TESTIMONY OF JOHN D. WALKE

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NATURAL RESOURCES DEFENSE COUNCIL

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

BEFORE THE SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW, COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

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Thank you, Chairman Bachus and Vice Chairman Farenthold, and Ranking Member Cohen for the opportunity to testify today. My name is John Walke, and I am clean air director and senior attorney for the Natural Resources Defense Council (NRDC). NRDC is a nonprofit organization of scientists, lawyers, and environmental specialists dedicated to protecting public health and the environment. Founded in 1970, NRDC has more than 1.3 million members and online activists nationwide, served from offices in New York, Washington, Los Angeles, San Francisco, Chicago, and Beijing.

I have worked at NRDC since 2000. Before that I was a Clean Air Act attorney in the Office of General Counsel for the U.S. Environmental Protection Agency (EPA). Prior to that I was an attorney in private practice where I represented corporations, industry trade associations and individuals. Working in each of these three capacities, I have represented my clients in lawsuits that resulted in settlement agreements or consent decrees involving the EPA. My testimony today draws upon these different experiences as well as the experiences of other NRDC attorneys.

H.R. 1493, the Sunshine for Regulatory Decrees and Settlements Act of 2013, arises out of the baseless belief that government lawyers engage in "sue and settle" litigation strategies. The "sue and settle" expression alleges that government agencies seek to limit their discretion by colluding with plaintiffs to settle cases. This suggestion is squarely at odds with NRDC's experience, as well as my own experience as a private practitioner and government attorney. In litigation against the United States over four decades, NRDC attorneys have observed that Department of Justice and agency attorneys zealously advocate for the government's position. This has been true under both Democratic and Republican administrations.

Moreover, we fail to see real world evidence of the "sue and settle" phenomenon. A careful examination of the record, including testimony by witnesses for the majority at last year's hearing[1] for H.R. 1493's predecessor, H.R. 3862,[2] fails to establish real world problems that would justify this harmful and heavy-handed legislation. H.R. 1493 purports to solve problems that do not actually exist. It is a fundamentally flawed piece of legislation that we urge the subcommittee to oppose for the reasons discussed below.

Lack of Factual Foundation for Charges

The premise of the legislation is unfounded and indeed unsubstantiated. The "sue and settle" allegations implicit in the bill and reflected in last year's hearing testimony on H.R. 3862 amount to serious charges of intentional wrongdoing — that federal agencies and third parties conspire to settle litigation to advance untoward policy and legal objectives.

Yet last year's testimony on H.R. 1493's predecessor is devoid of any evidence whatsoever of that allegation. For example, majority witness Andrew Grossman of The Heritage Foundation asserted 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."[3] Nowhere

[1] *Hearing on H.R. 3041, the "Federal Consent Decree Fairness Act," and H.R. 3862, the "Sunshine for Regulatory Decrees and Settlements Act" Before the Subcomm. on Courts, Commerce and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. (Feb. 3, 2012) (hearing notice *available at* http://judiciary.house.gov/hearings/Hearings%202012/hear_0203012.html) ("Hearing on H.R. 3862").
[2] H.R. 3862, 112th Cong. (2012) *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112hr3862rh/pdf/BILLS-112hr3862rh.pdf.
[3] Hearing on H.R. 3862 (Testimony of Andrew Grossman, Visiting Legal Fellow, The Heritage Foundation *available at* http://judiciary.house.gov/hearings/Hearings%202012/Grossman%2002032012.pdf). *See also, e.g.* the

in his written testimony, however, does Mr. Grossman furnish evidence backing this claim; the most he could muster was 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.

Similarly, the office of Majority Leader Eric Cantor issued a report entitled "The Imperial Presidency"[4] that leveled the serious charge that the current administration engages in improper and possibly unconstitutional collusive litigation practices:

> The Obama Administration regularly relies on "sue-and-settle" tactics to avoid Congressional scrutiny and minimize public participation in the rulemaking process, while fast tracking the priorities of environmental groups. In practice, groups like the Sierra Club and the Natural Resources Defense Council will sue the EPA for failing to meet a nondiscretionary duty, usually a statutory deadline. Rather than fighting the lawsuit, EPA officials – many of whom used to work for the very groups that are now suing – will make enormous concessions in a settlement agreement that requires the agency to take a particular action. These settlement agreements are the product of closed-door negotiations between the EPA and environmental groups – states, industry, stakeholders, and the public have no voice in the process. Furthermore, these settlement agreements can be legally binding on future Administrations, raising serious constitutional concerns.

The first thing one notices when reading this passage is there is no evidence to support the charges. No facts, no examples, no footnotes.

The next striking thing is the basic irony that Majority Leader Cantor is arguing that the Executive Branch should defend in court to the bitter end its failure to comply with statutory deadlines set by Congress, since statutory deadlines are overwhelmingly the "nondiscretionary duties" at issue in government consent decrees and settlements. If Congress does not like a statutory deadline, it can change it. If Congress no longer supports statutory programs, it may amend them. But statutory deadlines and requirements are the law, and Congress surely does not want the Executive Branch to violate a duly enacted law. An administration that defied congressionally enacted deadlines or other provisions, even when sued to comply with them, would be thumbing

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majority report accompanying H.R. 3862 *available at* http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt593/pdf/CRPT-112hrpt593.pdf.

[4] The Office of Majority Leader Eric Cantor, *The Imperial Presidency: Implications for Economic Growth and Job Creation*, at 23 *available at* http://majorityleader.gov/theimperialpresidency/files/The-Imperial-Presidency-Majority-Leader-Eric-Cantor%27s-Office.pdf.

its nose at Congress—intruding on congressional prerogatives—not the other way around.

Most striking of all is the consistent failure in Majority Leader Cantor's report and elsewhere by critics of agency settlements and consent decrees to identify instances of collusion or other impropriety, notwithstanding an entire political narrative developing without supportive facts. Critics have not identified settlements that dictated particular regulatory outcomes by skirting required administrative rulemakings. Conservative authors of editorials, op-eds and blogs have taken up this narrative without so much as the barest facts to support the charges.[5] The U.S. Chamber of Commerce recently issued an entire report[6] on this subject and was unable to identify any evidence of collusion, conspiracy or agencies manipulating settlements or laws to carry out improper exercises of authority. My testimony examines the Chamber Report in greater detail below.

Shifting Arguments

Faced with the inability to identify collusion or impropriety and the dilemma this represents for their agenda, critics have resorted to shifting their arguments and re-defining what the term "sue-and-settle" means. The Chamber of Commerce report provides a particularly stark example of this shell game.

The Chamber chose a "sue-and-settle" methodology for its report that consists of Internet searches identifying all cases in which EPA and an environmental group entered into a consent decree or settlement agreement between 2009 and 2012. One cannot help noticing the report's slanted, partisan failure to examine any settlements between EPA and industry parties or conservative organizations, or any settlements involving the Bush administration. EPA regularly enters into settlements with industry parties, and I provide a list of illustrative examples in a footnote to my testimony.[7] Had the Chamber examined settlements prior to 2009, the results would have disclosed that the Bush administration

[5] See, *e.g.*, Op-Ed., *EPA's back-room 'sue and settle' deals require reform*, WASH. EXAMINER, May 25, 2013 *available at* http://washingtonexaminer.com/epas-back-room-sue-and-settle-deals-require-reform/article/2530505 & Op-Ed., *No more back-room deals between bureaucrats and liberal activists*, WASH. EXAMINER May 27, 2013, available *at* http://washingtonexaminer.com/national-editorial-no-more-back-room-deals-between-bureaucrats-and-liberal-activists/article/2530584 (last visited May 31, 2013) ("Washington Examiner Op Eds").

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

[7] See *infra* n. 37.

entered into settlements and consent decrees with environmental groups, industry, states and other organizations just like the present administration.

Most striking of all is that by merely compiling EPA settlements (with just environmental groups, under just this administration), the report's methodology[8] quietly dispenses with any need for proof of collusion or impropriety in consent decrees or settlement agreements. The Chamber cannot remotely back up the charge that collusion was involved in all of these settlements, or even in any of them, so the report does not even try.

It is not surprising that the Chamber's methodology found instances of settlements with EPA, since settlements are a common and long-accepted form of resolving litigation over clear legal violations under any administration. But the Chamber Report then proceeds to assert that these unremarkable facts are evidence of the collusion imagined by critics. As such, the Chamber Report redefines and significantly expands the already politically loaded sue-and-settle allegation to encompass settlements generally, precisely because there is no evidence of collusion.

The Chamber continues this argument-shifting tactic elsewhere in its report. The report reveals that one of the Chamber's grievances concerns not just settlements (lacking any evidence of impropriety), but even the basic legal rights of citizens (and corporations and states, among others) under various federal laws to hold government accountable when it breaks the law: "In the final analysis, Congress is also to blame . . . . Most of the sue and settle lawsuits were filed as citizen suits authorized under the various environmental statutes."[9]

These citizen suit authorities are one of the longest-standing and proudest features of modern administrative laws. Courts have recognized the importance of these suits, noting that they represent a "deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that [environmental laws] would be implemented and enforced."[10]

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[8] Chamber Report at 46-49.
[9] *Id.* at 8.
[10] *Natural Res. Def. Council v. Train*, 510 F.2d 692, 700 (1974); *See also Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 263 (1975) ("Congress has opted to rely heavily on private enforcement to implement public policy"); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 737 (1987) (Blackmun, J., dissenting) (noting reasonable fees provisions of environmental laws "to encourage the enforcement of federal law through lawsuits filed by private persons").

The Chamber is taking aim not at collusion, for which it lacks any proof, but instead at this "deliberate choice by Congress." The Chamber is directly targeting the legal rights of citizens to hold government accountable by enforcing mandatory statutory duties that agencies have unlawfully delayed or entirely failed to execute. The reason for this targeting is plain. The Chamber dislikes the rights that Congress has conferred upon Americans to protect themselves against health and environmental hazards when the government fails in its obligations to do so. The Chamber so dislikes these citizens' rights because the result may mean that agencies are required to enforce the law, making some of the Chamber's members comply with health, safety and environmental standards.

Nondiscretionary Statutory Duties

Consent decrees between federal agencies like EPA and plaintiffs are most commonly lodged in federal district courts to address an agency's failure to perform a nondiscretionary (or mandatory) statutory duty under federal law. These nondiscretionary duties most frequently concern failure to meet one or more plain statutory deadlines.[11]

The Republican co-sponsors of the companion Senate bill, S. 714, recognize the nature of these legal obligations. They have noted that the settlement agreements and consent decrees targeted by their legislation "[t]ypically" arise in cases where "the defendant agency has failed to meet a mandatory statutory deadline for a new regulation or is alleged to have unreasonably delayed discretionary action."[12] In my experience, consent decrees with federal agencies overwhelmingly concern nondiscretionary statutory duties like legal deadlines, and settlements are entered into far less often for unreasonably delayed discretionary actions. Indeed, caselaw tells us that agencies like EPA routinely litigate unreasonable delay lawsuits rather than settling them, sometime winning such cases, sometimes losing them.[13]

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[11] See, *e.g.*, *American Lung Association et al., v. U.S. EPA*, No. 1:12-cv-00243, at 2 (D. D.C. Sept. 4, 2012) (consent decree in a "suit[] against EPA alleging that the Agency has failed to perform a nondiscretionary duty required by the Clean Air Act") ("$PM_{2.5}$ Consent Decree") *available at* http://switchboard.nrdc.org/blogs/jwalke/PM2.5%20consent%20decree.pdf; *American Nurses Assoc. et al. v. Johnson*, No. 1:08-cv-02198 (D. D.C. Dec. 18, 2008) (consent decree requiring action by EPA to issue final regulations relating to toxic air pollution from power plants).

[12] Press Release, Senator Chuck Grassley, "Regulatory Reform Initiative Seeks Sunshine, Accountability, and Pro-Jobs Environment," April 11, 2013 http://www.grassley.senate.gov/news/Article.cfm?RenderForPrint=1&customel_dataPageID_1502=45458 ("Senator Grassley Press Release").

[13] See, *e.g.*, *WildEarth Guardians et al., v. US EPA*, No. 11-02064 (D. D.C. Nov. 17, 2011) (Defendant EPA currently litigating case brought by WildEarth Guardian, Sierra Club, Earthjustice relating to air pollution from coal mines); *In re Natural Resources Defense Council*, 645 F.3d 400 (D.C. Cir. 2011)

There is a misconception that settlements to resolve agency failures to meet statutory deadlines pressure agencies to act hastily and sloppily. This is an unfounded concern. First and most obviously, agencies only consent to decrees and agree to settlements when the agency believes in good faith that it can meet the specified deadlines. Presenting settlements and decrees to judges for approval means an agency is making a representation to the court that it can satisfy the terms of the document. As with the absence of any proof of collusion, I have seen no evidence that agencies agreeing to deadlines in settlements are acting in bad faith or making misrepresentations to courts.

Second, settlement agreements and consent decrees also contain standard language allowing the parties to modify the agreements with mutual consent and court approval, or even for the agency to modify the agreement over the plaintiffs' objection if the court approves the modification.[14] In my experience, if the agency determines that it needs more time then deadlines in these agreements are extended.[15]

Finally, EPA has addressed this issue directly and corrected the misunderstanding that settlement deadlines pressure agencies. Republican Senators recently submitted questions to EPA Administrator nominee Gina McCarthy and asked whether "deadlines in settlements sometimes put extreme pressure on the EPA to act."[16] To the contrary, EPA responded: "Where EPA settles a mandatory duty lawsuit based on the Agency's failure to meet a statutory rulemaking deadline, the settlement agreement or consent decree *acts to relieve pressure on EPA* resulting from missed statutory deadlines by establishing extended time periods for agency action."[17]

(NRDC case in which FDA litigated, and won, case regarding regulation of bisphenol A); *Chicago Ass'n of Commerce and Industry v. U.S. EPA*.873 F.2d 1025 (7th Cir. 1989) (EPA litigated and won case regarding unreasonable delay on municipal waste agency application for sewage removal credits).

[14] See, *e.g.*, $PM_{2.5}$ Consent Decree, at 4, ¶ 6 ("The Parties may extend the deadline established in Paragraph 3 by written stipulation executed by counsel for all Parties and filed with the Court on or before the date of that deadline; such extension shall take effect immediately upon filing the stipulation. In addition, EPA reserves the right to file with the Court a motion seeking to modify any deadline or other obligation imposed on EPA by Paragraphs 3, 4, 5 or 14. EPA shall give Plaintiffs at least five business days' written notice before filing such a motion. Plaintiffs reserve their rights to oppose any such motion on any applicable grounds.") *available at* http://switchboard.nrdc.org/blogs/jwalke/PM2.5%20consent%20decree.pdf.

[15] Agencies may determine more time is needed due to unforeseen circumstances or last-minute crunches, often leading to relatively short extensions. See, *e.g.*, *American Nurses Assoc. et al. v. Johnson*, *supra* n. 11 (consent decree modified on Oct. 24, 2011, to allow final standards no later than Dec. 16, 2011).

[16] Senator Vitter, Questions for the Record, Gina McCarthy Confirmation Hearing, Environment and Public Works Committee, May 6, 2013, at p. 23 *available at* http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=9a1465d3-1490-4788-95d0-7d178b3dc320 ("Senator Vitter Questions").

[17] *Id.* (emphasis added).

Benefits of Enforcing Laws to Protect Health, Safety and the Environment

The statutory safeguards that federal agencies are bound to enforce with nondiscretionary duties and statutory deadlines exist to protect Americans' health, safety, natural environment, food supply, medication and other consumer products, and financial and investor interests. Let me list just two examples of the myriad ways that enforcing statutory deadlines through citizen suits have benefitted Americans:

- Enforcing the statutory deadline for long-overdue mercury and air toxics standards for power plants, which resulted in EPA adopting safeguards projected to avoid, *every year*:
    - Up to 11,000 premature deaths;
    - 2,800 incidents of chronic bronchitis;
    - 4,700 heart attacks;
    - 130,000 asthma attacks;
    - 5,700 hospital and ER visits; and
    - 3,200,000 restricted activity days.[18]

- Enforcing the statutory deadline for overdue clean air health standards for soot pollution (fine particles or $PM_{2.5}$), which resulted in EPA adopting safeguards projected to avoid, every year:
    - Up to 1,500 premature deaths;
    - Up to 800 heart attacks;
    - Up to 250,000 asthma attacks among children; and
    - Up to 570,000 restrict activity or lost work days.[19]

Anti-Enforcement Agenda

H.R. 1493 subverts the power of the judiciary as well as the obligation of the executive branch to enforce congressional enactments, as a means of skewing outcomes. It is quite revealing that the complaints at last year's Subcommittee hearing on H.R. 3862 were more about opposition to the underlying statutory mandates than to the vehicles for

[18] U.S. EPA, Fact Sheet: Mercury and Air Toxics Standards: Benefits and Costs of Cleaning Up Toxic Air Pollution from Power Plants, *available at* http://www.epa.gov/mats/pdfs/20111221MATSimpactsfs.pdf.
[19] U.S. EPA, Regulatory Impact Analysis for the Final Revisions to the National Ambient Air Quality Standards for Particulate Matter, *available at* http://www.epa.gov/ttn/ecas/regdata/RIAs/finalria.pdf, at 5-68 (Table 5-18).

enforcing those mandates. This opposition to the enforcement of mandatory statutory duties and substantive legal safeguards courses through the Chamber Report.[20]

H.R. 1493 creates the unprecedented legal opportunity for third party "intervenors" to obstruct settlement talks and prolong illegal, harmful actions when federal agencies are sued for violating federal laws. Specifically, the bill mandates that non-party intervenors be given the right to participate in federal agency settlement discussions. *See* Sec. 3(b) and (c). The bill then mandates that all settlement discussions be conducted only pursuant to time-consuming and open-ended mediation programs administration by the federal courts. (The bill carefully avoids placing any time limits on this mediation mandate.) *See* Sec. 3(c). This unprecedented elimination of informal settlement opportunities and the speedier resolution of lawsuits, provides intervenors with legally rejected[21] and heretofore unheard of opportunities to disrupt and obstruct the settlement of lawsuits that the government believes should not be defended in court.

This extreme approach would give industry intervenors the right to participate in and prolong settlement discussions to argue that agencies like the EPA have not broken the law—even when agencies admit that they have, and when it is inescapable that they have. These industry intervenors would be granted the opportunity to oppose rulemakings and schedules to remedy the legal violations, over the objections of injured plaintiffs, even when the agency is willing to follow the law and correct its illegal behavior. I discuss this feature of the bill more extensively in the section-by-section bill analysis on pages 20-24.

By targeting citizen suits, settlements, and longstanding judicial processes and caselaw, H.R. 1493 absolutely would make it harder to ensure that the federal government does not break the law or faces required legal remedies when it does. Notably, the bill includes no measures to ensure that the federal government does not break the law or that it faces the appropriate consequences when it does. Instead, the bill is a one-way ratchet weakening law enforcement.

[20] See generally Chamber Report; Senator Grassley Press Release, *supra* n. 12; Senator Vitter Questions *supra* n. 16; Washington Examiner Op-Eds, *supra* n. 5.

[21] On pages 16-17 of this testimony, I discuss a Supreme Court decision that would be overturned by this aspect of the legislation. That decision declared that "[i]t has never been supposed that one party—whether an original party, a party that was joined later, or an intervenor could preclude other parties from settling their own disputes and thereby withdrawing from litigation." *Local Number 93 v. City of Cleveland*, 478 U.S. 501, 528-29 (1986).

Disruption of Judicial Processes

The bill also creates new procedural obstacles to resolving litigation early in the process, wasting the time and resources of litigants and the courts and conflicting directly with the expressly stated and longstanding policy of the federal judiciary. The advisory committee notes to Federal Rule of Evidence 408 specifically invoke "the public policy favoring the compromise and settlement of disputes."[22]

Above all, H.R. 1493 ignores the role of the judiciary in resolving disputes by ignoring the reason that many of these consent decrees occur in the first place. In drafting legislation, Congress sets deadlines and priorities when it directs agencies to undertake certain rulemakings. When these deadlines are missed, it is the proper role of the judiciary to ensure that laws, as written by Congress and signed into law by the president, are properly enforced.[23] The proper role of the judiciary is to enforce the statutory deadlines set and written into law by Congress rather than further impede the agency from meeting these deadlines. Preventing the judiciary from enforcing statutory deadlines is not an appropriate way to alter the regulatory system, and would gradually turn regulatory statutes into dead letters.

This bill, and the majority witnesses' prior testimony, would have one believe that these radical shifts in the balance of power are costless and serve only to increase transparency in agency decision-making. This could not be further from the truth. This legislation creates a judiciary that is required to obstruct settlement agreements and consent decrees, increasing transaction costs for all parties and the courts. This would mean less efficiency, flexibility and timely enforcement of the law. Costly and protracted litigation would mean that agency wrongs—violations of congressional mandates, mind you—would take even longer to be rectified.

[22] See FED. R. EVID. 408 advisory committee's note *available at* http ://www.law. cornell .edu/rules/fre/rule 408.

[23] Hearing on H.R. 3862, *supra* n. 1 (Statement of David Shoenbrod, Visiting Scholar, American Enterprise Institute) *available at* http://judiciary.house.gov/hearings/Hearings%202012/Schoenbrod%2002032012.pdf; *See also* Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMPORARY PROBLEMS 311, 323 (1991) (showing that EPA meets only a small percentage of statutory deadlines).

Existing Safeguards and Public Participation Opportunities

H.R. 1493 ignores the legal mechanisms already in place to ensure transparency, public participation, and an agency's maintenance of its discretionary powers and legal responsibilities. Notably, the witnesses for the majority at last year's hearing on H.R. 3862 praise these existing mechanisms at length in their testimony. At last year's hearing, Mr. Grossman lauded the so-called "Meese Policy" as an exemplary non-partisan approach that recognizes the appropriate place for the Executive Branch of government, yet he failed to acknowledge current practices that limit what the federal government can agree to when it enters into consent decrees or settlements regarding discretionary duties.[24]

Roger Martella, another witness[25] for the majority at the H.R. 3862 hearing, also praises current administrative processes, identifying "every significant administrative law initiative" as having "three inexorable components: the agency's proposed rule, the final rule, and the litigation by the loser in the rulemaking."[26] Moreover, Mr. Martella does not think "we can or should endeavor to change those components."[27] As Mr. Martella highlights, in the rulemaking context an agency may not evade or subvert required notice and comment rulemaking procedures through a consent decree or settlement.

Notably, no witness at last year's hearing for H.R. 3862 identified rules that followed settlements with agencies and did not go through public notice and comment under the Administrative Procedure Act before taking effect. For today's hearing, the witnesses should be asked whether they can identify any such examples of rules that skirted required APA procedures and, if so, whether those actions escaped judicial review.

American Nurses Association v. Jackson, a case cited by both Mr. Grossman in his testimony on H.R. 3862 last year and in the Chamber Report, provides a perfect example of these procedures. I feel compelled to address this case at some length to rebut the

[24] Memorandum from Edwin Meese III, Attorney General, to All Assistant Attorneys General and All United States Attorneys (Mar. 13, 1986); See also Memorandum from Randolph D. Moss, Acting Assistant Attorney General Office of Legal Counsel, for Raymond C. Fisher, Associate Attorney General (June 15, 1999) available at http://www.justice,gov/olc/consent decrees2.hm; 28 C.F.R. Subpt. Y (2012).
[25] Hearing on H.R. 3862, *supra* n. 1 (Statement of Roger R. Martella, Jr., Sidley Austin LLP, "Addressing Off Ramp Settlements: How Legislation Can Ensure Transparency, Public Participation, and Judicial Review in Rulemaking Activity,") *available at* http://judiciary.house.gov/hearings/Hearings%202012/Martella%2002032012.pdf.
[26] *Id.* at 1.
[27] *Id.*

Chamber's and Mr. Grossman's unfounded charges since NRDC was a plaintiff in that lawsuit. In that case, the EPA merely agreed to propose standards by a certain date and to finalize standards by a later date. No particular outcomes or substantive positions were mandated by the consent decree. The agency provided a formal comment period of 90 days on the proposed standards, but made the proposal publicly available for nearly 140 days before that comment period closed. And the consent decree was open to being modified jointly by the parties or unilaterally by the agency (with court approval), a common feature of agency consent decrees.[28] Further, section 113(g) of the Clean Air Act requires that the agency take public comment on consent decrees, providing yet another opportunity for public input.[29]

Moreover, what Mr. Grossman and the Chamber fail to note is that the clean air standards at issue in the consent decree already were over a decade overdue based on deadlines for action that Congress itself had set when amending the Clean Air Act in 1990. EPA had violated a nondiscretionary duty to issue these standards by a statutory deadline, the agency acknowledged that it had missed this statutory deadline, and the court would not have approved the consent decree had the court not agreed that EPA had violated a nondiscretionary statutory duty.[30] Mr. Grossman's testimony leveled complaints at the EPA mercury and air toxics standards, but these are all the same issues that industry raised during the comment period and are currently raising in court to challenge the final standards. This proves the point, echoed in Mr. Martella's statement, that existing administrative and judicial processes provide opportunities for public participation and the full exercise of legal rights, without the need for misconceived legislation like H.R. 1493.

Mr. Grossman represented groups opposed to the *American Nurses Association* consent decree and unsurprisingly he repeated that opposition in last year's testimony; but at bottom his disagreement is over the substance of the Clean Air Act's standards, not any procedural failings. The requirement to issue the standards originated with Congress (author of the 1990 Clean Air Act amendments) and was simply enforced by citizens and the courts.

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[28] *See supra* n. 11.

[29] Clean Air Act section 113(g), 42 U.S.C. §7413(g) (2013).

[30] Shortly before promulgation of the final regulations at issue in the consent decree, industry intervenors sought to interfere with the decree and unilaterally alter its terms to delay those regulations by a year. The court rejected that industry motion. When the industry intervenors sought to re-file an essentially identical motion a short while later, Mr. Grossman filed a brief supporting the industry intervenors. The court did not even bother to rule on that repetitive motion, making clear it was no more meritorious than the first one.

Some members of Congress opposed the mercury and air toxics standards in the 112th Congress, but several House bills to void these standards did not become law[31] and a Congressional Review Act resolution of disapproval aimed at the standards failed in the Senate.[32] Harmful legislation like H.R. 1493 should not be used to obstruct enforcement of laws that Congress chooses not to amend or repeal through regular legislative amendments.

EPA Settlements with Industry Parties

It is instructive to examine some of the many settlement agreements that EPA enters into with corporations or industry trade associations, because these settlements confound the sue-and-settle mythology and undermine the basis for H.R. 1493. What one finds in the creation and content of some of these settlements with industry is strikingly similar to settlement agreements with non-industry parties.

First, EPA concludes that it makes more sense to settle a lawsuit brought by industry rather than litigate the case, after the agency weighs the defensibility of its legal stance, the expenditure of resources, and the certainty provided by settling. Second, EPA enters into private discussions with the industry plaintiffs to craft a settlement agreement. (When parties to an EPA lawsuit are public health groups, industry critics hypocritically and pejoratively dub these talks "back-room negotiations.")[33] These private settlement talks do not include intervenors or non-industry parties.

Third, EPA frequently agrees to deadlines to propose and finalize rulemakings (just like in settlements with non-industry parties).[34] EPA commits to schedules that it can represent to the court the agency will satisfy. The settlements contain standard language allowing EPA to seek extensions in these deadlines, with mutual consent of the parties or via unilateral agency motion if the court approves the extension.[35]

Fourth, EPA then often agrees to take comment in future proposed rulemakings on specific measures included as terms in the industry settlements.[36] One actually observes

[31] Transparency in Regulatory Analysis of Impacts to the Nation, H.R. 2401, 112th Cong. (2012).
[32] S.J. Res. 37, 112th Cong. (2012).
[33] See, *e.g.*, U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors.*
[34] See, *e.g., infra* n. 37.
[35] *See, e.g., EnerNOC, Inc. v. U.S. EPA.*, 2013 WL 655313 (D.C. Cir. Feb. 6, 2013) (Obama EPA settlement agreement described *infra* n. 37 modified twice); *Engine Mfrs. Ass'n v. U.S. EPA*, 2006 WL 1825298 (D.C. Cir. June 16, 2006) (¶3: " The parties may extend the dates set forth in Paragraphs 1 and 2, or otherwise modify this Agreement").
[36] *See, e.g., Am. Petroleum Inst. v. U.S. EPA*, No. 95-1098 (D.C. Cir. Feb. 9, 1995) *infra* n. 37.

this practice more in EPA settlements with industry than in settlements with public health groups.[37] The reason is that industry litigants often have very specific regulatory approaches or test methods that they want EPA to present for comment in proposed rulemakings. This practice inches closer to the line that critics charge (erroneously) that EPA crosses in settlements with public health groups: committing to substantive regulatory outcomes in settlement agreements. But in these industry settlements just as in those with public health groups, EPA does not cross that line: agreeing to take comment on a very specific proposed regulatory outcome "substantially similar" to the terms in a settlement agreement still preserves the EPA Administrator's discretion to reach different decisions in final rules. And it still preserves the rights of the public to comment on and oppose the proposal reflecting that industry-preferred outcome.

Fifth, as discussed above, the subsequent proposed and final rulemakings satisfy all procedural requirements under the APA and the pertinent organic statutes—just as with rulemakings following settlements with health and environmental organizations.

There is nothing improper about this sequence of events. EPA and the industry plaintiffs are using long-accepted and even favored judicial tools. Industry is resorting to lawsuits under statutory citizen suit authorities and reaching private settlements with a federal agency to vindicate the industry plaintiff's legal interests. The settlements do not include intervenors. But they do not harm non-parties because the agency is not limiting its legal discretion, it is not committing to substantive outcomes, and the agency is not bypassing procedural requirements for public participation in rulemakings.

Chamber of Commerce Report

The Chamber Report takes aim at the Obama administration and accuses federal agencies of engaging in collusive litigation practices with public interest groups (a practice they disparage as "sue-and-settle" litigation). As discussed above, the very methodology of the Chamber report reveals its misleading nature because it merely

[37] *See, e.g., Am. Petroleum Inst. v. U.S. EPA*, No. 95-1098 (D.C. Cir. Feb. 9, 1995) (Clinton EPA settlement agreement with American Petroleum Institute agreeing to propose and take comment on amendment to certain federal regulations); *Engine Mfrs. Ass'n v. U.S. EPA*, 2006 WL 1825298 (D.C. Cir. June 16, 2006) (Bush EPA settlement agreement with a number of industry groups to propose, and one year later finalize, standards relating to heavy duty diesel engines);; *Wisconsin Builders Assoc. v. U.S. EPA*, No. 09-4113 (7th Cir. Dec. 28, 2009) (Obama EPA settlement agreement with industry groups requiring proposed final rule, comment period, and final rule); *EnerNOC, Inc. v. U.S. EPA*., 2013 WL 655313 (D.C. Cir. Feb. 6, 2013) (Obama EPA settlement agreement requiring proposed and final rulemakings by certain dates).

compiles settlements with one type of private party whose views the Chamber does not share.

Early on, the report authors slip and reveal one of the secrets behind the Chamber's political enterprise. The Chamber confesses that its "major concern" is that agency settlements with private parties "will spread to other complex statutes that have *statutorily imposed dates* for issuing regulations."[38]

This tells us that the Chamber knows what's really going on and why it is resorting to misrepresentation throughout its report. Namely, the Chamber understands that the agencies it excoriates are entering into settlements and consent decrees to carry out statutorily required obligations for which the agencies lack discretion.

Here are some of the core falsehoods in the Chamber Report.

Chamber Fiction: "Perhaps the most significant impact of these sue and settle agreements is that by freely giving away its discretion in order to satisfy private parties, an agency uses congressionally appropriated funds to achieve the demands of private parties."[39]

Facts: The legal obligations in these agreements involve nondiscretionary duties written into laws passed by Congress. Agencies lack discretion as a matter of law to ignore or contravene these mandatory statutory duties. Most of these obligations concern statutory deadlines. For example, the Clean Air Act requires[40] EPA to review national air quality standards every five years. The Chamber Report does not begin to explain where EPA enjoys discretion to miss this deadline, even though the report lists this as a prime example where EPA has discretion to do something other than what the law says.[41]

Indeed, the Clean Air Act spells out in unmistakable language the basis for citizen suit lawsuits against the government: lawsuits in federal district court are permitted only when the act or duty to be performed by the EPA Administrator is "not discretionary."[42] The report's misrepresentation of nondiscretionary statutory duties for agencies ends up confirming the Chamber's agenda to prolong government violations of statutory health and safety obligations.

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[38] Chamber Report, at 7 (emphasis added).
[39] *Id.*
[40] Clean Air Act section 109, 42 U.S.C. §7409 (2013) *available at* http://www.law.cornell.edu/uscode/text/42/7409.
[41] Chamber Report, at 43.
[42] Clean Air Act section 304(a), 42 U.S.C. §7604(a) (2013) *available at* http://www.law.cornell.edu/uscode/text/42/7604.

Take a recent EPA consent decree relating to soot pollution (fine particulate) standards[43] from the Chamber's hit list.[44] EPA agreed to a date to finalize its review of air quality standards for soot pollution, after the agency missed the mandatory 5-year deadline. The decree contains the following language—typically included in similar decrees—that suggests that the Chamber might not even be reading the settlements it condemns for allegedly stripping agencies of legally preserved discretion:

> Nothing in this Consent Decree shall be construed to limit, expand, or otherwise modify the discretion accorded to EPA by the Clean Air Act or by general principles of administrative law, including the discretion to alter, amend or revise any final action EPA takes [relating to soot standards], except the deadline specified therein. EPA's obligation to [revise soot standards] by the times specified therein does not constitute a limitation, expansion or other modification of EPA's discretion within the meaning of this paragraph.

Amazingly, the Chamber report highlights *this* consent decree as one in which EPA is denied discretion and rule outcomes are dictated.[45] This is demonstrably wrong.

Chamber Fiction: "The practice of agencies entering into voluntary agreements with private parties to issue specific rulemaking requirements also severely undercuts agency compliance with the Administrative Procedure Act . . . "[46]

Facts: The Chamber does not begin to show that the entry of a settlement agreement or consent decree violated administrative laws in the report's catalogue of examined cases.[47] Nor does the report back its charge that the agreements in these cases committed agencies to adopt specific rulemaking requirements that violated administrative laws. The report resorts to mere assertions again and again because the Chamber knows (or should know) that its claims are legally unsupported.

The Chamber Report proposes to "fix" these problems through promoting legislation such as H.R. 1493. However, the "Sunshine for Regulatory Decrees and Settlements Act of 2013" is a dangerous piece of legislation. In addition to obstructing enforcement of safeguards, flouting traditional concepts of separation of powers and limiting the role of the judiciary, the proposed legislation casually overturns controlling

[43] $PM_{2.5}$ Consent Decree, *available at* http://switchboard.nrdc.org/blogs/jwalke/PM2.5 consent decree.pdf.
[44] Chamber Report, at 43.
[45] *Id.* at 19.
[46] *Id.* at 6.
[47] *Id.* at 30-42.

Supreme Court precedent. In *Local Number 93 v. City of Cleveland*, 478 U.S. 501, 528-29 (1986), the Court stated that:

> It has never been supposed that one party – whether an original party, a party that was joined later, or an intervenor – could preclude other parties from settling their own disputes and thereby withdrawing from litigation. Thus, while an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent.

The Chamber dislikes this established legal understanding because it prevents industry intervenors from obstructing agency decisions to follow statutory obligations that some of the Chamber's member corporations might wish to remain unenforced.

So let's review the list of villains in the Chamber Report:

- Congress is to blame for its nerve in giving citizens the right to hold government accountable when federal agencies break laws: "In the final analysis, Congress is also to blame . . . Most of the sue and settle lawsuits were filed as citizen suits authorized under the various environmental statutes."[48]
- The courts are to blame for "rubber stamping" agency agreements that remedy government agencies' law-breaking. The Chamber even charges that "generally it does not matter to courts if the decree or agreement is not required or authorized by statute."[49] This is a very serious charge, made all the more outrageous by the Chamber's absolute failure to substantiate it. The report identifies no instances of courts approving consent decrees or agreements requiring agencies to undertake actions contrary to statutes.
- And finally, of course, citizens and public health groups are to blame for having the nerve to hold government accountable, enforcing laws passed by Congress using means long authorized by Congress.

One will have anticipated this by now, but who remains blameless? The Chamber and its member corporations. They are only demanding the right to obstruct enforcement of laws on the books. They are only seeking to allow harmful levels of pollution and financial abuses to continue because they don't like the laws that curtail these harms. The Chamber and its member corporations are happy to vindicate their legal interests by entering into settlements with federal agencies.

[48] Chamber Report at 8.
[49] *Id.* at 4.

In the final analysis, the Chamber of Commerce report ends up being a thinly veiled attempt to promote a political agenda to obstruct enforcement of legal safeguards that protect Americans against harmful corporate activities.

EPA Consent Decree Concerning Air Toxics Standards for Brick Manufacturers

One of the majority's witnesses for today's hearing, Mr. Allen Puckett, is President and CEO of the company Columbus Brick Co. Columbus Brick submitted comments opposing an EPA consent decree addressing Clean Air Act air toxics standards for "brick and structural clay products manufacturing facilities". It is instructive to review the facts associated with this consent decree to understand how the public is harmed by the failure to enforce the law (or worse), and to examine how consent decrees begin to remedy those harms, albeit belatedly. As I will show, the actual facts associated with this consent decree don't even fit the story line of "sue-and-settle" collusion.

The Clean Air Act required EPA to adopt standards reducing toxic air pollution, including carcinogens like arsenic and chromium, from the brick manufacturing industry no later than November 15, 2000.[50] EPA did not get around to issuing those standards until 2003. In 2007, the D.C. Circuit Court of Appeals vacated those standards for being unlawfully weak and unprotective and remanded the rulemaking to EPA for further proceedings.[51]

In unusually pointed language, the judges rebuked EPA for defying the court's legal precedents by relying upon the same deregulatory legal arguments in the brick case that the court had already rejected repeatedly.[52] The industry should not have been surprised by this decision, given previous court rulings on the same dispositive legal issue.

As a result of the prior administration's unlawful actions, and the *vacatur* of the standards, there currently are no federal air toxics standards in place for brick manufacturers. The industry is in the 13th year past the time that Congress expected toxic pollution from these industrial facilities to be covered by Clean Air Act standards.

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[50] 42 U.S.C. § 7412(e).
[51] *Sierra Club v. EPA*, 479 F.3d 875 (D.C.Cir. 2007).
[52] *Id.* at 884 ("If the Environmental Protection Agency disagrees with the Clean Air Act's requirements for setting emissions standards, it should take its concerns to Congress. If EPA disagrees with this court's interpretation of the Clean Air Act, it should seek rehearing *en banc* or file a petition for a writ of certiorari. In the meantime, it must obey the Clean Air Act as written by Congress and interpreted by this court.")

In 2008, when EPA had not so much as proposed brick toxic standards that were by then eight years overdue, the Sierra Club filed a lawsuit over EPA's failure to perform a nondiscretionary statutory duty and promulgate standards by the required 2000 deadline.[53] EPA then moved to dismiss the Sierra Club's lawsuit, with the agency having the chutzpah to argue that the plaintiff's lawsuit was *too late* and the case should be dismissed under the federal statute of limitations. The court denied the EPA motion. Only after that court ruling—leaving EPA with no defense to its failure to meet the nondiscretionary statutory deadline—did the agency then agree to enter into settlement discussions with the plaintiffs. This is hardly an example of "sue-and-settle" collusion.

EPA published the consent decree for public comment in accordance with the Clean Air Act. Columbus Brick opposed the consent decree and urged that the schedule for issuing the long overdue standards be delayed further.[54] The company's primary argument was that "there is not enough time for EPA to develop health-based standards, which allow EPA to tailor the level of the standard so that it protects health without imposing unnecessarily stringent standards."[55]

As a clean-air attorney working on air toxic standards for over 15 years, allow me to translate what a "health-based standard" is. It is an *exemption* from the law's rigorous technology-based air toxics standards to which all other industries are subject. EPA has never adopted such an exemption for the toxic pollution emitted by brick manufacturers, for the simple reason that neither the law nor science justifies such exemption. Notably, not even the Bush administration adopted this exemption for brick standards that were vacated in 2007. At any rate, EPA has had at least six years since 2007 to develop such an exemption if it cared to, and the agency has given no sign that it believes such an exemption is warranted.[56]

This industry-specific, situational desire for an exemption is unjustified under the Clean Air Act on multiple grounds. But it is a far cry from providing any justification for the harmful legislation that is the subject of today's hearing. The brick manufacturing industry has been effectively exempt from the rigorous safeguards required by the Clean

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[53] *Sierra Club v. U.S. EPA*, No. 1:08-cv-00424-RWR (D. D.C. Mar. 11, 2008) (Consent Decree entered on April 18, 2013).
[54] Letter from Alan Puckett III, Columbus Brick Company, to EPA Docket Center (Jan. 7, 2012).
[55] *Id.*
[56] While the name "health-based standard" may sound laudatory and desirable, it is in fact an exemption from the law's more rigorous standards; Congress intended the so-called "health-based standard" only for hazardous air pollutants with health thresholds below which no harms are known or believed to occur. The hazardous air pollutants that brick manufacturers want to exempt do not meet this standard. 42 U.S.C. § 7412(d)(4).

Air Act's toxics program for over 13 years, in clear violation of mandatory statutory duties given to EPA.

The American people have been subjected to excessive levels of highly toxic air pollution from brick manufacturers for far longer than the law allows, while other industries have been meeting required standards for one to two decades. The unfairness here is certainly not an *accelerated* rulemaking schedule. And the only thing that gives the public any assurance of seeing the law enforced and toxic pollution reduced will have resulted from the legal right that citizens have to hold government accountable: first with a lawsuit to overturn badly unlawful standards in 2007, and then to hold EPA accountable for failing to meet a nondiscretionary legal duty.

Section-by-Section Analysis of H.R. 1493

H.R. 1493 would lead to a series of harmful consequences that we hope are unintended. But the bill's fundamental flaw is that it offers irresponsible, ideological "solutions" to a problem that, as noted above, does not exist. Passage of H.R. 1493 would prolong litigation, undermine law enforcement and legal protections for health and safety, and further overburden the courts, creating incentives for unlawful agency activities.

Section 2: Definitions

The definitions for "covered consent decree" and "covered settlement agreement" reveal the incredible breadth and ill-considered design of H.R. 1493. These terms are broader than "covered civil action." For example, in addition to lawsuits against federal agencies contemplated in the definition of "covered civil action," the term "covered consent decree" also encompasses the following:

> (3) (B) any other consent decree that requires *agency action relating to a regulatory action* that affects the rights of--
>
> (i) private persons other than the person bringing the action; or
>
> (ii) a State, local, or tribal government.

This coverage sweeps in not only suits against government agencies for failure to meet deadlines or perform mandatory duties, but also an ill-defined and potentially much broader category of actions as well.

For example, this language would encompass consent decrees or settlements of actions to challenge permits issued by government agencies (including permits to individual sources where the agency has not delegated the state authority), including a company's challenges to its own permits. Settlement of a permitting dispute would require "agency action relating to a regulatory action…." This would result in intervenors—such as citizens groups, labor unions, or competitors to the company—being granted the legal right to participate in court-mediated settlement discussions involving the company and the federal permitting agency. These intervenors would have the opportunity to block and delay resolution of permitting disagreements, even if the company and permitting agency reached an agreement.

Another example of this provision's far-reaching disruption would include consent decrees or settlements involving government enforcement actions, including settlements favorable to corporate or municipal defendants. One common example under the Clean Water Act involves consent decrees that EPA negotiates with municipalities that violate the Act by discharging untreated sewage during overflow events. EPA and the Department of Justice frequently use negotiated consent decrees to relieve local governments of obligations associated with strict compliance with the Clean Water Act.

Environmental organizations sometimes challenge these decrees for their alleged leniency, often without success. H.R. 1493 now confers upon environmentalist-intervenors the legal right to derail settlements that EPA and municipalities have negotiated historically to relieve the latter of costlier compliance obligations. Now these intervenors can compel the municipalities and EPA to enter into open-ended mediation overseen by the courts, with the avowed purpose of blocking any settlements that relieve the local governments from strict compliance with the law. By opening up this Pandora's Box to differently motivated intervenors, this is what the authors of H.R. 1493 invite.

Section 3(a)(2)

Section 3(a)(2) prevents entry of a consent decree or a court's dismissal pursuant to a settlement agreement or consent decree, stating that "[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 after the end of proceedings in accordance with paragraph (1) and subparagraphs (A) and (B) of paragraph (2) of subsection (d) or subsection (d)(3)(A), whichever is later." The section operates to prevent entry of a consent decree or settlement agreement until the federal agency publishes notice of a proposed consent decree, accepts comments, responds to those comments, and holds a

public hearing on the consent decree, if it chooses to. This provision ignores statutory mechanisms already in place in many statutes that require a version of just such procedures. However, by adding more procedural hoops in this provision and requiring that consent decrees and settlement agreements not be entered until whichever of these procedures is last completed, the bill would delay enforcement of federal statutes and the vindication of valid legal rights, while wasting public and judicial resources. As written, this provision could produce lengthy, even indefinite delays in litigation, with a corresponding burden on both the court and the parties'—including the taxpayers'—resources.

Section 3(b)

The presumption required by this section subverts the current understanding and evidentiary foundation regarding inadequate legal representation. Moreover, as noted above, it would upend Supreme Court precedent, as seen in *Local Number 93.* Section 3(c), below, continues this trend.

Section 3(c)

Section 3(c) subverts law enforcement and the rule of law. It allows parties that oppose such law enforcement the unprecedented opportunity to obstruct and delay requirements to follow federal law. Consider the situation in which a federal agency commits a gross violation of a federal law and a state challenges that lawbreaking in court. Today, the state and federal agency have the ability to resolve that obvious legal violation and to do so through a consent decree or settlement agreement, promptly, without wasting judicial resources, while ensuring federal law is upheld and the state's valid legal interests safeguarded.

Section 3(c) thwarts all of that. The bill anoints third parties that support the perpetuation of the grossly unlawful behavior with the right to obstruct and delay a plaintiff state's legal right to ensure that the law is followed and the plaintiff's valid interests protected. It matters not under the bill whether those plaintiffs are individuals, corporations, nongovernmental organizations or any special interest, nor does it matter whether those third party interests are illegitimate and illegal, or whether the plaintiff is prejudiced and harmed. In all cases in which these third parties gain intervenor status, courts must delay and deny enforcement of the law by referring the case to a mediation program or magistrate judge to "reach an agreement on a covered consent decree or

settlement agreement" that must include the plaintiff, defendant agency and all intervenors. Thus, the bill jettisons the proper enforcement of federal statutes and the rule of law into a purgatory of continuing lawlessness. And intervenor(s) dedicated to the perpetuation of illegal behavior are granted legal standing to negotiate, obstruct or delay the obligation to follow the law, over the strong objections of the injured plaintiff(s).

Exactly how do the bill's drafters imagine that settlement discussions will occur involving a defendant agency that broke the law but was willing to correct that wrongdoing; an intervenor committed (for whatever reason) to the continuing violation of the law and opposed to such correction; and a plaintiff whose interests and legal right concern the upholding of the law? This process will guarantee the prolonging of the illegal behavior and the continuing injury of the plaintiff.

Perversely, section 3(c) even forces plaintiffs to participate in costly mediation activities, with the bill making no provision for their costs to be paid, of course, thereby imposing an unprecedented legal and financial burden on the legitimate interests of states, individuals, businesses and other groups that want to ensure that the federal government follows the law. Requiring parties to enter into and pay for mediation could substantially burden the public right of access to the courts, and in doing so impinge on this fundamental First Amendment right. Section 3(c) fails to specify the duration of the mediation or any ability to opt out if the mediation is not working. In the real world all these defects are a recipe for failure and prolonged unlawfulness.

It bears emphasizing that the bill's indiscriminate anointment of intervenors to exercise this manner of obstruction and delay will harm plaintiff corporations, state and local governments, nonprofit groups and individuals alike, when they or their interests have been harmed by federal agency lawbreaking. The bill guarantees equal opportunity unfairness and injustice for all plaintiff classes seeking to uphold the law. Worse, the legislation inexplicably and irresponsibly sides with parties supporting continued lawbreaking against parties seeking to require the upholding of laws, legally protected interests, and the rule of law itself.

Section 3(d)(1)

This section, like section 3(a)(2), underscores the extent to which this bill ignores current mechanisms in the law that prevent parties to a lawsuit from interfering with the rights of nonparties. The bill entirely ignores existing statutes' relevant provisions that specifically allow for input from nonparties to a consent decree. For example, section 113(g) of the Clean Air Act requires that the EPA Administrator publish in the Federal

Register notice of a consent decree or settlement agreement 30 days before it is finalized. At that time, nonparties provide comments to the Administrator and Attorney General, who can then withhold his or her consent to the proposed order or agreement.

Section 3(d)(4)

Section 3(d)(4) creates the obligation to catalog all mandatory rulemaking duties and describe how certain consent degrees or settlement agreements "would affect the discharge of those duties." This provision would be extraordinarily burdensome and time consuming for agencies and the section has no clear limitation on this vague directive. The determination of what constitutes a mandatory duty is not without controversy, and the very creation of the catalogue contemplated by the section could be an extremely contentious and lengthy process. Further litigation over whether the agency has accurately listed these duties would result, and would further burden the courts, benefiting no one but lawyers.

Section 4

This section upsets longstanding Supreme Court precedent on the standards for modification of consent decrees, and allows a settlement to be second-guessed *de novo* merely because of "changed circumstances" or "the agency's obligations to fulfill other duties." This is a radical reformulation of modification procedures that will result in more intrusive court interference with the executive branch, rather than less, since the federal government has little control over the resolution of a case that goes to trial. This provision provides a lopsided benefit to defendant agencies in all cases that are settled, allowing agencies to effectively escape settlement agreements and consent decrees they did not care to go forward with. This furthers obstructs the enforcement of congressional enactments that may already be long overdue, and the legislation imposes no time limit on the ability of agencies seeking to escape legal obligations reflected in agreements and decrees.