

# Sue and Settle: Demonizing the Environmental Citizen Suit

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## I. INTRODUCTION

When federal agencies fail to issue regulations, respond to petitions, approve plans, review standards, or take any number of actions that are required by statute, the federal Administrative Procedure Act (APA) and federal environmental laws authorize citizens to sue the agencies to force them to carry out their legal obligations.<sup>1</sup> Indeed, Congress anticipated that citizens would play an important role in the enforcement of federal environmental laws.<sup>2</sup> When faced with lawsuits for failing to perform non-discretionary duties, agencies tend to settle because their liability is clear.<sup>3</sup>

As part of such settlements, the agencies will generally agree to comply with their legal obligations according to a new schedule negotiated with the challengers.<sup>4</sup> Consequently, the agencies ultimately carry out their statutorily mandated obligations, albeit later than Congress demanded. Needless to say, there are those who would prefer that the agencies continue to ignore their statutory obligations and abstain from issuing new regulations, approving air quality control plans, listing species as

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1. *See, e.g.*, Endangered Species Act, 16 U.S.C. § 1540(g) (2012) (citizen suit provision); Clean Water Act, 33 U.S.C. § 1365 (2012) (citizen suit provision); Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (2012) (citizen suit provision); Clean Air Act, 42 U.S.C. § 7604 (2006) (citizen suit provision); *see also* Administrative Procedure Act, 5 U.S.C. § 704 (2006) (provision authorizing judicial review of final agency actions).

2. *See infra* Part IV.A.

3. *See infra* Part IV.B.1.

4. *See* WILLIAM L. KOVACS, KEITH W. HOLMAN & JONATHAN A. JACKSON, U. S. CHAMBER OF COMMERCE, SUE AND SETTLE: REGULATING BEHIND CLOSED DOORS 30–42 (2013) [hereinafter CHAMBER OF COMMERCE, SUE AND SETTLE REPORT], *available at* <https://www.uschamber.com/sites/default/files/legacy/reports/SUEANDSETTLEREPORT-Final.pdf>.

endangered, or taking other actions required by law. Perhaps unsurprisingly, these settlements have long been controversial. Public, private, and governmental interests continue to contest the proper balance and mechanisms by which federal agencies function and fulfill their obligations.

*Criticisms of “Sue and Settle”*

In the spring of 2013, industry groups and states began a concerted lobbying effort to oppose citizen enforcement of the federal environmental laws. The United States Chamber of Commerce and lobbyists for states created a catch-phrase—“sue and settle”—to demonize citizen enforcement and the federal government’s practice of settling lawsuits it is destined to lose in court.<sup>5</sup> The Chamber alleged that the federal government, by settling lawsuits brought by citizens groups rather than defending them in court, was colluding with those non-governmental organizations and excluding other affected parties to reallocate the agencies’ priorities and obligations.<sup>6</sup>

According to the Chamber, sue and settle occurs when an agency intentionally relinquishes its statutory discretion by accepting lawsuits from outside groups that 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.<sup>7</sup> The Chamber criticized such settlements on the grounds that affected parties are not involved in the settlement negotiations, do not have adequate notice that settlement negotiations are ongoing, and do not have adequate opportunities to review and comment on the settlement agreements.<sup>8</sup>

In a May 2013 report, the Chamber reviewed lawsuits that were settled by the Environmental Protection Agency (EPA), the Department of Interior, and other agencies between 2009 and 2012. The report concluded that seventy-one of those lawsuits were sue and settle cases.<sup>9</sup> With regard to the EPA, the Chamber alleged that the agency “chose . . . not to defend itself . . . at least 60 times between 2009 and 2012 [and] [i]n each case, it agreed to settlements on terms favorable to [special interest advo-

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5. *Id.* at 3.

6. *Id.*

7. *Id.*

8. *See id.* at 5–6.

9. *Id.* at 12. The report asserted that “other agencies, including the U.S. Forest Service, the Bureau of Land Management, the National Park Service, the Army Corps of Engineers, the U.S. Department of Agriculture, and the U.S. Department of Commerce, have also agreed to this tactic.” *Id.* at 5.

cacy] groups.”<sup>10</sup> The Chamber alleged that those settlements “directly resulted in EPA agreeing to publish more than 100 new regulations, many of which impose compliance costs in the tens of millions and even billions of dollars.”<sup>11</sup>

The report asserted that federal agencies are settling sue and settle lawsuits far more frequently during the current Presidential administration than during prior administrations.<sup>12</sup> The Chamber also criticized the congressional decision allowing courts to award attorney’s fees in these kinds of lawsuits. The authors of the Chamber report noted that attorney’s fees were awarded in forty-nine of the seventy-one sue and settle cases, concluding that “advocacy groups are incentivized by federal funding to bring sue and settle lawsuits and exert direct influence over agency agendas.”<sup>13</sup>

At about the same time as the Chamber released its report, the American Legislative Exchange Council (ALEC), an organization of state legislators,<sup>14</sup> released a report criticizing sue and settle lawsuits on the grounds that the settlements frequently do not involve the participation of states that will be affected by the settlements.<sup>15</sup> The authors of the report noted that the federal environmental statutes are generally enforced through a model of cooperative federalism, where the States have important rights and obligations.<sup>16</sup> The authors complained, however, that “[w]ith sue and settle, the EPA has found a way to cut states out of the process, instead negotiating the agency’s priorities with environmental special interests.”<sup>17</sup> Like the Chamber report, the ALEC report charged that the sue and settle practice has increased dramatically over the past few years.<sup>18</sup>

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10. *Id.* at 5.

11. *Id.*

12. *See id.* at 13–14. The report cites sixty such settlements during the Obama Administration’s first term (2009–2012), compared with twenty-eight (second Bush term), thirty-eight (first Bush term), and twenty-seven (second Clinton term) in previous administrations.

13. *Id.* at 12 n.14.

14. The Council is “the nation’s largest nonpartisan, individual membership organization of state legislators . . . [and is] committed to advancing the Jeffersonian principles of free markets, limited government, federalism[,] and individual liberty.” WILLIAM YEATMAN, AM. LEGISLATIVE EXCH. COUNCIL, THE U.S. ENVIRONMENTAL PROTECTION AGENCY’S ASSAULT ON STATE SOVEREIGNTY iii (2013) [hereinafter ALEC, STATE SOVEREIGNTY REPORT], available at [http://alec.org/docs/EPA\\_Assault\\_State\\_Sovereignty](http://alec.org/docs/EPA_Assault_State_Sovereignty).

15. *See id.* at 5–7.

16. *Id.* at 1.

17. *Id.* at 5.

18. *Id.* at 6. The report identifies forty-eight sue and settle agreements during President Obama’s first term, compared to eight agreements during President Bush’s second term. *Id.*

State regulators have also criticized the EPA's litigation strategies on several recent occasions. In the spring of 2013, regulators from twenty-one states sent a letter to the EPA, urging the agency to refrain from agreeing to establish power plant carbon dioxide emission limits for power plants in settling a suit brought by environmental groups.<sup>19</sup> In addition, the Attorneys General of twelve states submitted a Freedom of Information Act request to the EPA to provide the states with "records concerning EPA's practice of entering into consent decrees with non-governmental organizations in cases concerning the implementation of several environmental programs"<sup>20</sup>—the agreements that critics label sue and settle agreements.<sup>21</sup> When the EPA denied that request, the Attorneys General requested all records concerning negotiations between the EPA and non-governmental organizations that led to a consent decree regarding implementation of the Clean Air Act's (CAA) regional haze program.<sup>22</sup> When the EPA denied the request on the grounds that it was overbroad, the states filed a lawsuit challenging the agency's denial,<sup>23</sup> asserting that the "EPA's actions were not consistent with the cooperative federalism structure of the CAA or the Regional Haze program."<sup>24</sup>

Congress has also taken an interest in this issue. In 2012, Representative Ben Quayle introduced the Sunshine for Regulatory Decrees and Settlements Act to impose limits on settlement agreements and consent decrees involving federal agencies.<sup>25</sup> After the bill died in the 112th Congress, it was reintroduced in the 113th Congress as House Resolution 1493 and Senate Bill 714.<sup>26</sup> The proposed legislation would broaden intervention in lawsuits involving federal agencies, establish cumbersome

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19. See Michael Bastasch, *21 States Tell EPA to Avoid 'Sue and Settle' Lawsuits*, DAILY CALLER (June 19, 2013), <http://dailycaller.com/2013/06/19/21-states-tell-epa-to-avoid-sue-and-settle-lawsuits/>.

20. See Complaint ¶ 19, *Pruitt v. EPA*, No. 5:13-cv-0726 (W.D. Okla. July 16, 2013).

21. See Andrea Vittorio, *Attorneys General Seek EPA Compliance with FOIA over 'Sue and Settle' Tactics*, 44 ENV'T REP. (BNA) 2150 (July 7, 2013).

22. See Complaint, *supra* note 20, ¶ 18.

23. See generally *id.*

24. *Id.* ¶ 18. Shortly after the lawsuit was filed, the EPA's Inspector General (IG) announced that the IG would investigate how the agency decides what information to release under FOIA. See Andrea Vittorio, *Inspector General Plans to Investigate EPA on Freedom of Information Act Requests*, 44 ENV'T REP. (BNA) (July 26, 2013). Representatives of the EPA declined to indicate whether the investigation was related to the lawsuit or whether it was related to a recent report from the Competitive Enterprise Institute that concluded that the agency treats fee waiver requests under FOIA by environmental groups more favorably than requests by conservative groups. Vittorio, *supra*.

25. Sunshine for Regulatory Decrees and Settlements Act of 2012, H.R. 3862, 112th Cong. (2012).

26. Sunshine for Regulatory Decrees and Settlements Act of 2013, H.R. 1493, 113th Cong. (2013); S. 714, 113th Cong. (2013).

settlement procedures, create a more formal notice-and-comment process for settlements, require agencies to provide more explanation of (and justification for) settlements, and change the rules for judicial supervision and review of settlements.<sup>27</sup>

Criticism of federal agencies' seemingly collusive settlement of lawsuits is not a new phenomenon. Toward the end of the last century, academics and grassroots environmental groups criticized "rulemaking settlement" by agencies.<sup>28</sup> At that time, critics were concerned that industry groups frequently sued agencies after the agencies promulgated regulations, and then the parties entered into settlement agreements—without public participation or the participation of public interest groups—that led to amendment of the rules in a manner favorable to the industry groups.<sup>29</sup> Critics were concerned that agencies and industry groups were negotiating substantive changes to rules without adequate public participation.

In contrast to those earlier challenges, the current sue and settle critics focus primarily on settlements by agencies with environmental groups that change the timing of agency decision making, rather than the substance of the decision making.<sup>30</sup> Although the sue and settle lawsuits cited by critics rarely involved the negotiation of substantive changes to final rules, the reforms suggested by the Chamber and Congress are much more severe than the reforms suggested decades ago to address "rulemaking settlements" between agencies and industries that addressed such substantive changes.<sup>31</sup> The "cure" proposed for sue and settle lawsuits is much worse than the "disease" (if there is a disease at all).

Federal environmental laws establish a central role for citizens in enforcement of the laws, and citizens will continue to sue the EPA and other federal agencies when the agencies fail to meet statutory deadlines or carry out their duties under the laws, regardless of whether Congress adopts the proposed reforms. The reforms will simply make settlement of those lawsuits much more difficult, resulting in a longer litigation process that imposes higher costs on the government. In addition, since the cases are, for the most part, clear losers for the agencies, longer litigation will lead to higher awards of attorney's fees. More significantly, the longer litigation will delay the inevitable agency action and all of its en-

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27. *Id.*

28. *See infra* Part II.

29. *See* sources cited *infra* notes 42–60 and accompanying text.

30. *See* CHAMBER OF COMMERCE, SUE AND SETTLE REPORT, *supra* note 4, at 30–40.

31. *Compare* sources cited *infra* notes 69–75 and accompanying text (outlining reform proposals by Professors Jeffrey Gaba and Jim Rossi), *with* sources cited *infra* notes 96–118 and accompanying text (outlining reform proposals from the Chamber of Commerce and Congress).

vironmental and other benefits for many years. To the extent that reforms are necessary, much more modest proposals would suffice. This Article considers the features and history of rulemaking settlement controversies and proposes modest, sensible proposals for systemic improvement.

Part II of this Article examines “rulemaking settlements,” including the criticisms of those settlements and reforms suggested by the earlier critics. Despite the differences in foci and constituents between current and past settlement controversies, examining the past issues helps to frame and inform any address of current issues. Part III of this Article identifies the concerns raised by the modern critics of sue and settle lawsuits and describes the solutions proposed by those critics and Congress. Part IV outlines the important role that citizen enforcement plays in environmental laws, responds to the concerns raised by critics of sue and settle lawsuits, critiques the solutions proposed by the Chamber of Commerce and Congress, and suggests more modest reforms.

## II. RULEMAKING SETTLEMENTS

Toward the end of the last century, Professor Jeffrey Gaba noted that the promulgation of “final” rules by federal agencies through notice-and-comment rulemaking is often “merely the first round in a larger process in which truly final regulations may be promulgated only after the government and affected parties have privately negotiated their contents.”<sup>32</sup> Several years later, Professor Jim Rossi described the continuing trend of agencies to develop rules through negotiations to settle lawsuits, recognizing the potential advantages and disadvantages of the trend.<sup>33</sup> On the positive side, Rossi noted that “rulemaking settlements” were consistent with the trend, in administrative law, in favor of “private ordering over state imposed solutions” and the trend “toward flexible, consensual mechanisms for regulation, emphasizing less rigid, cooperative approaches over prolonged adversarial disputes.”<sup>34</sup>

“Rulemaking settlements” can be structured as settlement agreements between the litigating parties that result in the stay or ultimate dismissal of a lawsuit (or both) or as consent decrees negotiated by the parties that are then judicially enforceable.<sup>35</sup> While Professors Rossi and

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32. See Jeffrey M. Gaba, *Informal Rulemaking by Settlement Agreement*, 73 GEO. L.J. 1241, 1241–42 (1985).

33. See Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015 (2001).

34. *Id.* at 1016. Rossi pointed out the similarities between “rulemaking settlements” and negotiated rulemaking. *Id.*

35. *Id.* at 1023; Gaba, *supra* note 32, at 1246–47.

Gaba focus most of their analysis of “rulemaking settlements” on settlements of lawsuits filed to challenge final agency regulations, there are several contexts in which the settlements could arise. As Professor Gaba notes, the agreements “have fallen into one of three categories: scheduling agreements, process agreements, and substantive agreements.”<sup>36</sup>

Professor Gaba describes a “scheduling agreement” as one that “specifies the date by which the [agency] will promulgate a regulation [and is] usually negotiated in the course of litigation challenging the agency’s failure to issue regulations specifically required by statute.”<sup>37</sup> As Gaba notes, such agreements “dictate neither the content of the final regulations nor the steps the agency will take to develop the regulations.”<sup>38</sup> Scheduling agreements are also used to set deadlines to settle lawsuits brought when agencies fail to carry out other non-discretionary duties. Statutory-deadline suits are a major source of litigation for the Environmental Protection Agency, as the environmental statutes include hundreds of statutory deadlines.<sup>39</sup>

In contrast to a scheduling agreement, a “process agreement” does not specify the content or date of an agency regulation or action, “but the process the agency will employ to develop the regulation.”<sup>40</sup> The last type of agreement, the “substantive agreement,” involves agreement on the actual substance of an agency regulation or agency action.<sup>41</sup> In most cases, the substantive agreement simply results in a proposed rule that the agency will adopt through normal notice-and-comment procedures, which include opportunities for public involvement in the development of the rule.<sup>42</sup>

While the current controversies center on settlement agreements and consent decrees between federal agencies and public interest organizations, rulemaking settlements have been frequently used by regulated entities as well. As the United States Chamber of Commerce acknowl-

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36. Gaba, *supra* note 32, at 1243.

37. *Id.* at 1243.

38. *Id.* at 1244.

39. See William Yeatman, *EPA’s Woeful Deadline Performance Raises Questions About Agency Competence, Climate Change Regulations*, “*Sue and Settle*,” COMPETITIVE ENTERPRISE INST. (July 10, 2013), <http://cei.org/sites/default/files/William%20Yeatman%20-%20EPA%27s%20Woeful%20Deadline%20Performance%20Raises%20Questions%20About%20Agency%20Competence.pdf>. In a study of rules issued between 1988 and 2003, Jacob Gersen and Anne O’Connell noted that the EPA was required to comply with more than 1,000 statutory deadlines during that time period. See Jacob E. Gersen & Anne Joseph O’Connell, *Deadlines in Administrative Law*, 15 U. PA. L. REV. 923, 940 (2008).

40. See Gaba, *supra* note 32, at 1244.

41. *Id.* at 1245.

42. *Id.* at 1246.

edged in its report on sue and settle lawsuits, the “tactic” has been used for many years by business groups as well as public interest organizations and by both Republican and Democratic administrations.<sup>43</sup> As Professor Rossi points out, rulemaking settlements may frequently arise during changes in presidential administrations because “an outgoing administration may use settlement to commit a new administration to a policy course, or an incoming administration may use settlement to undermine regulatory actions adopted by the outgoing administration.”<sup>44</sup>

Most of the rulemaking settlements between regulated entities and states involve substantive agreements rather than scheduling agreements.<sup>45</sup> One of the most heavily criticized examples of this tactic by regulated entities or states involved the settlement, during the Bush Administration, of litigation brought to challenge a rule adopted during the Clinton Administration that limited logging, mining, and road building on millions of acres of land in national forests (the “roadless rule”).<sup>46</sup> When states and industry groups sued the Forest Service, the Bush Administration entered into agreements with the challengers to exempt millions of acres of land in Alaska from coverage under the rule and to establish a process to exempt vast amounts of acreage in other states from coverage under the rule.<sup>47</sup> The Bush Administration argued that the collaborative process established in the settlements was preferable over continuing to defend the litigation.<sup>48</sup>

In another case during the Bush Administration, the government settled a lawsuit brought by the state of Utah challenging the Department of Interior’s authority to adopt a policy that directed agency staff to create inventories of lands that could be identified and protected as wilderness.<sup>49</sup> In settling the case, the government stipulated that it had no authority to designate over 220 million acres of land throughout the country as wilderness, even though the case only involved a challenge to the designation of 2.6 million acres of land in Utah.<sup>50</sup>

In addition to those cases, critics have condemned other “sweet-heart deal” settlements with states and industry during the Bush Admin-

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43. See CHAMBER OF COMMERCE, SUE AND SETTLE REPORT, *supra* note 4, at 11–14.

44. See Rossi, *supra* note 33, at 1033.

45. See Patrick Parenteau, *Anything Industry Wants: Environmental Policy Under Bush II*, 11 DUKE ENVTL. L. & POL’Y F. 363, 394 (2004).

46. *Id.* at 394–96; see also Martin Nie, *Administrative Rulemaking and Public Lands Conflict: The Forest Service’s Roadless Rule*, 44 NAT. RESOURCES J. 687, 709–10 (2004).

47. See Parenteau, *supra* note 45, at 394–96; Nie, *supra* note 46, at 709–10.

48. See Nie, *supra* note 46, at 711.

49. See Parenteau, *supra* note 45, at 396–98.

50. *Id.* at 397–98.



istration, including an agreement to eliminate a ban on the use of snowmobiles in Yellowstone National Park, an agreement to review the endangered listing of the northern spotted owl (despite scientific evidence demonstrating that the population was declining), and an agreement to allow more logging on spotted owl reserves.<sup>51</sup> All of those agreements were substantive agreements, rather than scheduling agreements. When an agency enters into a substantive agreement, it is generally exercising a greater level of discretion than when it enters into a scheduling agreement, and there is a greater need for some limit on the settlement process.

Recent studies by Professor Wendy Wagner and Professor Cary Coglianese suggest that, even today, regulated entities may be able to use the sue and settle tactic more effectively than environmental groups to influence agencies to make substantive changes to final rules, as opposed to using the tactic to establish new deadlines in scheduling agreements.<sup>52</sup> Professor Wagner examined the rulemaking life cycle of ninety toxic-air emission standards adopted by the EPA to compare the influence of environmental groups and industry in the pre-rulemaking, rulemaking, and post-rulemaking process.<sup>53</sup> Similarly, Professor Coglianese examined a set of hazardous-waste rules adopted by the EPA to compare the influence of various groups in those rulemaking proceedings.<sup>54</sup> Both Wagner and Coglianese determined that the post-rulemaking period presents significant opportunities for parties to influence agencies to change their rules, through litigation or otherwise.<sup>55</sup> In Wagner's study, industry groups or environmental groups brought judicial challenges or filed petitions for reconsideration for 22% of the toxic-air emission rules.<sup>56</sup> Industry groups brought more challenges than environmental groups for those rules.<sup>57</sup> In Professor Coglianese's study, 44% of the hazardous-waste rules that he examined were either challenged in court or subjected to a petition for reconsideration.<sup>58</sup> While half of those cases settled, most of the settlements only involved regulated industry.<sup>59</sup> In the article describing her study, Professor Wagner noted that regulated parties are likely to

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51. *Id.* at 400–01.

52. See Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emissions Standards*, 63 ADMIN. L. REV. 99 (2011).

53. *Id.*

54. *Id.* at 108, 114, 136.

55. *Id.* at 113–15.

56. *Id.* at 134.

57. *Id.*

58. *Id.* at 136.

59. *Id.*

have an advantage in motivating the agencies to make changes to rules through litigation because regulated parties are more likely to bring challenges that lead to rule delays, compared to environmental groups who often bring challenges that seek to vacate rules entirely.<sup>60</sup>

Critics have expressed concerns about agencies entering into settlement agreements with environmental groups, regulated entities, or states when such agreements substantively change finalized rules, policies, or actions. For instance, Professor Rossi and Professor Gaba have both recognized that rulemaking settlements limit the participation of non-parties that are likely to be affected by the terms of the settlement.<sup>61</sup> Professor Rossi argues that when agencies' regulations or decisions are challenged in court, the agencies have an incentive to settle the lawsuit quickly in order to implement their decision without delay and avoid high litigation costs.<sup>62</sup>

Rossi notes that many persons who are affected by the agencies' regulations or decisions and who may have been involved in the initial development of the rulemaking or decision will not be involved in the negotiations to settle the lawsuit. He notes further that agencies may have an incentive to limit affected persons' involvement in the negotiation process if it would slow down the settlement of the lawsuit.<sup>63</sup> Thus, Rossi recognizes that rulemaking settlements can limit the participation of persons who are likely to be affected by the substantive terms of the settlement.<sup>64</sup> Further, he suggests that agencies may be willing to make concessions in the negotiations that are not in the public interest and that the agencies might not have been willing to make if a wider array of interested persons were involved in the settlement negotiations.<sup>65</sup>

Professor Rossi also raises concerns that the settlement negotiation process is not transparent and that the parties to the litigation are negotiating substantive changes to agency rules or decisions "in secret."<sup>66</sup> Rossi expresses heightened concerns when the settlement to which the agency and litigants agree can be implemented without additional processes for public participation, such as notice-and-comment rulemaking.<sup>67</sup>

Although the policies that agencies and litigants agree to when they enter into substantive rulemaking settlements must generally be imple-

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60. *Id.* at 115.

61. See Rossi, *supra* note 33, at 1016–20; Gaba, *supra* note 32, at 1267–68.

62. See Rossi, *supra* note 33, at 1026.

63. *Id.* at 1027.

64. *Id.*

65. *Id.* at 1016–17.

66. *Id.* at 1029.

67. *Id.*

mented through subsequent notice-and-comment proceedings, Professor Gaba recognizes that agencies have some incentive to finalize rules in the subsequent notice-and-comment process in a manner consistent with the rules that were proposed as part of the settlement agreement. Thus, critics might argue that the subsequent rulemaking procedure is not procedurally adequate, since the agency may be biased in the rulemaking process.<sup>68</sup>

To address some of the concerns outlined above, Professor Rossi suggests that it is important to provide broad notice of potential rulemaking settlements.<sup>69</sup> He argues that courts should “referee whether parties have been given adequate notice of a settlement,” and since he is focusing primarily on settlement of lawsuits challenging rules that have been adopted by agencies, he argues that courts should attempt to ensure that persons who commented on the rule during the notice-and-comment period are provided notice of the settlement.<sup>70</sup> Similarly, Professor Gaba stresses the importance of providing notice of proposed settlements to non-parties who could be affected by the settlements and who are interested in the proceedings.<sup>71</sup>

Both Professor Gaba and Professor Rossi suggest that the rules regarding intervention in lawsuits should be read liberally to allow non-parties to participate in the lawsuit that gives rise to the rulemaking settlement when the interests of the non-parties are not otherwise being adequately represented.<sup>72</sup> Finally, both Professor Rossi and Professor Gaba suggest that courts should play a more active role in reviewing the rulemaking settlements. Professor Rossi suggests that courts should engage in “hard look” arbitrary-and-capricious review of rulemaking settlements to force agencies to provide a more complete explanation of the factors raised in the settlement negotiations that ultimately motivated the agencies to enter into the agreement.<sup>73</sup> He recognizes, though, that there is not clear legal authority for that level of judicial scrutiny.<sup>74</sup> Similarly, Professor Gaba suggests that courts could require that agencies provide a written justification for the changes to rules that are proposed as part of a rulemaking settlement or that the settlement be published with an opportunity for non-parties to comment on the settlement.<sup>75</sup>

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68. See Gaba, *supra* note 32, at 1242, 1251–58.

69. See Rossi, *supra* note 33, at 1047–49.

70. *Id.* at 1048–49.

71. See Gaba, *supra* note 32, at 1275–76.

72. See *id.* at 1276–78; Rossi, *supra* note 33, at 1047.

73. See Rossi, *supra* note 33, at 1050–57.

74. *Id.* at 1056–57.

75. See Gaba, *supra* note 32, at 1278–79.

While Professors Gaba and Rossi raised those concerns to rulemaking settlements involving substantive changes to agencies' rules or final actions, both stressed that scheduling agreements raise far fewer concerns.<sup>76</sup> Nonetheless, scheduling agreements are subject to criticism, as explored in the next Part.

### III. THE "SUE AND SETTLE" CRITICISMS AND REFORMS

While academics have, for several decades, criticized "rulemaking settlements" in lawsuits involving substantive changes to agencies' rules or final actions, the recent wave of criticism of sue and settle lawsuits with the federal government focuses on lawsuits that are brought when a federal agency has not issued a regulation by a statutory deadline or has failed to take some other "non-discretionary" action that the law requires the agency to take, and the agency settles the lawsuit with a "scheduling agreement." Indeed, 83% of the lawsuits that were the focus of the report issued by the United States Chamber of Commerce involved such challenges.<sup>77</sup> Nevertheless, the criticisms raised by business groups and states are broader, and the reforms suggested are more stringent, than those raised by academics in the past, in the context of rulemaking agreements where the parties agree to substantive changes to rules or agency actions.

#### A. Criticisms Raised by the United States Chamber of Commerce

In its spring 2013 report, the United States Chamber of Commerce alleged that the federal government was "intentionally" relinquishing statutory discretion by "accepting lawsuits from outside groups that effectively dictate the priorities and duties" of the government without participation of affected parties or the public.<sup>78</sup> The Chamber raised con-

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76. *See id.* at 1244; Rossi, *supra* note 33, at 1018.

77. The Chamber of Commerce identified seventy-one lawsuits as sue and settle cases resulting in new rules and agency actions in its report. *See* CHAMBER OF COMMERCE, SUE AND SETTLE REPORT, *supra* note 4, at 30–40. In fifty-nine of those lawsuits, the plaintiffs were suing because the government had failed to take some non-discretionary action. The twelve cases identified in the Chamber's report that *did not* involve failure to take a non-discretionary action included the following: *Natural Res. Def. Council v. EPA*, No. 06-0820 (2d Cir. 2010); *Natural Res. Def. Council v. EPA*, No. 09-60510 (5th Cir. 2010); *New York v. EPA*, No. 06-1322 (D.C. Cir. 2010); *Sierra Club v. Jackson*, No. 09-1041 (D.C. Cir. 2010); *Sierra Club v. EPA*, No. 08-1258 (D.C. Cir. 2009); *Portland Cement Ass'n v. EPA*, No. 07-10406 (D.C. Cir. 2009); *Colo. Envtl. Coal. v. Salazar*, No. 09-00085 (D. Colo. 2011); *Ctr. for Biological Diversity v. U.S. Dep't of Agric.*, No. 08-03884 (N.D. Cal. 2010); *Coal River Mountain Watch v. Salazar*, No. 08-02212 (D.D.C. 2010); *Ctr. for Biological Diversity v. EPA*, No. 09-00670 (W.D. Wash. 2010); *WildEarth Guardians v. Kempthorne*, No. 08-00689 (D. Ariz. 2009); and *Northwoods Wilderness Recovery v. Kempthorne*, No. 08-01407 (N.D. Ill. 2009).

78. *See* CHAMBER OF COMMERCE, SUE AND SETTLE REPORT, *supra* note 4, at 3.

cerns about agency capture; the improper use of congressionally appropriated funds; limited participation for affected parties and the public; and avoidance of procedural requirements of the APA and other laws or executive orders regarding rulemaking.

Regarding agency capture, the Chamber alleged that when settling agencies enter into scheduling agreements that require the agencies to take actions by specific dates, the agencies are reordering their priorities and allocation of resources to meet the interests of the challengers and are limiting their discretion to set those priorities in a manner consistent with the public interest.<sup>79</sup> This allegation could be grounded, in part, on a policy adopted by Attorney General Edwin Meese in 1986 (the “Meese memo”) that prohibited the federal government from entering into a consent decree “that divests [a government official] of discretion” or “that converts into a mandatory duty the otherwise discretionary authority [of an official] to revise, amend[,] or promulgate regulations.”<sup>80</sup> That policy was subsequently clarified and narrowed during the Clinton Administration, and it has never been interpreted to prohibit the government from entering into a consent decree to set a timetable for compliance with a non-discretionary duty after the statutory deadline for compliance has passed.<sup>81</sup>

The Chamber also raised separation-of-powers concerns regarding the reordering of agencies’ priorities and allocation of resources in scheduling agreements, characterizing the settlement of such lawsuits as “a situation in which the [E]xecutive [B]ranch expands the authority of agencies at the expense of congressional oversight . . . with at least the implicit cooperation of the courts.”<sup>82</sup> Similarly, the Chamber asserted that agencies are improperly using “congressionally appropriated funds to achieve the demands of private parties” when they enter into agreements that have the effect of reordering the priorities.<sup>83</sup>

Further, the Chamber alleged that agencies frequently set unrealistic deadlines in scheduling agreements, causing the agencies to adopt poor quality rules in response to the short deadlines and to divert resources

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79. *Id.* at 3, 11. The Competitive Enterprise Institute raised similar concerns in an article published in July of 2013, examining EPA’s compliance with statutory deadlines in three Clean Air Act programs. See Yeatman, *supra* note 39.

80. See Memorandum from Edwin Meese III, Att’y Gen., to All Assistant Att’y’s Gen. and All U.S. Att’y’s, Department Policy Regarding Consent Decrees and Settlement Agreements 3–4 (Mar. 13, 1986), available at <http://www.archives.gov/news/samuel-alito/accession-060-89-1/Acc060-89-1-box9-memoAyer-LSWG-1986.pdf>.

81. See sources cited *infra* notes 167–70 and accompanying text.

82. See CHAMBER OF COMMERCE, SUE AND SETTLE REPORT, *supra* note 4, at 6–7.

83. *Id.* at 7.

from other rulemakings and other actions, which results in poor quality or delayed decision making in those actions as well.<sup>84</sup>

In addition to concerns about agencies' authority to enter into scheduling agreements, the Chamber raised concerns that the government does not provide adequate opportunities for persons affected by settlements or the public to participate in the negotiation of the terms of the settlement because the government does not provide adequate notice to all interested persons when the government has been sued or when someone has filed a petition for rulemaking.<sup>85</sup> The Chamber alleged that the failure to provide affected parties and the public with broader opportunities to participate in the negotiation of settlement terms is anti-democratic and will lead to poorly reasoned decisions because the affected parties will not be able to provide important information that would be relevant to the agency's decision regarding the settlement terms.<sup>86</sup> The American Legislative Exchange Council (ALEC) asserted similar concerns about exclusion of states from the settlement negotiation process in its 2013 report.<sup>87</sup> Because federal environmental laws frequently provide for a partnership between the federal government and states in administering and enforcing various provisions of the laws, ALEC alleged that exclusion of states from the settlement negotiations violated principles of cooperative federalism that are fundamental to those laws.<sup>88</sup>

Although there are opportunities for states, affected parties, or the public generally to receive notice and provide comment for some consent decrees and settlements, the Chamber, in its report, alleged that those opportunities are insufficient because agencies rarely change the terms of consent decrees in response to such input; thus, the opportunity to submit comments comes too late in the process.<sup>89</sup> In the small number of cases studied where agencies enter into substantive agreements in settlements or consent decrees, the Chamber also asserted that agencies avoid procedures required by the Administrative Procedure Act.<sup>90</sup> Although the agreements generally require agencies to issue proposed rules in accordance with the APA, the Chamber argued that "the outcome of the rule-

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84. *Id.* at 23–24.

85. *Id.* at 5–6. The American Legislative Exchange Council raised similar concerns in its report, suggesting that "[s]tates are frequently caught off guard by . . . sue and settle agreements because the EPA doesn't inform them about the ongoing settlement negotiations." See ALEC, STATE SOVEREIGNTY REPORT, *supra* note 14, at 6.

86. See CHAMBER OF COMMERCE, SUE AND SETTLE REPORT, *supra* note 4, at 5, 23.

87. See ALEC, STATE SOVEREIGNTY REPORT, *supra* note 14, at 1, 5–6.

88. *Id.* at 1.

89. See CHAMBER OF COMMERCE, SUE AND SETTLE REPORT, *supra* note 4, at 24.

90. *Id.* at 6.

making is essentially set,” and the public thus does not have an opportunity to comment as required by the APA.<sup>91</sup>

Along the same lines, the Chamber alleged that when agencies agree to expeditious deadlines for action to resolve lawsuits based on their failure to meet earlier deadlines, they do not provide sufficient time to comply with the Regulatory Flexibility Act, the Unfunded Mandates Act, and various other statutes and executive orders that apply to review of agencies’ rules.<sup>92</sup> The Chamber also alleged that short deadlines limited the review of rules and agency actions by the Office of Management and Budget.<sup>93</sup>

Finally, although the Chamber report focused primarily on cases that were settled by scheduling agreements and brought against the EPA and the Department of the Interior, the Chamber expressed concerns that the litigation tactic could be used more frequently to reach substantive agreements (instead of scheduling agreements<sup>94</sup>) and that the tactic could be used against other agencies based on authority in the APA.<sup>95</sup>

#### *B. Reforms Suggested by the United States Chamber of Commerce*

The Chamber report included several concrete recommendations for action to address the concerns raised in its report. In light of their concerns that affected parties are not aware of ongoing lawsuits and settlement negotiations, the Chamber recommended that federal agencies should immediately inform the public, through their website or a notice in the Federal Register, when they receive notice of “an advocacy group’s” intent to sue the agency.<sup>96</sup> According to the Chamber, this would provide affected parties with a better opportunity to intervene in

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91. *Id.* at 6. In addition, the Chamber alleged that agencies cannot make many changes to rules after they are proposed, so it is important to involve a range of interested parties in the development of the proposed rule, rather than drafting the rule “to accommodate the specific demands of a single interest.” *Id.* at 25.

92. *Id.* at 23. Despite the charges, the Chamber does not cite any instances where agencies failed to comply with those statutory or regulatory requirements.

93. *Id.* at 23.

94. *Id.* at 22.

95. *Id.* at 7. Most of the lawsuits that the Chamber report examined were brought under the citizen suit provisions of various federal environmental laws, rather than the APA. The Chamber expressed concerns, though, that lawsuits could be brought under the APA to challenge an agency’s failure to issue regulations under other laws, based on a federal district court decision in California that adopted that approach. *Id.* (citing Order Re Cross-Motions for Summary Judgment, *Ctr. for Food Safety v. Hamburg*, No. 4:12-cv-04529-PJH (N.D. Cal. Aug. 29, 2012)).

96. See CHAMBER OF COMMERCE, *SUE AND SETTLE REPORT*, *supra* note 4, at 28.

the cases, prepare more thoughtful comments on any proposed settlements, or both.<sup>97</sup>

Regarding intervention, the Chamber recommended that courts apply a strong presumption in favor of allowing persons to intervene in lawsuits.<sup>98</sup> This presumption could be rebutted by a showing that the potential intervenor's interests are adequately represented by the existing parties in the action.<sup>99</sup> Under the current rules, the intervenor has the burden of proving that existing parties do not adequately represent its interests, so the Chamber's recommendation would turn the burden on its head. In addition to recommending a strong presumption in favor of intervention, the Chamber recommended that judicial rules be amended to provide that intervenors must be given the opportunity to be involved in the settlement negotiations.<sup>100</sup>

The Chamber also recommended that agencies should be required to submit a notice in the Federal Register when they have prepared a consent decree or settlement agreement and that agencies provide a reasonable period for public comment, perhaps forty-five days, before filing the agreement or decree with the court.<sup>101</sup> Finally, the Chamber recommended more rigorous judicial oversight of the terms of settlement agreements and consent decrees.<sup>102</sup> Specifically, the Chamber recommended that 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."<sup>103</sup>

### *C. Congressional Reform Proposals*

Representative Ben Quayle's Sunshine for Regulatory Decrees and Settlements Act of 2012 was intended to impose significant procedural and substantive restrictions on federal agencies when they enter into consent decrees or settlement agreements.<sup>104</sup> Although that bill died in the 112th Congress, it was reintroduced in the 113th Congress as Senate Bill

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97. *Id.*

98. *Id.* at 29.

99. *Id.*

100. *Id.*

101. *Id.* at 28.

102. *Id.* at 29.

103. *Id.*

104. See Sunshine for Regulatory Decrees and Settlements Act of 2012, H.R. 3862, 112th Cong. (2012).



714 and House Resolution 1493.<sup>105</sup> Many provisions of the legislation are similar to the recommendations of the Chamber.

First, the legislation provides that an agency must publish online a notice of intent to sue or a complaint in a case involving the agency's failure to take an action required by law<sup>106</sup> within fifteen days after receiving it.<sup>107</sup> The legislation also establishes elaborate notice-and-comment requirements for consent decrees and settlement agreements in a much wider range of cases—in any case where the decree or agreement requires regulatory action that affects the rights of private persons other than the persons suing or that affects the rights of a state, local, or tribal government.<sup>108</sup>

In those cases, the legislation requires agencies to publish proposed consent decrees or settlement agreements in the Federal Register and online, along with a statement providing the statutory basis for the decree or agreement and a description of the terms of the decree or agreement, including whether it provides for attorney's fees.<sup>109</sup> After publishing the notice, the legislation requires the agency to provide a sixty-day public comment period and to prepare a record for the notice-and-comment process, which includes a summary of the comments and responses and an index of all the documents in the record.<sup>110</sup> The legislation prohibits agencies from entering a consent decree or moving to dismiss an action based on a settlement agreement until the agency complies with these notice-and-comment requirements.<sup>111</sup>

The legislation imposes additional limits on the format of consent decrees and settlement agreements in cases that require regulatory action that affects states or private persons that are not parties. If the agreement or decree requires an agency to take action by a specific date (like most of the settlements in the Chamber report), the legislation requires the

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105. *See* Sunshine for Regulatory Decrees and Settlements Act of 2013, H.R. 1493, 113th Cong. (2013); S. 714, 113th Cong. (2013).

106. The legislation defines a "covered civil action" as a civil action (A) seeking to compel agency action; (B) alleging that the agency is unlawfully withholding or unreasonably delaying an agency action relating to a regulatory action that would affect the rights of (i) private persons other than the person bringing the action; or (ii) a State, local, or tribal government; and (C) brought under (i) chapter 7 of title 5, United States Code; or (ii) any other statute authorizing such an action.

H.R. 1493, § 2(2).

107. *Id.* § 3(a)(1).

108. Section 2(3) defines the scope of "covered consent decrees," and section 2(5) defines the scope of "covered settlement agreements."

109. *Id.* § 3(d)(1).

110. *Id.* § 3(d)(2).

111. *Id.* § 3(a)(2).

agency to inform the court of any required regulatory actions the agency has not taken that the decree or agreement does not address, how the decree or agreement would affect the agency's performance of those other required actions, and why it is in the public interest to enter into the decree or agreement despite the effects on the performance of other required actions. The legislation also provides that when a settlement includes certain terms that were addressed in the 1986 Meese memo, the head of the agency or the Attorney General must personally sign a certification approving those terms.<sup>112</sup>

The legislation also imposes restrictions on the settlement negotiation process. First, like the Chamber's recommendation, the legislation changes the rules for intervention in any lawsuit covered by the legislation and creates a rebuttable presumption that the interests of a person filing a motion for intervention are not adequately represented by the existing parties to the action.<sup>113</sup> In addition to broadening the scope of parties that are likely to be involved in the litigation, the legislation significantly changes the nature of the settlement negotiations by requiring that negotiations must include all intervening parties and be "conducted pursuant to the mediation or alternative dispute resolution program of the court or by a district judge other than the presiding judge, magistrate judge, or special master, as determined appropriate by the presiding judge."<sup>114</sup>

While the legislation does not incorporate the Chamber's recommendations regarding the standard of review that a court should apply when deciding whether to approve a consent decree,<sup>115</sup> the legislation creates a presumption that it is proper, when the court is reviewing a pro-

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112. *Id.* § 3(e). The certification is required if the agreement includes a provision that (i) converts into a nondiscretionary duty a discretionary authority of an agency to propose, promulgate, revise, or amend regulations; (ii) commits an agency to expend funds that have not been appropriated and that have not been budgeted for the regulatory action in question; (iii) commits an agency to seek a particular appropriation or budget authorization; (iv) divests an agency of discretion committed to the agency by statute or the Constitution of the United States, without regard to whether the discretion was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties; or (v) otherwise affords relief that the court could not enter under its own authority upon a final judgment in the civil action.

*Id.* § 3(e)(2)(A).

113. *Id.* § 3(b)(1).

114. *Id.* § 3(c).

115. Although it does not address the standard that a court should apply when deciding whether to initially approve a consent decree, the legislation requires courts to review consent decrees and settlement agreements de novo when an agency moves a court to modify a decree or agreement on the grounds that the terms in the settlement "are no longer fully in the public interest due to the obligations of the agency to fulfill other duties or due to changed facts and circumstances." *Id.* § 4.

posed consent decree or settlement agreement, to allow amicus participation by anyone who submitted comments on the proposed decree or agreement.<sup>116</sup>

Finally, the legislation requires agencies to submit an annual report to Congress that identifies the number, identity, and content of lawsuits filed against the agency that are covered by the legislation as well as consent decrees or settlements entered into by the agency that are covered by the legislation.<sup>117</sup> For each consent decree or settlement agreement, the report must identify the statutory basis for the settlement and the basis for any award of attorney's fees or costs in those actions.<sup>118</sup>

#### IV. A RESPONSE TO THE CRITICS

The recommendations of the U.S. Chamber of Commerce and the proposed congressional legislation would provide significant roadblocks to settlement of lawsuits brought against federal agencies when agencies fail to carry out duties required by law, but the reforms would not reduce the number of such lawsuits. Citizens play a vital role in enforcement of the federal environmental laws when the government fails to act as required by law, and the proposed reforms would simply prolong the government's ultimately futile defense of those lawsuits. Many of the concerns raised by the Chamber and other critics are overstated. To the extent that some of the concerns have merit, however, such concerns can be addressed through more moderate reforms.

##### *A. The Important Role of Citizen Enforcement*

Citizen suits are a "quintessentially American legal process innovation."<sup>119</sup> Congress first authorized citizens to sue the government or other persons who violate environmental laws when it included a citizen suit provision in the Clean Air Act in 1970.<sup>120</sup> Every major federal environmental law enacted since (other than FIFRA<sup>121</sup>) includes a citizen suit

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116. *Id.* § 3(f)(1). The legislation also requires the court to ensure that the consent decree or settlement agreement allows for sufficient time and incorporates adequate procedures for the agency to comply with the APA, other statutes, or executive orders that impose requirements on rulemaking. *Id.* § 3(f)(2).

117. *Id.* § 3(g).

118. *Id.*

119. See Zygmunt J.B. Plater, *The Three Economies: An Essay in Honor of Joseph Sax*, 25 *ECOLOGICAL L.Q.* 411, 425 (1998).

120. See 42 U.S.C. § 7604 (2012).

121. Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (2012).

provision.<sup>122</sup> Citizen suits serve several important purposes. First, citizen enforcement ensures that congressional priorities are implemented when other factors may limit federal or state enforcement of those priorities.<sup>123</sup> Second, citizen enforcement promotes democratic ideals by enabling interested citizens to participate meaningfully in the formulation and implementation of environmental policy.<sup>124</sup>

Regarding the primary purpose of citizen enforcement, numerous reports over several decades have documented chronic under-enforcement or non-enforcement of environmental laws by federal or state agencies.<sup>125</sup> As Professor Buzz Thompson notes, the balance of political power shifts toward industry in the implementation and enforcement of environmental laws, as regulated entities will lobby hard against penalties and enforcement, and without citizen enforcement, few would advocate against leniency in enforcement.<sup>126</sup> Further, he notes that because of the diffuse nature of harm caused by many environmental violations, citizens may frequently be unaware of such violations.<sup>127</sup> In addition, when states are tasked with enforcing federal environmental laws, as they are under the cooperative federalism approach adopted in many of those laws, states have an added incentive to limit enforcement when they feel that aggressive enforcement might encourage businesses to relocate to other states that are less rigorous in their enforcement of the laws.<sup>128</sup> Arguably, it is inappropriate to take those factors into account in determining whether to enforce environmental laws.<sup>129</sup>

Political pressures are not the only factor that contributes to under-enforcement or non-enforcement of environmental laws by federal and state agencies. Environmental agencies at the federal and state levels are frequently underfunded and understaffed.<sup>130</sup> Thus, even if agencies have the political will to enforce the laws more aggressively, they frequently lack the necessary resources. When federal or state agencies lack the resources or the political will to enforce the environmental laws enacted by Congress, citizen suit provisions allow citizens to step in and implement congressional will. In fact, the mere threat of citizen litigation alters the

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122. See Barton H. Thompson, Jr., *Innovations in Environmental Policy: The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 192.

123. See *id.* at 198.

124. *Id.*

125. *Id.* at 191.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 202–03.

130. *Id.* at 191–92.

political calculus for federal and state agencies and can motivate government enforcement.<sup>131</sup>

Although some critics, including the Chamber of Commerce in its report,<sup>132</sup> assert that citizen suits are motivated primarily by the opportunity to collect attorney's fees, most studies conclude that citizen suits frequently address significant violations of environmental laws and rarely address frivolous violations.<sup>133</sup> The Chamber asserts that there has been no meaningful oversight of citizen suits for over forty years because jurisdiction rests with the congressional committee that oversees the substantive statute at issue rather than the House and Senate Judiciary Committees, which have expertise and jurisdiction over granting "access to federal courts."<sup>134</sup> However, that assertion exhibits the Chamber's fundamental misunderstanding of the central role of citizen suits in the structure of the environmental statutes. To the extent that there are any "abuses" of the citizen suit process, the congressional committees that have jurisdiction over the environmental statutes are uniquely qualified to evaluate the implementation of the citizen suit provisions in those statutes.

Even if citizen suits had not been used so effectively to address problems of chronic under- or non-enforcement of environmental laws, the provisions would still be valuable because of the democracy benefits noted above. Citizen suits provide interested persons with a "seat at the table" in environmental policymaking and provide a process for ensuring that their interests are represented.<sup>135</sup> As Professor Thompson points out, "procedure is often as important to members of the public as outcomes."<sup>136</sup>

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131. The citizen suit provisions in environmental laws generally (1) require citizens to notify the defendants and the government before filing suit; (2) require citizens to wait a specific time period, usually sixty days after giving notice, before filing a citizen suit; and (3) prohibit citizens from filing a suit if the government is diligently prosecuting a civil action against a defendant for the violation that is the subject of their lawsuit. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1365 (2012); Resource and Conservation Recovery Act, 42 U.S.C. § 6972 (2012); Clean Air Act, 42 U.S.C. § 7604 (2012).

132. *See* CHAMBER OF COMMERCE, SUE AND SETTLE REPORT, *supra* note 4, at 12 n.14.

133. *See* Thompson, *supra* note 122, at 203–04.

134. *See* CHAMBER OF COMMERCE, SUE AND SETTLE REPORT, *supra* note 4, at 8.

135. Thompson, *supra* note 122, at 210.

136. *Id.*

*B. A Response to the Chamber's Criticisms*

## 1. Agencies Are "Accepting" Lawsuits

In its report, the Chamber asserts that agencies intentionally relinquish their statutory authority when they "accept" lawsuits from outside groups.<sup>137</sup> The report suggests that agencies are colluding with environmental groups to provide them with a preferential role in setting environmental policy. As support for this assertion, the Chamber notes:

[T]he 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 the court on the same day that the advocacy group filed its complaint against the EPA.<sup>138</sup>

While the Chamber implies that this is evidence of collusion between the parties, the Chamber conveniently fails to note that the environmental laws require citizens to give defendants notice of intent to sue and that they must wait for a specific period of time, usually sixty days, before filing a lawsuit against the defendant.<sup>139</sup> The notice requirement gives the defendant an opportunity to come into compliance and gives federal and state governments the opportunity to bring enforcement actions before the plaintiff proceeds with suit against the defendant.<sup>140</sup> It is not at all surprising, therefore, that a plaintiff may negotiate a settlement with a defendant before filing suit, without any collusion.<sup>141</sup>

While the Chamber tries to paint a picture of increased litigation by environmental groups leading to collusive settlements with the EPA, a recent Government Accountability Office study of environmental litigation against the EPA found "no discernible trend" in the number of lawsuits brought against the agency between 1995 and 2010.<sup>142</sup> In fact, the

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137. CHAMBER OF COMMERCE, SUE AND SETTLE REPORT, *supra* note 4, at 3.

138. *Id.* at 11 n.12 (citing *Defenders of Wildlife v. Perciasepe*, No. 12-5122, slip op. at 6 (D.C. Cir. Apr. 23, 2013)).

139. *See supra* note 131.

140. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1365(b) (2012); Resource and Conservation Recovery Act, 42 U.S.C. § 6972(b) (2012); Clean Air Act, 42 U.S.C. § 7604(b) (2012).

141. At hearings on H.R. 3862 (the 2012 legislation), John Cruden, who served as Deputy Attorney General and other senior positions in the Environment and Natural Resources Division of the Department of Justice, testified, "I am not aware of any instance of a settlement, and certainly none I personally approved, that could remotely be described as 'collusive.'" *See* H.R. REP. NO. 112-593, at 27 (2012) (dissenting views).

142. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-650, ENVIRONMENTAL LITIGATION: CASES AGAINST EPA AND ASSOCIATED COSTS OVER TIME 13 (2011), available at <http://www.gao.gov/new.items/d11650.pdf>.

largest category of plaintiffs suing the EPA over the study period was trade associations (25%), followed by private companies (23%), local environmental and citizens groups (16%), and national environmental groups (14%).<sup>143</sup> While a change in presidential administration was identified as one factor that influences the number of lawsuits brought each year and the type of plaintiffs who bring them, several other factors were also identified as significant, including the passage of new regulations, amendments to laws, and EPA's failure to meet statutory deadlines.<sup>144</sup> Over the fifteen-year period under study, almost 60% of the lawsuits brought alleged violations of the 1990 Clean Air Act.<sup>145</sup>

The Chamber's allegation that the agencies are "accepting" the lawsuits also implies that an agency's decision to settle, instead of continuing to defend the lawsuit, is evidence of collusion or is, at least, improper. However, over 80% of the lawsuits addressed in the Chamber report involve challenges to an agency's failure to meet a statutory deadline or take some other action required by law.<sup>146</sup> In those cases, it is very easy to prove that the agency has violated the law. Courts routinely reject claims, like those advanced by the Food and Drug Administration in a case<sup>147</sup> cited by the Chamber,<sup>148</sup> that the agency lacks the resources to act by the statutorily mandated date or that it is administratively infeasible to act by that date.<sup>149</sup> Indeed, the House Judiciary Report on the Sunshine for Regulatory Decrees and Settlements Act of 2012 points out that "plaintiffs may have strong cases on liability in these matters, giving them substantial leverage over the defendant agencies."<sup>150</sup> Usually, therefore, the only issue in the litigation is the remedy for failing to act, and statutes that impose deadlines on agency action rarely grant explicit authority to courts or agencies to modify those deadlines.<sup>151</sup> In fashioning a remedy, courts will frequently rely on equitable authority to grant agencies additional time to act, especially when meeting the existing deadlines would jeopardize the implementation of other essential programs or where compliance with the deadlines is impossible.<sup>152</sup> The court may set

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143. *Id.* at 16.

144. *Id.* at 13.

145. *Id.* at 15.

146. *See supra* note 77.

147. *See* *Ctr. for Food Safety v. Hamburg*, No. 4:12-cv-04529-PJH (N.D. Cal. Aug. 29, 2012).

148. *See* CHAMBER OF COMMERCE, *SUE AND SETTLE REPORT*, *supra* note 4, at 7.

149. *See* Order Re Cross-Motions for Summary Judgment at 7–8, *Ctr. for Food Safety v. Hamburg*, No. 4:12-cv-04529-PJH (N.D. Cal. Aug. 29, 2012) [hereinafter Summary Judgment Order], available at [http://www.centerforfoodsafety.org/files/57-sj-decision\\_78315.pdf](http://www.centerforfoodsafety.org/files/57-sj-decision_78315.pdf).

150. *See* H.R. REP. NO. 112-593, at 4, 27 (2012).

151. *See* Gersen & O'Connell, *supra* note 39, at 964.

152. *Id.* at 964–65.

a deadline on its own, ask the agency to propose a new deadline, or simply order the agency to act expeditiously.<sup>153</sup>

Thus, when an agency is faced with a lawsuit based on its failure to act in accordance with a statutory deadline, settlement is usually the most appropriate solution. If the agency does not enter into a settlement agreement, it expends additional financial and human resources defending a case that it will ultimately lose. In doing so, it increases its liability for attorney's fees when the plaintiff ultimately prevails in the litigation,<sup>154</sup> and instead of maintaining control over the new deadline in a settlement, the agency faces the possibility that the court will establish a new deadline either unilaterally or based on the recommendations of the plaintiffs.<sup>155</sup> The prolonged litigation also delays the time before the agency ultimately takes the act that it has failed to take, which will likely provide benefits to the environment, human health, or both. Through a settlement, therefore, the agency maintains its control over setting a new deadline, reduces its litigation costs and exposure to attorney's fees, and protects the environment and human health more expeditiously.

## 2. Agencies Are Improperly Limiting Their Discretion in Settlements

The Chamber report criticizes federal agencies, including the EPA, on the ground that the agencies are improperly limiting their discretion by agreeing to perform statutorily required duties by specified deadlines in settlements and consent decrees. The criticism ignores two important realities. First, in most of the suits addressed in the Chamber report, the agencies had very little discretion to exercise, as Congress had required the agencies to act before the lawsuits were brought. Congress set the agency's agenda and priority of resources, not the environmental challengers. Statutory deadlines shift agency resources away from programs

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153. *Id.* at 965–66. In the *Center for Food Safety* case cited by the Chamber in its report, the court ordered the parties to negotiate a deadline that was agreeable to the parties. See Summary Judgment Order, *supra* note 149, at 10.

154. Many of the federal environmental laws authorize courts to award litigation costs, including attorney's fees, to prevailing or substantially prevailing parties. See Clean Water Act, 33 U.S.C. § 1365(d) (2012); Resource Conservation and Recovery Act, 42 U.S.C. § 6972(e) (2012). The Clean Air Act and Endangered Species Act are broader and authorize courts to award litigation costs, including attorneys fees to any party whenever the court determines an award is appropriate. See Clean Air Act § 7604(d); Endangered Species Act, 16 U.S.C. § 1540(g)(4) (2012).

155. A court might impose a deadline that the agency cannot meet. See *Sierra Club v. Jackson*, No. 01-1537(PLF), 2011 WL 181097 (D.D.C. Jan. 20, 2011). When the district court ordered the EPA to issue the regulations on a very short schedule, the agency simultaneously issued the regulations, 76 Fed. Reg. 15,608 (Mar. 21, 2011), and a notice of intent to reconsider the regulations, 76 Fed. Reg. 15,266 (Mar. 21, 2011).



without deadlines to programs with deadlines.<sup>156</sup> As Professors Gersen and O’Connell note, “when Congress uses a [statutory] deadline, it is usually to constrain agency actions that have a broad effect on powerfully situated political interests.”<sup>157</sup>

Whenever agencies settle lawsuits by agreeing to new deadlines for action, regulated entities are receiving some benefit because the congressionally required deadline has been delayed. Nevertheless, as John Walke, director of the Clean Air program at the Natural Resources Defense Council, pointed out, regulated entities would prefer that the agencies not take the actions required by law at all, rather than delay them.<sup>158</sup> A Competitive Enterprise study found that between 1993 and 2013, the EPA generally promulgated regulations for three programs under the Clean Air Act about 2,072 days after their statutory deadlines.<sup>159</sup> The Chamber and regulated entities would prefer that the EPA and other agencies persist in the non-enforcement of statutory obligations, rather than agree to expeditious timetables when they miss congressional deadlines.

Second, the Chamber’s charge that agencies are improperly limiting their discretion also ignores the reality that when agencies enter into settlement agreements and consent decrees, they are legitimately exercising their discretion and not improperly limiting it. As noted above, the Chamber’s criticism is likely based, in part, on the 1986 Meese memo, which prohibited the federal government from entering into a consent decree “that divests [a government official] of discretion” or “that converts into a mandatory duty the otherwise discretionary authority [of an official] to revise, amend[,] or promulgate regulations.”<sup>160</sup> The memo was adopted shortly after the EPA entered into a consent decree with several environmental groups that challenged the agency’s failure to regulate toxic water pollutants as required by the Clean Water Act.<sup>161</sup> As part of the consent decree, the agency agreed to implement a much different regulatory program to control toxic water pollution than was required.<sup>162</sup> Although the decree required the EPA to apply standards and

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156. Gersen & O’Connell, *supra* note 39, at 973.

157. *Id.* at 942.

158. See Jessica Coomes, *EPA Unable to Meet Rulemaking Deadlines Required by Clean Air Act, Analysis Finds*, 44 ENV’T REP. (BNA) 2054 (July 12, 2013).

159. See Yeatman, *supra* note 39.

160. See Meese memo, *supra* note 80, at 3.

161. See *Natural Res. Def. Counsel v. Train*, 8 E.R.C. (BNA) 2120, 2122 (D.D.C. 1976), *rev’d in part on other grounds sub nom.* *Natural Res. Def. Counsel v. Costle*, 561 F.2d 904 (D.C. Cir. 1977).

162. See Rossi, *supra* note 33, at 1033–35.

undertake programs that were not required by the statute, the United States Court of Appeals for the District of Columbia held that the settlement did not impermissibly interfere with the agency's discretion.<sup>163</sup> Judge Wilkey, in dissent, argued that courts could not approve consent decrees that included conditions that courts could not impose if the case went to trial.<sup>164</sup> Attorney General Meese, in his 1986 memo, agreed with Judge Wilkey's dissenting opinion.<sup>165</sup>

As Professor Robert Percival has noted, virtually every commitment to take action, including an agreement to a revised schedule when an agency misses a statutory deadline, will involve some restraint on an agency's exercise of discretion.<sup>166</sup> However, in such cases, the agency's discretion is already considerably restrained by the statute that required the agency's delayed action. It is not clear, therefore, that a consent decree that establishes a new timetable to replace a missed statutory deadline is converting a discretionary duty into a mandatory duty.<sup>167</sup>

Notably, the Meese memo never prevented agencies from agreeing to modify statutory deadlines in consent decrees or to otherwise limit their discretion.<sup>168</sup> In addition, the Meese memo was significantly modified more than a decade ago. In a 1999 memorandum, the Justice Department concluded that the Meese memo was based on policy considerations rather than legal considerations. It further declared that

the Attorney General is free to enter into settlements that . . . limit the future exercise of Executive Branch discretion when that discretion has been conferred upon the Executive Branch pursuant to statute and there exists no independent statutory limitation on the authority of the Executive Branch to so limit the future exercise of that discretion.<sup>169</sup>

The Department also concluded:

We do not believe . . . that Article III precludes the Executive Branch from entering into judicially enforceable discretion limiting settlements as a general matter or that Article III bars federal courts

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163. See *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117 (D.C. Cir. 1983).

164. *Id.* at 1131 (Wilkey, J., dissenting).

165. See Meese memo, *supra* note 80, at 3.

166. See Robert V. Percival, *The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policymaking*, 1987 U. CHI. LEGAL F. 327, 343.

167. In the parlance of the Meese memo. See *id.* at 342.

168. See Rossi, *supra* note 33, at 1035.

169. See Memorandum from Randolph D. Moss, Acting Assistant Att'y Gen., Office of Legal Counsel, to Raymond C. Fisher, Assoc. Att'y Gen., Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion (June 15, 1999), available at [http://www.usdoj.gov/olc/consent\\_decree2.htm](http://www.usdoj.gov/olc/consent_decree2.htm).

from entering consent decrees that limit Executive Branch discretion whenever such decrees purport to provide broader relief than a court could have awarded pursuant to an ordinary injunction.<sup>170</sup>

It seems clear, therefore, that agencies are not improperly limiting their discretion when they enter into consent decrees that set new schedules to replace lapsed statutory deadlines. Instead, as Professor Gaba has noted, it is more appropriate to characterize the agency's action as an exercise of discretion rather than an interference or limitation of discretion.<sup>171</sup>

### 3. Settlements Violate Separation-of-Powers Principles and Lead to Poor Quality Rules

The Chamber also raised separation-of-powers concerns regarding agency settlements. Specifically, the Chamber argued that by agreeing to new deadlines to take action required by law, the Executive Branch is expanding the authority of agencies at the expense of congressional oversight.<sup>172</sup> Similarly, it argued that agencies are improperly using congressionally appropriated funds to achieve the demands of private parties when they enter into such agreements.<sup>173</sup>

However, the fundamental point that the Chamber ignores in making both of those arguments is that in these settlements, the litigants are forcing the agencies to act in a way that is as close to congressional intent as possible—in light of the fact that the agencies have already violated that intent. To the extent that an agreement requires an agency to devote resources to a lapsed statutory deadline, Congress wanted those resources expended to meet the deadline at an earlier time and, barring any statutory amendment, still wants the agency to meet that deadline as expeditiously as possible. The agreements are implementing, rather than frustrating, congressional intent. If Congress no longer feels it necessary for agencies to meet statutory deadlines, it can eliminate or change the deadlines, or it can limit the agencies' use of funds to implement those statutorily mandated obligations by including riders—additional provisions that, despite generally being unpassable on their own and lacking in connection to the main subject of a bill, are added to the bill prior to passage—in appropriations legislation for the agencies.

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170. *Id.* Nevertheless, federal regulations still require assistant attorneys general to refer to the deputy attorney general or the associate attorney general a "proposed settlement [that] converts into a mandatory duty the otherwise discretionary authority of a department or agency to promulgate, revise, or rescind regulations." 28 C.F.R. § 0.160 (2013).

171. Gaba, *supra* note 32, at 1262.

172. See source cited *supra* note 82 and accompanying text.

173. See source cited *supra* note 83 and accompanying text.

The Chamber also raised concerns that agencies frequently set unrealistic deadlines in settlements, which leads to poor quality rules and which diverts resources from other actions, leading to poor quality decision making with regard to those actions.<sup>174</sup> However, the Chamber ignores the fact that agencies have significant incentives to avoid entering into agreements that establish unrealistically short deadlines. For example, various studies have suggested that 75% of the EPA's major rules are challenged in court<sup>175</sup> and that the challenged rules are invalidated, to some extent, in 30%–50% of those cases.<sup>176</sup> Almost half of the lawsuits against the EPA are brought by businesses and trade organizations.<sup>177</sup> When an agency regulation is challenged, the agency must be able to defend the rule or action as reasonable, within the agency's authority, and that it was adopted in accordance with the procedures required by law.<sup>178</sup> The EPA and other litigation-averse agencies have strong incentives to devote as much time as is necessary to decision making in order to make a rule or decision that will withstand judicial scrutiny. Although the APA only requires a minimal notice-and-comment period, it generally takes the EPA many years to finalize rules after the agency publishes an initial notice of proposed rulemaking.<sup>179</sup> Therefore, the EPA and other agencies will be reluctant to enter into settlement agreements with challengers that require the agencies to act within an unrealistically short time frame.

#### 4. Settlements Limit the Opportunities for Participation by Non-Parties Who Are Affected by the Settlements and by the Public

In addition to challenges regarding the terms of settlement agreements and consent decrees, the Chamber raised several concerns challenging the procedures used to negotiate and finalize those agreements. One of the central concerns that the Chamber raised was that non-parties and the public who are affected by agencies' settlements do not have adequate opportunities to participate in the negotiation and review of those

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174. See source cited *supra* note 84 and accompanying text.

175. See Stephen M. Johnson, *Ossification's Demise: An Empirical Analysis of EPA Rulemaking from 2001-2005*, 38 ENVTL. L. 767, 769, 771 (2008) (finding that 75% of EPA's economically significant rules finalized between 2001 and 2005 were challenged in court and citing former EPA administrator's statement that 80% of EPA's rules were challenged).

176. *Id.* at 769.

177. See *supra* text accompanying note 143.

178. See 5 U.S.C. § 706 (2012) (judicial review standards of the APA).

179. See Johnson, *supra* note 175, at 767, 770 (finding that it took EPA an average of one and a half to two years to finalize the rules examined in the study and citing other studies that found that it took agencies an average of three to five years to finalize rules).

agreements.<sup>180</sup> However, in cases where the agency is simply agreeing to a new deadline to replace a statutory deadline that the agency missed, the only harm that non-parties suffer is a lost opportunity to lobby agencies to further delay those actions.<sup>181</sup>

Even in cases where agencies enter into substantive agreements, as opposed to scheduling agreements, the rules that the agency negotiates as part of the settlement agreement or consent decree generally must be adopted through the notice-and-comment process, so non-parties will have ample opportunity to participate in the decision-making process before the agency takes final action.<sup>182</sup> While environmental groups may have greater access to agencies in developing the proposal during the settlement negotiations, such access could counterbalance, to some extent, the monumental imbalance that normally exists in favor of industry during the development of proposed rules outside of the litigation context.<sup>183</sup>

As Professor Wagner notes, since courts have limited the changes that agencies can make to proposed rules during the notice-and-comment process, agencies have a strong incentive to work closely with the regulated community before issuing a proposed rule. During this period, the agency can gather the information necessary to develop a legally defensible rule that will require minimal changes during the notice-and-comment period.<sup>184</sup> Most of the policymaking and true regulatory work occur during the rule-development stage, which is also a time when there are very few limits on discussions between agencies and third parties, and few requirements for disclosure of those contacts.<sup>185</sup>

Professor Wagner's study of the EPA's development of hazardous air pollution regulations found that industry representatives had, on average, 170 times more communications with the EPA than public interest organizations during the rule-development stage and ten times more communications with the EPA than states during that stage.<sup>186</sup> Further, she indicated that "there are several accounts of industry not only com-

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180. See sources cited *supra* note 86 and accompanying text.

181. While there may be non-parties who would advocate for shorter deadlines, the concerns that the Chamber raises regarding the unrealistically short deadlines that agencies enter into suggest that the Chamber is not concerned with the potential silencing of those voices. See *supra* text accompanying note 84. Nevertheless, non-parties whose interests are not adequately represented by the parties to the litigation should be able to intervene in the proceedings under normal rules of intervention. See FED. R. CIV. P. 24.

182. See Gaba, *supra* note 32, at 1267–68.

183. See Wagner, Barnes & Peters, *supra* note 52, at 110–13, 124–27.

184. *Id.* at 110–11.

185. *Id.* at 112; see also Gaba, *supra* note 32, at 1269.

186. See Wagner, Barnes & Peters, *supra* note 52, at 124–25.

menting, but actually drafting the proposed rule as part of these pre-NPRM [notice of proposed rulemaking] discussions.”<sup>187</sup> Consequently, if environmental groups have some increased access to agencies when agencies are developing a proposed rule as part of a settlement of a lawsuit, it may simply counterbalance the advantage that industry representatives may have already had at an earlier stage in the development of the rule.

However, it is not necessary to speculate whether preferential access for environmental groups during settlement negotiations would be defensible because existing procedures for intervention provide significant opportunities for non-parties to be involved in the lawsuits brought by environmental groups. The Chamber asserted, however, that industries and other non-parties who may be affected by the settlement of lawsuits brought by environmental groups against agencies often lack the opportunity to participate in those lawsuits because they are not aware that the lawsuits have been filed, they have been denied opportunities to intervene, or they are not aware that the settlement agreements or consent decrees in the lawsuits are being finalized.<sup>188</sup>

While the Chamber asserted that participation in sue and settle lawsuits is difficult because many persons affected by the lawsuits are not aware that the lawsuits have been filed, almost 85% of the seventy-one lawsuits addressed in the Chamber’s report were against the EPA, and as the Chamber noted in a footnote in its report, the EPA publishes all of the notices of intent to sue that it receives on its website.<sup>189</sup> Of the remaining eleven lawsuits, all except two were filed against either the Department of the Interior or one of the bureaus within the Department of the Interior, and they post many of the notices of intent to sue that they receive on their websites as well.<sup>190</sup>

Regarding intervention, Professor Gaba raised concerns almost three decades ago that were similar to the Chamber’s when he suggested that a liberal reading of the federal rules on intervention was necessary to protect the interests of persons who were being excluded from agency settlement negotiations that developed substantive rules for notice-and-comment rulemaking.<sup>191</sup> However, Gaba was focusing on participation in

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187. *Id.* at 127.

188. See CHAMBER OF COMMERCE, SUE AND SETTLE REPORT, *supra* note 4, at 22–25.

189. *Id.* at 6 n.6. As of December 1, 2013, sixty of seventy-one cases cited were brought against the EPA. See *Notices of Intent to Sue the Environmental Protection Agency (EPA)*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/ogc/noi.html> (last updated Feb. 3, 2014).

190. See, e.g., *Candidate Conservation*, U.S. FISH & WILDLIFE SERVICE, <http://www.fws.gov/southeast/candidateconservation/esaactions.html> (last updated Aug. 9, 2013).

191. See Gaba, *supra* note 32, at 1277–78.

litigation that leads to substantive agreements, rather than scheduling agreements.<sup>192</sup> Significantly, even with regard to negotiations for substantive agreements, Gaba did not advocate for a change in the existing rules for intervention, but merely a liberal reading of those rules.<sup>193</sup>

The Federal Rules of Civil Procedure provide that

[o]n timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposition of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.<sup>194</sup>

The burden on the movant is minimal, as the Supreme Court has held that the movant must merely show that the representation of her interest “*may be*” inadequate.<sup>195</sup> Generally, though, the federal rules regarding intervention as a right are construed liberally, and any doubt regarding adequacy of representation is resolved in favor of the proposed intervenor.<sup>196</sup>

Intervention is still possible even when the intervenor and existing parties are seeking the same ultimate result, as long as the intervenor will raise issues that the existing parties are unlikely to raise.<sup>197</sup> It is not surprising, therefore, that intervention was denied in only two of the seventy-one cases that were included in the Chamber's study.<sup>198</sup> In comparison, more than 100 persons or entities successfully intervened in those seventy-one cases.<sup>199</sup>

The American Legislative Exchange Council raised intervention concerns similar to those expressed by the Chamber when it alleged in a report that the EPA opposes the involvement of states in settlement nego-

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192. *See id.* at 1241–43.

193. *Id.* at 1277–78.

194. FED. R. CIV. P. 24(a)(2).

195. *See* *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (emphasis added).

196. *See* 6 JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 24.03(1)(a), (4)(a)(i) (3d ed. 1999) [hereinafter *MOORE'S FEDERAL PRACTICE*].

197. *Id.* ¶ 24.03(4)(a)(i).

198. The Chamber of Commerce identified seventy-one lawsuits as sue and settle cases resulting in new rules and agency actions in its report. *See* CHAMBER OF COMMERCE, *SUE AND SETTLE REPORT*, *supra* note 4, at 30–40. Of those lawsuits, the court denied a motion to intervene in only two cases: *Ctr. for Biological Diversity v. Kraft*, No. 11-06059 (N.D. Cal. 2011) and *Defenders of Wildlife v. Jackson*, No. 10-01915 (D.D.C. 2010).

199. *See* Stephen M. Johnson, *Intervenors in Sue and Settle Lawsuits*, MERCER L., <http://www2.law.mercer.edu/elaw/intervenors.pdf> (last visited Mar. 19, 2014).

tiations in sue and settle cases.<sup>200</sup> However, the cases that ALEC cites in the report hardly demonstrate a pattern of EPA opposition to state involvement. In the first case cited in the report, *Wildearth Guardians v. Jackson*,<sup>201</sup> the EPA opposed the state of North Dakota's motion to intervene in the lawsuit because (1) the consent decree the State sought to challenge had been published in the Federal Register for comment; (2) the State did not submit any comments on the proposed decree; (3) the decree had been entered by the court several months earlier; and (4) there was no ongoing litigation in which to intervene.<sup>202</sup>

In the other case cited, *Fowler v. EPA*, the EPA offered to provide the state agencies with regular briefings on settlement negotiations and an opportunity to voice any concerns over such negotiations, although it opposed an order that would require the state agencies to participate in the negotiations since the intervening state agencies ultimately had no power to veto a settlement of which they did not approve, and inclusion of the intervenors could delay and complicate the settlement negotiations.<sup>203</sup> The court agreed with the EPA and issued an order requiring regular briefings in lieu of participation by the intervenors in the settlement negotiations.<sup>204</sup>

In addition to the concerns regarding lack of notice and opportunity to intervene in suits, the Chamber complained that persons who would be most affected by settlements did not have notice or an opportunity to comment on proposed consent decrees or settlement agreements.<sup>205</sup> However, fifty of the seventy-one lawsuits (70%) addressed in the Chamber report were lawsuits filed under the Clean Air Act.<sup>206</sup> The

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200. See ALEC, STATE SOVEREIGNTY REPORT, *supra* note 14, at 6–7.

201. No. 4:09-CV-02453-CW (N.D. Cal. 2009).

202. See Defendant's Opposition to North Dakota's Motion to Intervene and Motion to Show Cause at 2–5, *WildEarth Guardians v. Jackson*, No. 4:09-CV-02453-CW (N.D. Cal. Oct. 20, 2011).

203. The ALEC report cites *Fowler v. EPA*, No. 1:09-cv-00005-CKK (D.D.C. 2005), docket document 33. See ALEC, STATE SOVEREIGNTY REPORT, *supra* note 14, at 7 n.18.

204. See Order, *Fowler v. EPA*, No. 1:09-cv-00005-CKK (D.D.C. 2005).

205. See CHAMBER OF COMMERCE, SUE AND SETTLE REPORT, *supra* note 4, at 23–25.

206. The Clean Air Act cases listed in the Chamber report include the following: *Am. Petroleum Inst. v. EPA*, No. 08-1277 (D.C. Cir. 2010); *Am. Lung Ass'n v. EPA*, No. 12-00243 (D.D.C. 2012); *Am. Nurses Ass'n v. Jackson*, No. 08-02198 (D.D.C. 2009); *Ass'n of Irrigated Residents v. EPA*, No. 10-03051 (N.D. Cal. 2010); *Ass'n of Irrigated Residents v. EPA*, No. 09-01890 (N.D. Cal. 2009); *Ctr. for Biological Diversity v. EPA*, No. 11-06059 (N.D. Cal. 2012); *Colo. Citizens Against Toxic Waste, Inc. v. Johnson*, No. 08-01787 (D. Colo. 2009); *Comite Civico del Valle, Inc. v. Jackson*, No. 10-00946 (N.D. Cal. 2010); *Comite Civico del Valle, Inc. v. Jackson*, No. 09-04095 (N.D. Cal. 2009); *Comite Civico del Valle, Inc. v. Jackson*, No. 10-02859 (N.D. Cal. 2010); *El Comite Para El Bienestar De Earlimart v. EPA*, No. 11-03779 (N.D. Cal. 2011); *Env'tl. Def. Fund v. Jackson*, No. 11-04492 (S.D.N.Y. 2012); *Ky. Env'tl. Found. v. Jackson*, No. 10-01814 (D.D.C. 2011); *Ky. Env'tl. Found. v. Jackson*, No. 11-01253 (D.D.C. 2012); *La. Env'tl. Action Network v. Jackson*, No. 09-01333 (D.D.C. 2010); *Mossville Env'tl. Action NOW v. Jackson*, No. 08-01803 (D.D.C. 2009);



Clean Air Act includes a provision that requires the federal government to publish a notice in the Federal Register whenever a federal agency is proposing to enter into a consent decree or settlement agreement “of any kind” under the Act and to allow persons to submit comments on the agreement or decree for thirty days before the government can file the agreement or decree with a court.<sup>207</sup> Thus, in almost three-fourths of the cases in the Chamber’s study, the EPA provided notice and an opportunity for comment on the decree or agreement pursuant to an existing statutory obligation. The Superfund law and the Resource Conservation and Recovery Act (RCRA)—the federal hazardous waste law—also include provisions that require the EPA to provide notice and an opportunity for comment before finalizing consent decrees or settlement agreements in certain situations.<sup>208</sup> Further, the Environment and Natural Resources Division of the Department of Justice, which represents the EPA, the Department of Interior, and most federal agencies in litigation, posts proposed consent decrees on its website as well as in the Federal Register.<sup>209</sup>

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*Nat’l Parks Conservation Ass’n v. Jackson*, No. 11-01548 (D.D.C. 2011); *Natural Res. Def. Council v. EPA*, No. 10-06029 (C.D. Cal. 2010); *New York v. EPA*, No. 06-1322 (D.C. Cir. 2010); *Portland Cement Ass’n v. EPA*, No. 07-1046 (D.C. Cir. 2009); *Sierra Club v. Jackson*, No. 10-04060 (N.D. Cal. 2011); *Sierra Club v. Jackson*, No. 11-03106 (N.D. Cal. 2012); *Sierra Club v. Jackson*, No. 10-01954 (N.D. Cal. 2010); *Sierra Club v. EPA*, 09-00218 (D.D.C. 2009); *Sierra Club v. EPA*, No. 08-00424 (D.D.C. 2012); *Sierra Club v. EPA*, No. 10-01541 (D.D.C. 2011); *Sierra Club v. Jackson*, No. 10-00133 (D.D.C. 2010); *Sierra Club v. Jackson*, No. 09-00152 (N.D. Cal. 2010); *Sierra Club v. Jackson*, No. 11-02000 (D.D.C. 2012); *Sierra Club v. Jackson*, No. 10-02112 (D.D.C. 2011); *Sierra Club v. Jackson*, No. 01-01537 (D.D.C. 2003); *Sierra Club v. Jackson*, No. 12-00012 (D.D.C. 2012); *Sierra Club v. Jackson*, No. 10-00889 (D.D.C. 2010); *Sierra Club v. Jackson*, No. 11-02180 (D.D.C. 2012); *Sierra Club v. Jackson*, No. 11-00035 (D.D.C. 2011); *Sierra Club v. Jackson*, No. 12-00013 (D.D.C. 2012); *Sierra Club v. Jackson*, No. 12-00705 (D.D.C. 2012); *Sierra Club v. Jackson*, No. 11-00100 (D.D.C. 2011); *WildEarth Guardians v. Jackson*, No. 10-04603 (N.D. Cal. 2011); *WildEarth Guardians v. Jackson*, No. 11-01661 (D. Ariz. 2011); *WildEarth Guardians v. Jackson*, No. 11-02205 (N.D. Cal. 2011); *WildEarth Guardians v. Jackson*, No. 09-02148 (D. Colo. 2010); *WildEarth Guardians v. Jackson*, No. 09-00089 (D.D.C. 2009); *WildEarth Guardians v. Jackson*, No. 09-02453 (N.D. Cal. 2010); *WildEarth Guardians v. Jackson*, No. 11-00190 (N.D. Cal. 2011); *WildEarth Guardians v. Jackson*, No. 11-00001 (D. Colo. 2011); *WildEarth Guardians v. Jackson*, No. 09-02109 (D. Colo. 2009); *WildEarth Guardians v. Jackson*, No. 10-01218 (D. Colo. 2010); and *WildEarth Guardians v. Jackson*, No. 12-00754 (D. Colo. 2012). The Chamber report also lists an additional Clean Air Act case without a case caption, simply titled “Sierra Club filed a notice of intent to file a lawsuit,” which settled on December 19, 2011.

207. See 42 U.S.C. § 7413(g) (2012).

208. See 42 U.S.C. § 9622(d)(2), (i) (Superfund—thirty-day comment period for various settlements); 42 U.S.C. § 6973(d) (RCRA—comment period for settlements involving imminent hazards).

209. See *Proposed Consent Decrees*, U.S. DEP’T JUST., ENV’T & NAT. RESOURCES DIVISION, [http://www.justice.gov/enrd/Consent\\_Decrees.html](http://www.justice.gov/enrd/Consent_Decrees.html) (last updated March 2014).

5. Settlements Allow Agencies to Avoid Procedures Required  
by the APA and Other Laws, and Executive Orders That  
Govern Agency Rulemaking

Although most of the lawsuits in the Chamber's study were settled through scheduling agreements rather than substantive agreements, the Chamber alleged that federal agencies were avoiding procedures required by the APA in the small set of cases that were resolved through substantive agreements.<sup>210</sup> However, in most settlement agreements, the federal government merely agrees to adopt a particular approach as a proposed rule, which is subject to all of the notice-and-comment requirements of the APA.<sup>211</sup> Indeed, when an agency attempts to avoid the notice and comment requirements of the APA by adopting substantive policies through a consent decree or settlement agreement, courts will invalidate the agreement or decree, as the Ninth Circuit Court of Appeals did in *Conservation Northwest v. Sherman*,<sup>212</sup> which the Chamber cited in its report.<sup>213</sup>

When the EPA or any other agency enters into a substantive agreement with challengers and issues a notice of proposed rulemaking to implement that agreement, any interested persons can participate in the rulemaking process, regardless of whether they were involved in the litigation that led to the proposed rulemaking. Moreover, any person who is dissatisfied with the final rule adopted by the agency through that process can sue the agency in accordance with the APA or other statutory authority. In fact, numerous studies have found that in the normal notice-and-comment rulemaking process, industry representatives play a significantly greater role than environmental groups, which the Chamber asserts is unfairly influencing the development of rules.<sup>214</sup> In Professor

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210. See CHAMBER OF COMMERCE, SUE AND SETTLE REPORT, *supra* note 4, at 6. The Chamber does not raise this criticism with regard to the lawsuits that are settled via scheduling agreements, because the Administrative Procedure Act does not impose any procedural requirements on agencies when agencies are setting a new deadline to act after the agency has missed a statutory deadline.

211. See source cited *supra* note 42 and accompanying text.

212. 715 F.3d 1181 (9th Cir. 2013), available at <http://cdn.ca9.uscourts.gov/datastore/opinions/2013/04/25/11-35729.pdf>.

213. See CHAMBER OF COMMERCE, SUE AND SETTLE REPORT, *supra* note 4, at 8. The Ninth Circuit invalidated a consent decree entered by the district court because the decree made changes to a Forest Plan that was required to be made through rulemaking. See *Conservation Nw.*, 715 F.3d at 1187–88.

214. See Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 133 (2006) (finding, in a review of ten rules from each of four agencies, including the EPA, that business interests submitted more than 57% of the comments, as compared to 22% from non-governmental organizations and 6% from public interest groups); see also Wagner, Barnes & Peters, *supra* note 52, at 129 (citing a study by Professor Cary Coglianese of twenty-five significant EPA rules in which Professor Coglianese found

Wagner's study of the EPA's hazardous air pollution regulations, she found that industry representatives participated in the notice-and-comment process for all ninety of the standards, while public interest organizations participated in the process for fewer than half of the standards.<sup>215</sup> Further, she found that 81% of the comments submitted during the rulemaking process came from industry representatives, compared to 4% submitted by public-interest organizations.<sup>216</sup>

The Chamber alleged that opportunities for participation in the notice-and-comment process after agencies settle lawsuits with substantive agreements is a sham because the agencies have a strong incentive to finalize the proposed rules without significant changes so that the underlying lawsuit will be dismissed.<sup>217</sup> Professors Gaba and Rossi raised similar concerns regarding rulemaking settlements in other contexts.<sup>218</sup>

However, Professor Gaba stressed that even if an agency may have an incentive to finalize the rule in the same form as proposed, this subtle bias would not violate the APA because it does not require an impartial decision maker in the development of rules.<sup>219</sup> Similarly, since procedural due process limits normally do not apply to rulemaking, due process would not prohibit any subtle bias in the agency toward finalizing the rule as proposed.<sup>220</sup> However, the normal requirements of the APA, including the standards of review, would apply to the agency's decision. Thus, the agency would have to justify its decision as reasonable in light of the comments that it received (and in light of all of the information before the agency).<sup>221</sup> Further, because the APA requires agencies to provide a concise general statement of the basis and purpose of final rules, the agency would not be able to ignore important issues or factors raised by commenters during the notice-and-comment process.<sup>222</sup>

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that businesses participated in 96% of the rules, while national environmental groups participated in less than half (44%).

215. See Wagner, Barnes & Peters, *supra* note 52, at 128.

216. *Id.* at 128–29.

217. See CHAMBER OF COMMERCE, *SUE AND SETTLE REPORT*, *supra* note 4, at 24–25.

218. See *supra* Part II.

219. See Gaba, *supra* note 32, at 1256–57.

220. *Id.* at 1257–58.

221. See 5 U.S.C. § 706(2)(A) (2012) (authorizing courts to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”). For cases describing the arbitrary and capricious standard as applied to review of agency rulemaking, see, for example, *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29 (1983) and *Baltimore Gas & Electric Co. v. Natural Resource Defense Council, Inc.*, 462 U.S. 87, 97–98 (1983).

222. See 5 U.S.C. § 553(c) (2012). For cases describing the obligation of agencies to respond to major issues of policy raised by commenters, see *Sherley v. Sebelius*, 689 F.3d 776, 784 (D.C. Cir. 2012) (while an agency is not required to respond to every single comment, an agency's decision

In addition to these reasons, in light of the significant advantage industry groups possess in the notice-and-comment rulemaking process and in the normal pre-rule development process,<sup>223</sup> the Chamber's claim that sue and settle lawsuits avoid the procedural protections of the APA lacks merit.

The Chamber also asserted that the consent decrees and settlement agreements provided insufficient time for agencies to comply with the regulatory review requirements of the Office of Management and Budget, the Regulatory Flexibility Act, the Unfunded Mandates Act, and several executive orders.<sup>224</sup> However, the Chamber did not cite any specific instance in which agencies did not comply with those laws or requirements.

### C. Shortcomings of Proposed Policy Recommendations

Although the Sunshine for Regulatory Decrees and Settlement Acts of 2012<sup>225</sup> and 2013<sup>226</sup> were introduced prior to the Chamber's report, they include provisions that target many of the concerns raised in the report. Even if the concerns raised by the Chamber were weightier than they are, the proposed legislation is much more restrictive than necessary.

#### 1. Intervention Reforms

The proposed legislation shifts the burden of proof regarding intervention by creating a rebuttable presumption that the interests of a person seeking intervention are not adequately represented by the existing parties to the litigation. However, as noted above, the rules regarding intervention are already quite lenient, and as Professor Peter Appel has noted, courts have additional incentives, due to rules of appellate procedure, to

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may be invalidated as arbitrary and capricious if the failure to respond to comments demonstrates that the agency's decision was not based on a consideration of the relevant factors); *Independent U.S. Tanker Owners Committee v. Dole*, 809 F.2d 847, 852 (D.C. Cir. 1987) (concise general statement "should indicate the major issues of policy that were raised in the proceedings and explain why the agency decided to respond to these issues as it did"); and *S. Carolina v. Block*, 717 F.2d 874, 886 (4th Cir. 1983) (agency's explanation must "enable a reviewing court to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them the way it did").

223. See sources cited *supra* notes 185–87, 214–16 and accompanying text.

224. See CHAMBER OF COMMERCE, SUE AND SETTLE REPORT, *supra* note 4, at 23.

225. H.R. 3862, 112th Cong. (2012).

226. H.R. 1493, 113th Cong. (2013); S. 714, 113th Cong. (2013).

grant motions to intervene without any change in the existing rules.<sup>227</sup>

Specifically, Professor Appel writes:

[I]f a district court denies intervention, the dissatisfied applicant can appeal immediately. If a district court grants intervention, however, no party can appeal that order until final judgment. Thus, the district court faced with a motion for intervention has two choices. The court can deny the motion and face the substantial possibility of an appeal, which could later disrupt the proceedings if the court of appeals reverses. On the other hand, the court can grant the motion and simply bear the additional aggravation of having the intervenor participate without the possibility of immediate appellate review and a greatly reduced chance that the appellate court will even review the intervention decision.<sup>228</sup>

Furthermore, even without changes to the rules on intervention, Professor Appel points out that in many cases, the parties to a lawsuit have incentives to allow non-parties to intervene in their litigation.<sup>229</sup> He notes that allowing non-parties to intervene could increase the likelihood that they will accept the solution agreed upon in the settlement and decrease the likelihood that they will challenge the implementation of that decision.<sup>230</sup> This would seem to be a significant incentive for the EPA, in light of the frequency of challenges to the rules it adopts.<sup>231</sup>

Conversely, Professor Appel argues that broad intervention rules impose significant costs on courts and litigants. Broad intervention rules complicate and delay litigation and can significantly increase financial and resource costs, as the parties must respond to additional arguments, demands for discovery, and witnesses from the intervenors. Further, the court must listen to and evaluate the claims of additional parties and manage the sprawling litigation.<sup>232</sup> Professor Appel also notes that “often additional voices can drown out the effective presentation of argument.”<sup>233</sup> Moreover, he argues that the existing intervention rules have reached far beyond their intended audience and that the historical purpose of the rules was to protect the rights of persons that had “such a

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227. See Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 WASH. U. L.Q. 215, 279–82, 292–93 (2000).

228. *Id.* at 293.

229. *Id.* at 300–01.

230. *Id.* at 300.

231. See source cited *supra* note 175 and accompanying text.

232. See Appel, *supra* note 227, at 279, 301–02.

233. *Id.* at 298.

pronounced interest in the litigation that litigating that interest away would probably present due process problems.”<sup>234</sup>

Writing several years earlier, Professor Percival suggested that intervention rules were adequate to protect the interests of regulated entities concerned about agencies settling lawsuits that might affect them.<sup>235</sup> Professor Percival pointed out that rules on intervention and notice may be inadequate to protect the interests of some poorly organized groups—especially those lacking significant financial resource—but that they adequately protected most regulated entities.<sup>236</sup> He also noted that even if poorly organized groups had more notice and opportunities to become involved, they would still lack the organization and resources necessary to effectively participate in the development of the settlement agreements.<sup>237</sup> Even if the current legislation were focused on protecting the interests of those non-parties—which it is not—the legislation provides no support to those groups to facilitate meaningful participation in the settlement process. Professor Appel raised similar concerns when he suggested that the goals of supporters of broad intervention rules for public law litigation could be met by the appointment of guardians ad litem, special masters, or experts, rather than intervenors, to protect the interests of the public or non-parties that might be affected by the settlement of the litigation.<sup>238</sup>

Since the existing rules do not seem to impose significant roadblocks to intervention (if the Chamber’s study is any indication), and since broader rules could impose significant costs on courts and litigants, it is unnecessary to expand the intervention rules as the proposed legislation would require. The proposed legislation requires that settlement negotiations must include all intervening parties and, more importantly, that the negotiations must be conducted pursuant to a mediation or alternative dispute resolution program, or by a judge, magistrate judge, or master appointed by the presiding judge.<sup>239</sup> While mediation and alternative dispute resolution are valuable tools when used in appropriate circumstances, it is not necessary to subject settlement negotiations to that degree of formality in every case. In many cases, requiring the parties to engage in mediation would needlessly divert time and resources from the settlement process. The additional procedural limitations on settlement

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234. *Id.* at 295.

235. See Percival, *supra* note 166, at 349.

236. *Id.*

237. *Id.*

238. See Appel, *supra* note 227, at 299.

239. See H.R. 1493, 113th Cong. § 3(c) (2013).

negotiations in the proposed legislation would more likely obstruct and delay those negotiations than facilitate them.

## 2. Notice Reforms

The proposed legislation also establishes elaborate notice-and-comment requirements for consent decrees and settlement agreements in a wide range of cases brought against federal agencies.<sup>240</sup> First, the legislation requires agencies to publish proposed consent decrees or settlement agreements in the Federal Register and online, along with a statement providing the statutory basis for the decree or agreement and a description of the terms of the decree or agreement, including whether it provides for attorney's fees.<sup>241</sup> After publishing the notice, the legislation requires the agency to provide a sixty-day public comment period and prepare a record for the notice-and-comment process that includes a summary of the comments and responses, and an index of all of the documents in the record.<sup>242</sup> Since notice-and-comment rulemaking is the paradigm of notice-and-comment proceedings in administrative law, it is useful to compare the proposed legislative requirements to the APA's requirements for notice-and-comment rulemaking.<sup>243</sup>

Significantly, the proposed sixty-day comment period is twice as long as the comment period required by the APA for notice-and-comment rulemaking.<sup>244</sup> Similarly, the procedures that the proposed legislation imposes on agencies regarding their duty to document and respond to comments are far more onerous than those imposed by the APA. The APA does not require agencies to prepare official records of notice-and-comment rulemaking proceedings<sup>245</sup> and does not explicitly require agencies to prepare a summary of the comments and responses in the proceedings.<sup>246</sup> The timing of the comment period in the proposed

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240. See sources cited *supra* notes 108–11 and accompanying text.

241. See H.R. 1493, § 3(d)(1).

242. *Id.* § 3(d)(2).

243. See 5 U.S.C. § 553 (2012).

244. *Id.* § 553(d).

245. The APA requires agencies to prepare records for decisions made through formal rulemaking or formal adjudication but not for decisions made through informal procedures. See 5 U.S.C. § 556(e) (2012).

246. See, e.g., *Sherley v. Sebelius*, 689 F.3d 776, 784 (D.C. Cir. 2012) (“[APA § 553] has never been interpreted to require the agency to respond to every comment, or to analyze every issue or alternative raised by the comments, no matter how insubstantial.” (quoting *Thompson v. Clark*, 741 F.2d 401, 408 (D.C. Cir. 1984)); *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 852 (D.C. Cir. 1987) (concise general statement “need not be an exhaustive, detailed account of every aspect of the rulemaking proceedings; it is not meant to be the more elaborate document, complete with findings of fact and conclusions of law, that is required in an on-the-record rulemaking.”); S.

legislation is also twice as long as the comment periods required for consent decrees and settlement agreements by the Clean Air Act<sup>247</sup> and the Superfund law,<sup>248</sup> and neither of these laws impose such detailed response and recording requirements on the agency to respond to comments and prepare an official record of the notice-and-comment process.<sup>249</sup> Like other provisions of the proposed legislation, these provisions seem to be designed to delay and obstruct settlement, rather than to increase transparency in the process.

Second, in addition to the comment and record-keeping requirements discussed above, the proposed legislation provides that if an agreement or decree requires an agency to take action by a specific date, the agency must inform the court of any required regulatory actions the agency has not taken that the settlement does not address, how the decree or agreement would affect the agency's performance of those other required actions, and why it is in the public interest to enter into the decree or agreement despite the effects on the performance of other required actions.<sup>250</sup> This reporting requirement is both broad and amorphous. First, it requires the agency to identify all actions that the agency is required to take under any law by a specific date, regardless of whether the settlement or decree would have any effect on the performance of those duties.<sup>251</sup> One could imagine that this requirement would be rather cumbersome for an agency like the EPA, which is required to take hundreds of actions by statutory deadlines.<sup>252</sup> Second, at the time of the settlement agreement or decree, it may be unclear what precise effect, if any, compliance with the new deadline in the settlement will have on performance

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Carolina v. Block, 717 F.2d 874, 886 (4th Cir. 1983) ("There is no obligation to make references in the agency explanation to all the specific issues raised in comments." (internal citation omitted)).

247. See 42 U.S.C. § 7413(g) (2012) (30 day comment period).

248. See 42 U.S.C. § 9622(d)(2), (i) (2012) (thirty-day comment period). The proposal is also fifteen days longer than the time period suggested by the Chamber of Commerce. See CHAMBER OF COMMERCE, SUE AND SETTLE REPORT, *supra* note 4, at 28.

249. The Clean Air Act does not specify a procedure that the EPA must follow in reviewing comments, but provides generally that "[t]he Administrator or the Attorney General, as appropriate, shall promptly consider any such written comments and may withdraw or withhold his consent to the proposed order or agreement if the comments disclose facts or considerations which indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of this chapter." 42 U.S.C. § 7413(g) (2012). The notice-and-comment provisions of Superfund are structured in a similar manner. See 42 U.S.C. § 9622(d)(2), (i).

250. See H.R. 1493, 113th Cong. § 3(d)(4) (2013).

251. *Id.*

252. The Competitive Enterprise Institute study referenced earlier in this article indicated that EPA is currently subject to 322 statutory deadlines for just three programs in the Clean Air Act. See Yeatman, *supra* note 39. Similarly, the Gersen study referenced earlier in this Article noted that the EPA was required to comply with over 1,000 statutory deadlines between 1988 and 2003. See Gersen & O'Connell, *supra* note 39, at 940.



of the hundreds of other statutory obligations of the agency. Nevertheless, the agency is required to speculate on what those effects might be and argue, based on those speculative effects, that the agreement or decree is in the public interest.<sup>253</sup>

It is unusual to require courts to supervise the discretionary allocation of scarce resources in this manner. Indeed, when the Food and Drug Administration refused, in response to petitions from prisoners sentenced to death by lethal injection, to bring enforcement actions under the Food and Drug Act to prevent the use of the lethal injection drugs, the Supreme Court, in a landmark decision, held that the agency's decision could not be reviewed under the APA because it was committed to agency discretion by law.<sup>254</sup> In justifying its decision, the Court wrote:

[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.<sup>255</sup>

Just as the Supreme Court recognized that an agency is in the best position to determine the optimal allocation of limited resources when it has the discretion to bring enforcement actions, Congress should not require courts to review and second-guess an agency's decisions regarding allocation of scarce resources when the agency agrees to a new deadline in a settlement agreement to replace a lapsed statutory deadline.

### 3. Judicial Review Reforms

Congress and the Chamber of Commerce have also proposed changes to the judicial role in the review and approval of consent decrees and settlement agreements. The proposed legislation would require courts to review consent decrees and settlement agreements to ensure that any deadlines included provide sufficient time for agencies to com-

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253. See H.R. 1493, § 3(d)(4).

254. See *Heckler v. Chaney*, 470 U.S. 821, 837–38 (1985).

255. *Id.* at 831–32.

ply with the APA and with rulemaking requirements in other laws and executive orders.<sup>256</sup> Although this is not a burdensome requirement, there is no evidence that prior settlement agreements were deficient in that regard.<sup>257</sup> In addition, while not burdensome, the requirement is not costless.

Any expansion of the judicial review of consent decrees and settlement agreements will impose costs on the parties to gather and provide information to the court so it can evaluate compliance with new requirements, and it will impose costs on the court to evaluate that information.<sup>258</sup> If courts are more likely to reject settlements based on new requirements or under expanded review authority, parties will need to engage in additional rounds of settlement negotiations to develop settlements that will either meet the new requirements or withstand the new review.<sup>259</sup> Further, if parties cannot predict whether courts will approve their settlements under expanded review procedures, parties may be less likely to settle.<sup>260</sup>

The Chamber of Commerce recommends a more fundamental change in judicial oversight than Congress has proposed, and argues that 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.”<sup>261</sup> As an initial premise, it should be noted that absent legislative intervention, a plaintiff and defendant are ordinarily free to settle their litigation without judicial approval.<sup>262</sup> However, in many cases, the parties may seek to invest the court with enforcement authority over their agreement by entering a consent decree, or in some cases, legislation may require judicial oversight of agreements.<sup>263</sup> Generally, when courts review consent decrees, they evaluate whether the decree is in the public interest and whether it was reached through good-faith bargaining.<sup>264</sup> Although the decree must resolve a matter within the court’s jurisdiction, the Supreme Court has held that a court is not barred from entering a consent decree “merely because it might lack authority . . . to

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256. See H.R. 1493, § 3(f)(2).

257. See source cited *supra* note 224 and accompanying text.

258. See Sanford I. Weisburst, *Judicial Review of Settlements and Consent Decrees: An Economic Analysis*, 28 J. LEGAL STUD. 55, 59 (1999).

259. *Id.*

260. *Id.*

261. See CHAMBER OF COMMERCE, SUE AND SETTLE REPORT, *supra* note 4, at 29.

262. See Weisburst, *supra* note 258, at 55.

263. *Id.* at 56.

264. See Joel S. Jacobs, *Compromising NEPA?: The Interplay Between Settlement Agreements and the National Environmental Policy Act*, 19 HARV. ENVTL. L. REV. 113, 117 (1995); Percival, *supra* note 166, at 340.

do so after a trial.”<sup>265</sup> The Chamber’s proposal would, therefore, reverse Supreme Court precedent and severely limit the authority of parties to enter into settlement agreements and consent decrees.

Professors Gaba and Rossi raised concerns about limited judicial review of consent decrees in the past, but their concerns arose in the context of substantive agreements, rather than scheduling agreements that were the focus of the Chamber’s report, and the reforms that they suggested were more modest. For instance, Professor Gaba recognized that where parties challenge an agency regulation and the agency agrees—via consent decree or settlement agreement—to make specific substantive changes to a rule and issue a new notice of proposed rulemaking, the settlement will often involve technical scientific or engineering details. However, a court reviewing the decree will generally lack the expertise to exercise independent judgment regarding those technical terms in the decree.<sup>266</sup> To ensure that such consent decrees are in the public interest, Professor Gaba suggested that courts could require agencies to submit a written explanation for their change in position from the regulation that they initially adopted, which was challenged in the case.<sup>267</sup> Professor Gaba also suggested that courts should exercise “hard look” review when reviewing challenges to regulations that were developed as a result of settlement agreements or consent decrees that included commitments by the agency to make specific substantive proposals.<sup>268</sup>

Professor Rossi also argued that more stringent judicial oversight of consent decrees could provide greater protection for the public interest and persons who are not parties to the decrees.<sup>269</sup> Specifically, he suggested that courts should examine consent decrees at the time of approval under the same hard look standard that Professor Gaba suggested should apply to courts’ review of regulations that were adopted pursuant to substantive settlement agreements or consent decrees.<sup>270</sup> Like Professor Gaba, Rossi focused his concerns on substantive agreements, rather than the scheduling agreements that were the primary focus of the Chamber’s report. Professor Rossi recognized, though, that there is no clear legal support for his proposal.<sup>271</sup>

The Chamber’s proposal is more extreme than those offered by Professors Rossi and Gaba and, to the extent that the proposed legislation

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265. See *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 526 (1986).

266. See Gaba, *supra* note 32, at 1278–79.

267. *Id.* at 1279.

268. *Id.* at 1281–82.

269. See Rossi, *supra* note 33, at 1031, 1044.

270. *Id.* at 1055–57.

271. *Id.* at 1057.

addresses a standard of review for judicial oversight of consent decrees and settlements, it adopts a more extreme position than that held by the Rossi or Gaba proposals: the proposed legislation requires courts to review proposals to modify consent decrees *de novo*, without giving any deference to agencies.<sup>272</sup> Like the other reforms suggested by the Chamber and in the proposed legislation, the judicial reforms are more likely to obstruct, delay, or prevent settlement of lawsuits than to protect the public interest.

#### 4. Effects of Proposed Reforms

When agencies are sued, especially in environmental cases, settlements are the predominant manner of resolution.<sup>273</sup> Many settlements are implemented through consent decrees because they provide distinct advantages over settlement agreements.<sup>274</sup> As Professor Percival notes, “Consent decrees streamline enforcement of settlement agreements because they are subject to continuing oversight and interpretation by a single court. Their enforcement does not require the filing of an additional lawsuit to establish the validity of the settlement contract, and they invoke ‘a flexible repertoire of enforcement measures.’”<sup>275</sup>

Regardless of whether the agreements are implemented in consent decrees, settlements benefit agencies because they allow agencies to maintain control over their resources and priorities, and avoid “judicial interference with the remedial plan” that the agencies prefer to implement.<sup>276</sup> By entering into settlements, an agency can avoid judgments that may have broad, adverse impacts on other programs administered by the agency.<sup>277</sup> Further, an agency can preserve scarce resources and prevent delay in the implementation of its regulatory programs by entering into settlements.<sup>278</sup> Settlements also benefit society and courts by reducing the demands placed on courts and promoting quicker implementation of regulatory programs.<sup>279</sup> In light of those benefits, there is an overrid-

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272. See H.R. 1493, 113th Cong. § 4.

273. See Percival, *supra* note 166, at 328.

274. *Id.* at 328, 335; Jacobs, *supra* note 264, at 116–17.

275. Percival, *supra* note 166, at 335 (quoting *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 523 n.13 (1986)).

276. *Id.* at 331; Jacobs, *supra* note 264, at 116, 154.

277. See Percival, *supra* note 166, at 331.

278. *Id.*; Jacobs, *supra* note 264, at 154.

279. See Percival, *supra* note 166, at 333. Professor Percival recognizes that settlements can also have some disadvantages for society. For instance, he notes that settlement negotiations may be so protracted in some cases that the cost of settlement is greater than the cost of litigation and that settlement terms are likely to reflect the resources available to the parties more closely than the

ing public interest in settling lawsuits against the government, especially when the litigation is likely to involve complex issues, as is the case in many environmental disputes.<sup>280</sup>

The reforms proposed by the Chamber of Commerce and the reforms in the proposed congressional legislation will not limit the authority of environmental groups or any other persons to sue the EPA or other agencies when the agencies fail to take actions required by law or when the agencies violate the law. Citizens will continue to sue the government in those cases.

However, the significant procedural limitations on consent decrees and settlement agreements in the reforms, such as those proposed by the Chamber and by Congress, will frustrate settlement of those lawsuits.<sup>281</sup> Instead of settling the lawsuits, the government (and therefore the public) will spend significant amounts of money and time defending those lawsuits in court.<sup>282</sup> The Congressional Budget Office estimates that the reforms in the proposed legislation will cost almost \$7 million over a four-year period.<sup>283</sup> To the extent that the government ultimately loses those lawsuits in court, which is almost a certainty for most of the failure-to-act lawsuits, continued litigation will lead to an increased award of attorney's fees for the challengers and, thus, more financial liability for the government.<sup>284</sup> Prolonged litigation, due to the limits on settlements, will also delay the implementation of regulations and agency actions that will provide benefits to human health and the environment.<sup>285</sup>

In addition to the above-mentioned harms, the proposed reforms interfere with judicial powers to manage litigation dockets and to resolve disputes equitably and efficiently, which is problematic in a litigious society.<sup>286</sup> The reforms threaten to impose all of those costs without providing significant benefits, as there is little evidence that there is any underlying problem to remedy. Aside from the allegations in its report, which have been shown here to be without merit, the Chamber provides no evidence that the EPA or other agencies are entering into any collusive set-

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merits of the parties' legal claims. *Id.* In addition, by settling a case, the parties "deprive society of the precedential value of an adjudicated judgment." *Id.*

280. See Jacobs, *supra* note 264, at 154.

281. See H.R. REP. NO. 112-593, at 22 (2012) (dissenting views).

282. *Id.* at 30.

283. See CONG. BUDGET OFFICE, H.R. 1493: SUNSHINE FOR REGULATORY DECREES AND SETTLEMENTS ACT OF 2013 (2013), available at <http://www.cbo.gov/sites/default/files/cbofiles/attachments/hr1493.pdf>.

284. See *supra* note 154 and accompanying text.

285. See Percival, *supra* note 166, at 331, 333.

286. See H.R. REP. NO. 112-593, at 32 (dissenting views).

tlements of lawsuits or that agencies are entering into settlements in order to circumvent proper rulemaking procedures.<sup>287</sup>

#### *D. A More Modest Solution*

Public awareness and participation are vital checks on the government and facilitates rational, deliberative decision making. For decades, commentators have raised concerns that the public or persons who are not involved in lawsuits against the government may be adversely affected by the settlement of those lawsuits if the non-parties do not have some opportunity to participate in the settlement process.<sup>288</sup> Accordingly, it would not seem to be overly burdensome to require government agencies to post a notice, on their websites and in the Federal Register, when a person files a notice of intent to sue. Persons who are not parties to the lawsuit but may be affected by the settlement of the suit could choose to intervene if they felt that intervention was necessary to protect their interests.<sup>289</sup>

The existing rules for intervention are sufficiently generous to allow persons whose interests are not adequately represented in the ongoing litigation to intervene,<sup>290</sup> so it is not necessary to modify those rules. Regarding the settlement process, while there may be situations where mediation or other alternative dispute resolution processes may be useful to resolve the litigation, the decision regarding whether to refer parties to mediation should be left to the courts, and it is not necessary to impose a general requirement for mediation or alternative dispute resolution in all cases against the federal government.

Once the parties have reached an agreement in litigation involving the federal government, either as a consent decree or settlement agreement, it would not seem overly burdensome to require notice and some opportunity for comment on the agreement before it is finalized if the agreement is likely to adversely affect persons who are not parties to the litigation. The requirement could be modeled on the provisions in the Clean Air Act, which require notice in the Federal Register and a thirty-day comment period and do not require the development of a formal record for the rulemaking period.<sup>291</sup>

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287. *Id.* at 26.

288. *See supra* Part II.

289. Industry representatives, trade associations, and non-government organizations routinely monitor litigation and rulemaking to assess potential impacts on their business, members, or the public. *See Percival, supra* note 166, at 349.

290. *See supra* Part IV.C.1.

291. 42 U.S.C. § 7413(g) (2012).

Regarding judicial approval and supervision of the settlement agreement or consent decree, few limits should be placed on existing judicial authorities. Courts should continue to be allowed to approve agreements even though they include conditions that the court could not impose, as long as the agreements do not violate the law.<sup>292</sup> The proposal in the congressional legislation that would require courts to ensure that scheduling agreements provide the government with enough time to comply with the APA and other laws and regulations regarding rulemaking is not objectionable as long as courts accord agencies deference regarding their calculation of reasonable time frames. After all, the agency has an incentive to develop a workable schedule since they would likely be sued if they attempted to take the actions addressed in the scheduling agreements without complying with the APA or other rulemaking statutes.

There is little evidence that the government is entering into collusive consent decrees and settlement agreements, as the Chamber of Commerce charges, and the proposals suggested by the Chamber and Congress seem to be designed to frustrate, rather than illuminate, settlement. However, since “sunlight is said to be the best of disinfectants,”<sup>293</sup> the modest changes outlined above to increase public participation and transparency in the development and review of consent decrees and settlement agreements would seem beneficial in light of the prior concerns raised by commentators such as Professors Rossi and Gaba.<sup>294</sup>

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292. See *supra* Part IV.C.3.

293. Louis Brandeis, *What Publicity Can Do*, HARPER'S WEEKLY, Dec. 20, 1913, reprinted in OTHER PEOPLE'S MONEY 92 (1932).

294. See *supra* Part II.