a judge as a technique to shape agencies' regulatory agendas. Recent sue and settle arrangements have fueled fears that the rulemaking process itself is being subverted to serve the ends of a few favored interest groups. The Chamber set out to determine how often sue and settle actually happens, to identify major sue and settle cases, and to track the types of agency actions involved. After an extensive effort, the Chamber was able to compile a database of sue and settle agreements and their subsequent rulemaking outcomes. The overwhelming majority of sue and settle actions between 2009 and 2012 occurred in the environmental context, particularly under the Clean Air Act, Clean Water Act, and the Endangered Species Act.[1]

[1] Clean Air Act, 42 U.S.C. § 7401 *et seq.;* Clean Water Act, 33 U.S.C. § 1251 *et seq*.; Endangered Species Act, 16 U.S.C. § 1531 *et seq.*

What is Sue and Settle?

Sue and settle occurs when an agency intentionally relinquishes its statutory discretion by accepting lawsuits from outside groups which effectively dictate the priorities and duties of the agency through legally-binding, court-approved settlements negotiated behind closed doors – with no participation by other affected parties or the public.[2]

As a result of the sue and settle process, the agency intentionally transforms itself from an independent actor that has discretion to perform its duties in a manner best serving the public interest, into an actor subservient to the binding terms of settlement agreements, including using its congressionally-appropriated funds to achieve the demands of specific outside groups. This process also allows agencies to avoid the normal protections built into the rulemaking process – review by the Office of Management and Budget and the public, and compliance with executive orders – at the critical moment when the agency's new obligations are created.

Because sue and settle agreements bind an agency to meet a specified deadline for regulatory action – a deadline the agency often cannot meet – the agreement essentially reorders the agency's priorities and its allocation of resources. These agreements often go beyond simply enforcing statutory deadlines and themselves become the legal authority for expansive regulatory action with no meaningful participation by affected parties or the public. The realignment of an agency's duties and priorities at the behest of an individual special interest group runs counter to the larger public interest and the express will of Congress.

What Did Our Research Reveal?

Number of sue and settle cases between 2009 and 2012

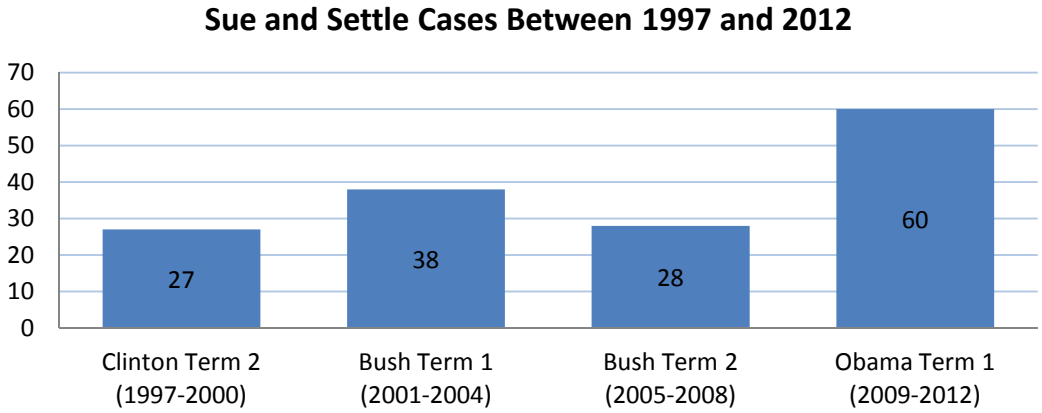
Our research shows that from 2009 to 2012, a total of 71 lawsuits were settled under circumstances such that they can be categorized as sue and settle cases under the Chamber's definition. These cases include EPA settlements under the Clean Air Act and the Clean Water Act, along with key Fish and Wildlife Service settlements under the Endangered Species Act. Significantly, settlement of these cases directly resulted in more than 100 new federal rules, many of which are major rules estimated to cost more than $100 million annually to comply with.

[2] The coordination between outside groups and agencies is aptly illustrated by a November 2010 sue and settle case where EPA and an outside advocacy group filed a consent decree and a joint motion to enter the consent decree with court *on the same day* the advocacy group filed its Complaint against EPA. *See Defenders of Wildlife v. Perciasepe*, No. 12-5122, slip op. at 6 (D.C.Cir. Apr. 23, 2013).

Comparing the use of sue and settle over the past 15 years

Unlike other environmental laws, the Clean Air Act specifically requires EPA to publish public notices of draft consent decrees in the *Federal Register*.[3] These public notices gave the Chamber the opportunity to identify Clean Air Act settlement agreements/consent decrees going back to 1997. We were therefore able to compare the number of Clean Air Act sue and settle agreements between 1997 and 2012.

The Chamber's data shows that sue and settle is by no means a recent phenomenon;[4] the tactic has been used during both Democratic and Republican administrations. To the extent that the sue and settle tactic skirts the normal notice and comment rulemaking process, with its procedural checks and balances, agencies have been willing for decades to allow sue and settle to skirt the rulemaking requirements of the Administrative Procedure Act.[5] Moreover, our research found that business groups have also taken advantage of the sue and settle approach to influence the outcome of EPA actions. While advocacy groups have used sue and settle much more often in recent years, the tactic has clearly been abused by both sides. The following chart compares the consent decrees finalized under the Clean Air Act during that period.



[3] Section 113(g) of the Clean Air Act, 42 U.S.C. § 7413(g), provides that "[a]t least 30 days before a consent decree or settlement agreement of any kind under [the Clean Air Act] to which the United States is a party (other than enforcement actions) . . . the Administrator shall provide a reasonable opportunity by notice in the Federal Register to persons who are not named as parties or intervenors to the action or matter to comment in writing." Of all the other major environmental statutes, only section 122(i) of the Superfund law, 42 U.S.C. § 9622(i) requires an equivalent public notice of a settlement agreement.

[4] The sue and settle problem dates back at least to the 1980s. In 1986, Attorney General Edward Meese III issued a Department of Justice policy memorandum, referred to as the "Meese Memo," addressing the problematic use of consent decrees and settlement agreements by government, including the agency practice of turning discretionary rulemaking authority into mandatory duties. *See* Meese, Memorandum on Department Policy Regarding Consent Decrees and Settlement Agreements (Mar. 13, 1986).

[5] 5 U.S.C. Subchapter II.

The economic implications of our findings

Since 2009, new regulatory requirements estimated at more than $488 billion in compliance costs have been imposed by the federal government.[6] By itself, EPA is responsible for adding tens of billions of dollars in new regulatory costs.[7] Significantly, at least 100 of EPA's costly new rules were the product of sue and settle agreements. The chart below highlights just ten of the most costly rules that arose from sue and settle cases:

Sue and Settle Agreements Create Costly Federal Rules

1. Utility MACT rule - up to $**9.6 billion** annual costs[8]
2. Lead Repair, Renovation & Painting rule - up to **$500 million** in first-year costs[9]
3. Oil and Natural Gas MACT rule - up to **$738 million** annual costs[10]
4. Florida Nutrient Standards for Estuaries and Flowing Waters - up to **$632 million** annual costs[11]
5. Regional Haze Implementation rules: **$2.16 billion** cost[12]
6. Chesapeake Bay Clean Water Act rules - up to **$18 billion** cost to comply[13]
7. Boiler MACT rule - up to **$3 billion** cost to comply[14]
8. Standards for Cooling Water Intake Structures - up to **$384 million** annual costs[15]
9. Revision to the Particulate Matter ($PM_{2.5}$) NAAQS - up to **$350 million** annual costs[16]
10. Reconsideration of 2008 Ozone NAAQS - up to **$90 billion** cost[17]

[6] S. Batkins, American Action Forum, "President Obama's $488 Billion Regulatory Burden" (Sept. 19, 2012).
[7] *Id.* Mr. Batkins estimates the regulatory burden added by EPA in 2012 alone to be $12.1 billion.
[8] Letter from President Obama to Speaker Boehner (Aug. 30, 2011), Appendix "Proposed Regulations from Executive Agencies with Cost Estimates of $1 Billion or More."
[9] 75 Fed. Reg, 24,802, 24,812 (May 6, 2010).
[10] Fall 2011 Regulatory Plan and Regulatory Agenda, "Oil and Natural Gas Sector-NSPS and NESHAPS," RIN: 2060-AP76.
[11] EPA, Proposed Nutrient Standards for Florida's Coastal, Estuarine & South Florida Flowing Waters (Nov. 2012).
[12] William Yeatman, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs* (July 2012).
[13] Sage Policy Group, Inc., *The Impact of Phase I Watershed Implementation Plans on Key Maryland Industries* (April 2011); *Chesapeake Bay Journal* (Jan. 2011).
[14] Letter from President Obama to Speaker Boehner, *supra* note 8.
[15] 2012 Regulatory Plan and Unified Agenda, "Standards for Cooling Water Intake Structures," RIN: 2040-AE95.
[16] EPA, "Overview of EPA's Revisions to the Air Quality Standards for Particle Pollution (Particulate Matter) (2012).
[17] Letter from President Obama to Speaker Boehner, *supra* note 8.

The Public Policy Implications of Sue and Settle

By being able to sue and influence agencies to take actions on specific regulatory programs, advocacy groups use sue and settle to dictate the policy and budgetary agendas of an agency. Instead of agencies being able to use their discretion as to how best utilize their limited resources, they are forced to shift these resources away from critical duties in order to satisfy the narrow demands of outside groups.

Likewise, when advocacy groups and agencies negotiate deadlines and schedules for new rules through the sue and settle process, the ensuing rulemaking is often rushed and flawed. Dates for regulatory action are often specified in statutes, and agencies like EPA very often cannot meet most or all of those deadlines. To a great extent, these agencies must use their discretion to set resource priorities to meet their many competing obligations. By agreeing to deadlines that are unrealistic and often unachievable, the agency lays the foundation for rushed, sloppy rulemaking that often delays or defeats the objective the agency is seeking to achieve.[18] These hurried rulemakings typically require fixing through technical corrections, subsequent reconsiderations, or court-ordered remands to the agency. Ironically, the process of issuing rushed, poorly-developed rules and then having to spend months or years to correct them defeats the advocacy group's objective of forcing a rulemaking on a tight schedule. The time it takes to make these fixes, however, doesn't change a regulated entity's immediate obligation to comply with the poorly-constructed and infeasible rule.

Moreover, if regulated parties are not at the table when deadlines are set, an agency will not have a realistic sense of the issues involved in the rulemaking (e.g., will there be enough time for the agency to understand the constraints facing an industry, to perform emissions monitoring, and develop achievable standards?). Especially when it comes to implementation timetables, agencies are ill-suited to make such decisions without significant feedback from those who will have to actually comply with a regulation.

By setting accelerated deadlines, agencies very often give themselves insufficient time to comply with the important analytic requirements that Congress enacted to ensure sound policymaking.

These requirements include the Regulatory Flexibility Act (RFA)[19] and the Unfunded Mandates Reform Act.[20] In addition to undermining the protections of these statutory

[18] In the Boiler MACT rulemaking, for example, EPA asked the court for an additional 16 months to properly consider comments it had received and finalize a legally defensible rule. In the face of opposition from the advocacy group, the court only granted an additional month, however, and EPA was forced to immediately reconsider the rule to buy itself more time.

[19] Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. §§ 601-612.

requirements, rushed deadlines can limit the review of regulations under the Office of Management and Budget's regulatory review under executive orders,[21] among other laws. This short-circuited process deprives the public (and the agency itself) of critical information about the true impact of a particular rule. An unreasonable deadline for one rule draws resources from other regulations that may also be under deadlines. Resulting delays will invite advocacy groups to reorder an agency's priorities further when they sue to enforce the other rules' deadlines.

This is illustrated clearly by recent sue and settle agreements entered into between advocacy groups and the U.S. Fish and Wildlife Service (FWS). FWS agreed in May and July 2011 to two consent decrees with an environmental advocacy group requiring the agency to propose adding more than 720 new candidates to the list of endangered species under the ESA.[22] Agreeing to propose listing this many species all at once imposes an overwhelming new burden on the agency, which requires redirecting resources away from other—often more pressing—priorities in order to meet agreed upon deadlines. According to the Director of the FWS, in FY 2011 the FWS was allocated $20.9 million for endangered species listing and critical habitat designation; the agency was required to spend more than 75% of this allocation ($15.8 million) undertaking the substantive actions required by court orders or settlement agreements resulting from litigation.[23] In other words, sue and settle cases and other lawsuits are now driving the regulatory agenda of the Endangered Species Act program at FWS.

Through sue and settle, advocacy groups also significantly affect the regulatory environment by getting agencies to issue substantive requirements that are not required by law.[24] Even when a regulation is required, agencies can use the terms of sue and settle agreements as a legal basis for allowing special interests to dictate the discretionary terms of the regulations.[25] Third parties have a very difficult time challenging the agency's surrender of its discretionary power, because they typically cannot intervene and the courts often simply want the case to be settled quickly.

One of the primary reasons advocacy groups favor sue and settle agreements approved by a court is that the court retains long-term jurisdiction over the settlement and the plaintiff group can readily enforce perceived noncompliance with the agreement by the agency. The court in the

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[20] Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1531-1538.
[21] *See, e.g.*, Executive Order 12,866, "Regulatory Planning and Review" (September 30, 1993); Executive Order 13132, "Federalism" (August 4, 1999); Executive Order 13,211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (May 18, 2001); Executive Order 13,563 "Improving Regulation and Regulatory Review" (January 18, 2011).
[22] *Wildearth Guardians v. Salazar* (D.D.C. May 10, 2011); *Center for Biological Diversity v. Salazar* (D.D.C. July 12, 2011).
[23] Testimony of Hon. Dan Ashe, Director, U.S. Fish and Wildlife Service before the House Natural Resources Committee (December 6, 2011).
[24] For example, EPA's imposition of TMDL and stormwater requirements on the Chesapeake Bay was not mandated by federal law.
[25] Agreed deadlines commit an agency to make one specific rulemaking a priority, ahead of all other rules.

endangered species agreements discussed above will retain jurisdiction over the process until 2018, thereby binding FWS Directors in the next Administration to follow the requirements of the two 2011 settlements. For its part, the agency cannot change any of the terms of the settlement (e.g., an agreed deadline for a rulemaking) without the consent of the advocacy group. Thus, even when an agency subsequently discovers problems in complying with a settlement agreement, the advocacy group typically can force the agency to fulfill its promise in the consent decree, regardless of the consequences for the agency or regulated parties.

For all these reasons, "sue and settle" violates the principle that if an agency is going to write a rule, the goal should be to develop the most effective, well-tailored regulation. Instead, rulemakings that are the product of sue and settle agreements are most often rushed, sloppy, and poorly thought-out. These flawed rules often take a great deal of time and effort to correct. It would have been better—and ultimately faster—to take the necessary time to develop the rule properly in the first place.

Notice and Comment *After* Sue and Settle Agreements Doesn't Give the Public Real Input

The opportunity to comment on the product of sue and settle agreements, either when the agency takes comment on a draft settlement agreement or takes notice and comment on the subsequent rulemaking, are not sufficient to compensate for the lack of transparency and participation in the settlement process itself. In cases where EPA allows public comment on draft consent decrees, EPA only rarely alters the consent agreement, even after it receives adverse comments.[26]

Moreover, because the settlement agreement directs the timetable and the structure (and sometimes even the actual substance) of the subsequent rulemaking, interested parties usually have very limited ability to alter the design of the final rule or other action through their comments.[27] In effect, the "cement" of the agency action is set and has already hardened by the time the rule is proposed, and it is very difficult to change it. Once an agency proposes a regulation, the agency is restricted in how much they can change it before it becomes final.[28] Proposed regulations are not like proposed legislation, which can be very fluid and go through

[26] In proposed settlement agreements the Chamber has commented on, such as for the revised $PM_{2.5}$ NAAQS standard, the timetable for final rulemaking action remained unchanged despite our comments insisting that the agency needed more time to properly complete the rulemaking. Even though EPA itself asserted that more time was needed, the rulemaking deadline in the settlement agreement was not modified.

[27] EPA overwhelmingly rejected the comments and recommendations submitted by the business community on the major rules that resulted from sue and settle agreements. These rules were ultimately promulgated largely as they had been proposed. *See, e.g.*, the Chamber's 2012 comments on the proposed PM NAAQS rule and the proposed GHG NSPS rule for new electric utilities.

[28] *See South Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1st Cir. 1974)('logical outgrowth doctrine" requires additional notice and comment if final rule differs too greatly from proposal).

several revisions before being enacted. When an agency proposes a regulation, they are not saying "let's have a conversation about this issue," they are saying, "this is what we intend to put into effect unless there is some very good reason we have overlooked why we cannot." By giving an agency feedback during the early rule development stage about how a regulation will affect those covered by it, the agency learns from all stakeholders about problems before they get locked into the regulation.

Sue and settle agreements cut this critical step entirely out of the process. Rather than hearing from a range of interested parties and designing the rule with the panoply of their concerns in mind, the agency essentially writes its rule to accommodate the specific demands of a single interest. Through "sue and settle," advocacy groups achieve their narrow goals at the expense of sound and thoughtful public policy.

Sue and Settle is An Abuse of the Environmental Citizen Suit Provisions

Congress expressed concern long ago that allowing unlimited citizen suits under environmental statutes to compel agency action has the potential to severely disrupt agencies' ability to meet their most pressing statutory responsibilities.[29] Matters are only made worse when an agency does not defend itself against sue and settle lawsuits and willingly allows outside groups to reprioritize its agenda and deadlines for action.

Most of the legislative history that gives an understanding of the environmental citizen suit provision comes from the congressional debate on the 1970 Clean Air Act (CAA). There is little legislative history beyond the CAA.[30] The addition of the citizen suit provision in later

[29] The Count of Appeals for the District of Columbia noted in 1974 that "While Congress sought to encourage citizen suits, citizen suits were specifically intended to provide only 'supplemental … assurance that the Act would be implemented and enforced.' *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1974). Congress made 'particular efforts to draft a provision that would not reduce the effectiveness of administrative enforcement… nor cause abuse of the courts while at the same time still preserving the right of citizens to such enforcement of the act.' Senate Debate on S. 3375, March 10, 1970, *reprinted in* Environmental Policy Division of the Congressional Research Service, A Legislative History of the Clean Air Act Amendments of 1970, Vol. I. at 387 (1974) (remarks of Senator Cooper)." *Friends of the Earth, et al. v. Potomac Electric Power Co.*, 546 F. Supp. 1357 (D.D.C. 1982)("[T]he agency might not be at fault if it does not act promptly or does not enforce the act as comprehensively and as thoroughly as it would like to do. Some of its capabilities depend on the wisdom of the appropriation process of this Congress. It would not be the first time that a regulatory act would not have been provided with sufficient funds and manpower to get the job done…. Notwithstanding the lack of capability to enforce this act, suit after suit after suit could be brought. The functioning of the department could be interfered with, and its time and resources frittered away by responding to these lawsuits. The limited resources we can afford will be needed for the actual implementation of the act")(Senator Hruska arguing against the citizen suit provision of the Clean Air Act during Senate debate on S.4358 on Sept. 21, 1970)..

[30] *See. e.g.* Robert D. Snook, *Environmental Citizen Suits and Judicial Interpretation: First Time Tragedy, Second Time Farce*, 20 W. New Eng. L. Rev. 311 (1998) at 318.

statutes was perfunctory and the statutory language used was generally identical to the CAA language.[31]

The inclusion of a citizen suit provision was far from a given when it was being considered in the CAA. The House version of the bill did not include a citizen suit provision.[32] The Senate bill did include such a provision,[33] but serious concern was expressed during the Senate floor debate. Senator Roman Hruska (R-NE), who was ranking member of the Senate Judiciary Committee, expressed two major concerns about the citizen suit provision: the limited opportunity for Senators to review the provision and the failure to involve the Senate Judiciary Committee:

> Frankly, inasmuch as this matter [the citizen suit provision] came to my attention for the first time not more than 6 hours ago, it is a little difficult to order one's thoughts and decide the best course of action to follow.
>
> Had there been timely notice that this section was in the bill, perhaps some Senators would have asked that the bill be referred to the Committee of the Judiciary for consideration of the implications for our judicial system.[34]

Senator Hruska entered into the record a memo written by one of his staff members. It reiterated the problem of ignoring the Judiciary Committee:

> The Senate Committee on the Judiciary has jurisdiction over, among other things,"(1) Judicial proceedings, civil and criminal, generally…..(3) Federal court and judges…." The Senate should suspend consideration of Section 304 [the citizen suit provision] pending a study by the Judiciary Committee of the section's probable impact on the integrity of the judicial system and the advisability of now opening the doors of the courts to innumerable Citizens Suits against officials charged with the duty of carrying out the Clean Air Act.[35]

Senator Griffin (R-MI), also a member of the Senate Judiciary Committee, noted the lack of critical feedback that was received regarding the provision:

> [I]t is disturbing to me that this far-reaching provision was included in the bill without any testimony from the Judicial Conference, the Department of Justice, or the Office of Budget and Management concerning the possible impact this might have on the Federal judiciary.[36]

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[31] *Id.* at 313-314, 318.
[32] *See e.g.* "A Legislative History of the Clean Air Amendments, Together with a Section-by-Section Index," Library of Congress, U.S. Govt. Print. Off., 1974-1980, Conference Report, at 205-206.
[33] *Id.*
[34] *Id.* Senate debate on S. 4358 at 277.
[35] *Id.* at 279.
[36] *Id.* at 350.

The citizen suit provision in the CAA was never considered by either the House or Senate Judiciary Committees.[37] The same is true for the citizen suit provision in the Clean Water Act, which was enacted just two years later.[38] Until the 112th Congress, there was no House or Senate Judiciary Committee hearing focused specifically on citizen suits, dating back 41 years to the creation of the first citizen suit provision in 1970.[39]

The Sunshine for Regulatory Decrees and Settlements Act of 2013

In 2012, during the 112th Congress, the House Judiciary Committee began considering the abuses of the sue and settle process. Representative Ben Quayle (R-AZ) introduced H.R. 3862, the Sunshine for Regulatory Decrees and Settlements Act of 2012. On July 24, 2012, the bill passed the House of Representatives as part of a larger bill by a vote of 245 to 172. As part of the development of the Sunshine for Regulatory Decrees and Settlement Act, the House Judiciary Committee held extensive hearings on sue and settle and issued a committee report on July 11, 2012. Unfortunately, the Senate never took action on the counterpart bill.

On April 11, 2013, the Sunshine for Regulatory Decrees and Settlements Act of 2013 was introduced in the House as H.R. 1493, and in the Senate as S. 714. These bills would (1) require agencies to give notice when they receive notices of intent to sue from private parties, (2) afford affected parties an opportunity to intervene *prior to the filing* of the consent decree or settlement with a court, and (3) publish notice of a proposed decree or settlement in the *Federal Register*, and take (and respond to) public comments at least 60 days prior to the filing of the decree or settlement. The bill would also require agencies to do a better job showing that a proposed agreement is consistent with the law and in the public interest. The bill takes a measured, moderate approach to the sue and settle problem. While some have advocated legislation to severely restrict agency settlements themselves, H.R. 1493 would simply ensure that these settlements are conducted out in the open and that interested parties can have a seat at the bargaining table.

[37] "A Legislative History of the Clean Air Amendments, Together with a Section-by-Section Index," Library of Congress, U.S. Govt. Print. Off., 1974-1980; The legislative history was also searched using Lexis.
[38] "A Legislative History of the Water Pollution Control Act Amendments of 1972, Together with a Section-By-Section Index," Library of Congress, U.S. Govt. Print. Off., 1973-1978; The legislative history was also searched using Lexis.
[39] In 1985, the Senate Judiciary Committee did hold a hearing on the Superfund Improvement Act of 1985 that among other things did discuss citizen suits (S. Hrg. 99-415). The hearing covered a wide range of issues, such as financing of waste site clean-up, liability standards, and joint and several liability To find hearing information, a comprehensive search was conducted using ProQuest Congressional at the Library of Congress. The search focused on hearings from 1970-present that addressed citizen suits.

Recommendations

The regulatory process should not be radically altered simply because of a consent decree or settlement agreement. There should not be a two-track system that allows the public to meaningfully participate in rulemakings, but excludes the public from the "sue and settle" negotiation and settlement process that results in rulemakings designed to benefit a specific interest group. There should not be one system where agencies can use their discretion to develop rules and another system where advocacy groups use lawsuits to legally bind agencies to improperly hand over their discretion.

Notice

Federal agencies must inform the public immediately upon receiving notice of an advocacy group's intent to file a lawsuit. The Department of Justice could also provide public notice of the filing of lawsuits against agencies, as well as settlements the agencies agree to. This public notice should be provided in a prominent location, such as the agency's website or through a notice in the *Federal Register*.[40] By having this notice, affected parties will have a better opportunity to intervene in cases and also prepare more thoughtful comments.

Comments and Intervening

Federal agencies should be required to submit a notice of a proposed consent decree or settlement agreement before it is filed with the court. This notice should be published in the *Federal Register* and allow a reasonable period for public comment (e.g., 45 days). Because it is so difficult for third parties to intervene in sue and settle cases, courts should presume that it is appropriate to include a third party as an intervenor. At present, intervenors can be excluded from settlement negotiations, *sometimes without even being notified of the negotiations*. There should be clarification that all parties in the action, including the intervenors, should have a seat at the negotiation table. Intervenors should only be excluded if this strong presumption could be rebutted by showing that the party's interests are adequately represented by the existing parties in the action.

Substance of Rules

Agencies should not be able to cede their discretionary powers to private interests, especially the power to issue regulations and to develop the content of rules. This problem does not exist in the normal rulemaking process. Yet, since courts readily approve consent decrees

[40] It is our understanding that EPA has recently begun to disclose the notices of intent to sue it receives from outside parties on the agency's website. While this is a welcome development, this important disclosure needs to be statutorily required, not just a voluntary meanure.

that legally bind agencies in the sue and settle context, the decree itself becomes a vehicle for agencies to give up their discretionary rulemaking power – and even to develop rules with questionable statutory authority. Courts should review the statutory basis for agency actions in consent decrees and settlement agreements in the same manner as if they were adjudicating a case. For example, they should ensure that an agency is required to perform a mandatory act or duty, and if so, that the agency is implementing the act or duty in a way that is authorized by statute.

Deadlines

Federal agencies should ensure that they (and their partners, including states and other agencies), have enough time to comply with regulatory timelines. The public should be given enough time to meaningfully comment on proposed regulations, and agencies should take enough time to adequately conduct proper analysis. This would include agency compliance with the Regulatory Flexibility Act, executive orders, and other requirements designed to promote better regulations. This is particularly important because recent rulemakings are often more challenging to evaluate in terms of scope, complexity, and cost than earlier rules were.

Congress Needs to Pass the Sunshine for Regulatory Decrees and Settlements Act of 2013

H.R. 1493 would implement these and other important common-sense changes. It is a law based on good government principles recognizing the importance of open government and public participation. This legislation would address the "sue and settle" problem and make federal agencies' regulatory agendas more transparent, open, and accountable.