

Ongoing Oversight: Monitoring the Activities of the Justice Department's Environment and Natural Resources Division

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My name is Andrew Grossman. I am an Adjunct Scholar at the Cato Institute and a litigator in the Washington, D.C., office of Baker & Hostetler LLP. The views I express in this testimony are my own and should not be construed as representing those of the Cato Institute, my law firm, or its clients.

Alexis de Tocqueville famously observed, “There is hardly a political question in the United States which does not sooner or later turn into a judicial one.”¹ That goes double for environmental policy. There is just about no question regarding the regulation of air and water quality, wildlife, and other natural resources that is not, or has not been, the subject of litigation. The Environment and Natural Resources Division of the Justice Department plays the central role in the bulk of those cases. Its policies and performance are therefore also central to the making and enforcement of environmental policy at the federal level, as well as the concomitant federalism and economic impacts of that regulation.

While ENRD does have an agency “client” in its cases, its position as a Department of Justice component reflects Congress’s judgment that litigation over environmental law be carried out by an entity that is independent of the agencies principally responsible for policymaking and enforcement of that law and that is capable of exercising independent judgment when necessary to uphold the law and to promote broader governmental interests. In short, the idea is to avoid agency parochialism. This is not to say that the relationship between ENRD and the agencies it represents should be antagonistic, but only that the Division must be willing and able to exercise its judgment in litigation, rather than simply defer to the wishes of the agencies in every instance and pursue agency priorities at all costs.

My testimony today identifies two areas of concern that merit oversight by this panel. First, in a recent decision, Judge Silberman of the United States Court of Appeals for the District of Columbia Circuit questioned whether ENRD is suffering what he called “litigation lapse[s]” to advance “the political views of its major ‘client’ (the EPA)” at the expense of broader governmental interests.² A federal judge, of course, does not raise such questions lightly, and Judge Laurence Silberman’s statement therefore raises a serious red flag about ENRD’s performance and priorities and whether it is deferring unduly to its agency clients.

¹ Alexis de Toqueville, *Democracy in America* 248 (J.P. Moyer and Max Lerner eds., Harper & Row 1996) (1832).

² *Ass’n of Battery Recyclers, Inc. v. EPA*, 716 F. 3d 667, 678 (D.C. Cir. 2013) (Silberman, J., concurring).

Second is the “sue and settle” phenomenon, which raises similar concerns about the conduct and resolution of litigation that seeks to set agency regulatory priorities and (in some instances) actually influences the content of those regulations. Since the House Judiciary Committee first directed its attention to the problem of collusive settlements in 2012,³ there have been a myriad of hearings and reports focusing on this problem, as well as the introduction of legislation to constructively address it. This is heartening. But the response from some in government and from the outside groups that pursue settlements has not been to debate the merits or discuss solutions, but simply to assert that there is no problem and that litigation brought for the very purpose of setting agency priorities has no real impact. That is not so. Recent examples show that the problem is real, it is serious, and it is, if anything, getting worse. Based on precedent and the incentives faced by agencies in the waning months of a presidency, there is a real risk over the next year and a half that the current administration may attempt to employ collusive settlements and consent decrees to bind its successor. Continued oversight by this subcommittee and those with jurisdiction over the relevant agencies will be crucial in the months ahead.

The final topic of this testimony is how to alter the incentives and the legal environment that facilitate collusive settlements. Over the past three years, Members of the House and Senate have developed several bills that seek to carry out the principles identified in my 2012 testimony on abuses of settlements and consent decrees. The most comprehensive of those bills, the Sunshine for Regulatory Decrees and Settlements Act, passed the House in the previous Congress, and (as reintroduced this Congress) has drawn strong support in the Senate. Although there is little prospect that any substantial regulatory reforms will become law in this Congress, now is the time to lay the intellectual and political groundwork for an aggressive first-one-hundred-days regulatory reform agenda for the next administration.

I. EPA v. DOJ?

The Department of Justice is a formidable adversary in litigation. It speaks for the federal government, which gives it great credibility. It has deep

³ See generally *The Use and Abuse of Consent Decrees in Federal Rulemaking*: Hearing before the Subcommittee on the Courts, Commercial and Administrative Law, Committee on the Judiciary, United States House of Representatives, 112th Congress (Feb. 3, 2012), available at http://judiciary.house.gov/_files/hearings/Hearings%202012/Grossman%2002032012.pdf (written testimony of Andrew M. Grossman, Visiting Legal Fellow, The Heritage Foundation) [hereinafter “2012 Testimony”].

institutional knowledge. And it is a repeat player, working with the courts over the long haul to develop doctrines that apply across the range of the law and its activities. In the same way that the Solicitor General is often regarded as the “tenth justice,” the Justice Department’s litigating components play a special role in court, particularly in agency cases and particularly in the D.C. Circuit, due to its specialized docket. When the Justice Department speaks—for example, when it says that application of a particular doctrine would have consequences for other governmental activities—the D.C. Circuit listens, avidly.

And when the Justice Department *doesn’t* speak—when it fails to raise an argument that is all the more conspicuous for its absence—it also listens. In two recent cases, the EPA (represented by the Justice Department) has declined to argue that cases challenging agency rules be dismissed for want of prudential standing on the part of petitioners. While “standing” is a constitutional requirement derived from the “case or controversy” requirement of Article III, prudential standing concerns a litigant’s suitability with respect to the purposes of a particular statute. Under D.C. Circuit law, a litigant must demonstrate that “that the interest it seeks to protect is arguably within the zone of interests to be protected or regulated by the statute...in question.”⁴ It is common, particularly in the D.C. Circuit, for the government to argue that one or another (or every) party challenging an agency action lacks standing to do so.⁵ And it frequently prevails on that point, particularly against organizations seeking to advance a policy agency through litigation. So it is notable when, in a case where the doctrine may well apply, the government declines to raise it in defense.

Yet that is what happened in several recent cases involving the EPA. *Grocery Manufacturers Association v. EPA* was a challenge by trade associations representing the petroleum and food industries to EPA decisions approving the introduction of a high-ethanol fuel blend that, in turn, would raise corn prices and impose costs on the petroleum industry.⁶ And *Association of Battery*

⁴ *Nat’l Petrochem. Refiners Ass’n v. EPA*, 287 F.3d 1130, 1147 (D.C. Cir. 2002) (per curiam) (quotation marks omitted). Subsequent to the cases discussed here, the Supreme Court has cast doubt on the D.C. Circuit’s approach to prudential standing. See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.4 (2014). But the D.C. Circuit, in turn, has so far declined to revisit its precedents in this area. See *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1256 (D.C. Cir. 2014); *Mendoza v. Perez*, 754 F.3d 1002, 1016–17 (D.C. Cir. 2014).

⁵ *Int’l Bhd. of Teamsters v. U.S. Dep’t of Transp.*, 724 F.3d 206, 211 (D.C. Cir. 2013).

⁶ 693 F. 3d 169, 180–81 (2012) (Kavanaugh, J., dissenting).

Recyclers, Inc. v. EPA was a challenge to a revision of the emissions standards for lead-smelting facilities brought by, among others, a battery recycler that supported stricter standards on its competitors.⁷ In both cases, the prudential standing issue under D.C. Circuit precedent was plain. In both cases, the court dismissed the claims of certain petitioners for want of prudential standing.⁸ And in both cases, the EPA declined to raise the issue.

Judge Silberman, in a concurring opinion in *Association of Battery Recyclers*, felt the need to remark on this unusual occurrence:

[I]t is worth noting that this question—whether prudential standing should be raised by a federal court *sua sponte*—typically arises when the government neglects to raise the issue, which might be thought a rare occasion of litigation lapse. However, in both this case and *Grocery Manufacturers*, the Justice Department failed to do so, and in both cases, the government’s position was defended by the Environmental Division. It would seem that this division—perhaps reflecting the political views of its major “client” (the EPA)—declines to raise standing issues available as a defense. That practice has led to some dramatic contrasts between positions taken by the Civil Division and the Environmental Division. Indeed, in one case some years ago, a lawyer for the Environmental Division *fainted* during oral argument while attempting to explain a different position on standing than one argued a few days before by a Civil Division lawyer.

The justification for the Justice Department’s control over all executive branch litigation—a control that I, as a judge, think is even more important than I once thought as a Justice Department official—depends on its ability to ensure uniformity and sophistication in government litigation. It hardly serves that end to allow one division of the Justice Department to subordinate a government-wide litigation interest to the desires of one agency.⁹

The potential conflict to which Judge Silberman alludes is this: the Justice Department’s broad responsibility for nearly all executive branch litigation versus the EPA’s interest in its relationships in litigation and otherwise

⁷ 716 F. 3d 667, 674.

⁸ 693 F. 3d at 179 (holding that a statute regarding fuel waivers does not include within its zone of interests food prices); 716 F.3d at 674 (no prudential standing where business “objects not to any regulatory burden imposed on it but instead to the absence of regulatory burdens imposed on its competitors”).

⁹ 716 F.3d at 678–79.

with environmentalist groups, whose presence in litigation is often challenged on prudential standing grounds. In other words, the EPA's close relationship¹⁰ with these groups may lead it to forgo meritorious arguments that might undermine those groups' interests in other cases. Thus, these two cases provide a strong indication that, as Judge Silberman observes, government-wide litigation interests are being subordinated "to the desires of one agency," EPA. And there is no reason to believe that the EPA's desires are limited to the issue of prudential standing.

This raises serious questions regarding the EPA's litigation practices that merit further investigation. Has the EPA directed the ENRD or other Justice Department components to forgo arguments that the government would raise in similar circumstances involving other agencies? What other defenses or arguments has the EPA sought to deemphasize or forgo to protect non-governmental interests? To what extent do outside groups participate in the formulation and execution of the EPA's litigation strategies? Are those groups also in contact with ENRD attorneys? Do former EPA officials who have decamped to environmentalist groups remain in contact with current staff and participate in discussions or provide input regarding agency litigation? To what extent are EPA officials previously affiliated with environmentalist groups involved in the formulation of the agency's litigation strategies? To what extent has EPA collaborated with environmentalist groups in formulating regulations and developing their legal rationales? What has been the litigation impact of the "revolving door" between EPA and environmentalist groups?¹¹ What have been the consequences to the government of formulating litigation strategy to accommodate third-party interests?

It may be that these episodes are isolated incidents, and that would be worth knowing. But it may be that the ENRD's litigation actions in these cases are symptoms of a more serious pathology—in the same way that a single botched prosecution threw light on failures in supervision and oversight of the Justice Department's Public Integrity Section.¹² In short, Congress and the

¹⁰ See, e.g., Coral Davenport, Taking Oil Industry Cue, Environmentalists Drew Emissions Blueprint, N.Y. Times, July 6, 2014, available at <http://www.nytimes.com/2014/07/07/us/how-environmentalists-drew-blueprint-for-obama-emissions-rule.html>.

¹¹ See William Yeatman, Regulatory Capture Comes Full Circle at the EPA, May 15, 2014, <http://www.globalwarming.org/2014/05/15/regulatory-capture-comes-full-circle-at-the-epa/> (listing "current and recent EPA political appointees that have come from green litigation groups (and vice-versa)").

¹² See generally Henry F. Schuelke III, Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, Apr. 7, 2009, <https://www.wc.com/assets/attachments/Schuelke%20Report.pdf>. By refer-

public would be well-served by greater transparency regarding the role of the EPA in formulating the litigation strategies carried out by the ENRD and regarding the involvement of non-governmental third parties.

II. The Sue and Settle Phenomenon Is Real

A. The Issue, In General

Typically, the federal government vigorously defends itself against lawsuits challenging its actions. But not always. Sometimes regulators are only too happy to face collusive lawsuits by friendly “foes” aimed at compelling government action that would otherwise be difficult or impossible to achieve. In a number of cases brought by activist groups, the Obama Administration has chosen instead to enter into settlements that commit it to taking action, often promulgating new regulations, on a set schedule. While the “sue and settle” phenomenon is not new, dating back to the broad “public interest” legislation of the 1960s and 1970s, what is new is the frequency with which generally applicable regulations, particularly in the environmental sphere, are being promulgated according to judicially enforceable consent decrees struck in settlement. The EPA alone entered into more than sixty such settlements between 2009 and 2012, committing it to publish more than one hundred new regulations, at a cost to the economy of tens of billions of dollars.¹³

In the abstract, settlements serve a useful, beneficial purpose by allowing parties to settle claims without the expense and burden of litigation. But litigation seeking to compel the government to undertake future action is not the usual case, and the federal government is not the usual litigant. Consent decrees and settlements that bind the federal government present special challenges that do not arise in private litigation. This happens in all manner of litigation, and is not confined to a particular subject matter. Settlements binding federal actors have been considered in cases concerning environmental policy, civil rights, federal mortgage subsidies, national security, and many others. Basically, settlements may become an issue in any area of the law where federal policymaking is routinely driven by litigation.

But they are especially prevalent in environmental law, due to the breadth of the governing statutes, their provisions authorizing citizen suits, and the great number of duties those statutes arguably impose on the relevant

ring to the prosecution of Sen. Stevens, I do not intend to suggest any misconduct on the part of the ENRD, its leadership, or its attorneys, but only to demonstrate how a lapse in one case may serve to reveal deeper problems.

¹³ U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors* (2013), at 14.

agencies. The ENRD, being responsible for litigation in this area, represents the EPA and the other relevant agencies in striking settlements.

B. Implications for Democratic Governance and Accountability

Judge Frank Easterbrook provides a compelling account of the ways that government officials may use consent decrees to obtain advantage—over Congress, over successors, over other Executive Branch officials—in achieving their policy goals:

The separation of powers inside a government—and each official's concern that he may be replaced by someone with a different agenda—creates incentives to use the judicial process to obtain an advantage. The consent decree is an important element in the strategy. Officials of an environmental agency who believe that the regulations they inherited from their predecessors are too stringent may quickly settle a case brought by industry (as officials who think the regulations are not stringent enough may settle a case brought by a conservation group). A settlement under which the agency promulgated new regulations would last only for the duration of the incumbent official; a successor with a different view could promulgate a new regulation. Both parties to the litigation therefore may want a judicial decree that ties the hands of the successor. It is impossible for an agency to promulgate a regulation containing a clause such as "My successor cannot amend this regulation." But if the clause appears in a consent decree, perhaps the administrator gets his wish to dictate the policies of his successor. Similarly, officials of the executive branch may obtain leverage over the legislature. If prison officials believe their budget is too small, they may consent to a judgment that requires larger prisons, and then take the judgment to the legislature to obtain the funds.¹⁴

The abuse of consent decrees in regulation raises a number of practical problems that reduce the quality of policymaking actions and undermine representative government. In general, public policy should be made in public, through the normal mechanisms of legislating and administrative law and subject to the give-and-take of politics. When, for reasons of convenience or advantage, public officials attempt to make policy in private sessions between government officials and (as is often the case) activist groups' attorneys, it is the public interest that suffers. Experience demonstrates at least five specific consequences that arise when the federal government regulates pursuant to a consent decree or settlement:

¹⁴ Frank Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. Chi. L. Forum 19, 33–34 (1987).

- **Special-Interest-Driven Priorities.** Settlements can undermine presidential control of the executive branch, empowering activists and subordinate officials to set the federal government's policy priorities. Regulatory actions are subject to the usual give-and-take of the political process, with Congress, outside groups, and the public all influencing an administration's or an agency's agenda, through formal and informal means. These include, for example, congressional policy riders or pointed questions for officials at hearings; petitions for rulemaking filed by regulated entities or activists; meetings between stakeholders and government officials; and policy direction to agencies from the White House. Especially when they are employed collusively, consent decrees short-circuit these political processes. In this way, agency officials can work with outside groups to force their agenda in the face of opposition—or even just reluctance, in light of higher priorities—from the White House, Congress, and the public. When this happens, the public interest—as distinct from activists' or regulators' special interests—may not have a seat at the table as the agency reorganizes its agenda by committing to take particular regulatory actions at particular times, in advance or to the exclusion of other rulemaking activities that may be of greater or broader benefit.
- **Rushed Rulemaking.** The public interest may also be sacrificed when officials use settlements to accelerate the rulemaking process by insulating it from political pressures that may reasonably require an agency to achieve its goals at a more deliberate speed. In this way, officials may gain an advantage over other officials and agencies that may have competing interests, as well as over their successors, by rushing out rules that they otherwise may not have been able to complete or would have had to scale back in certain respects.

In some instances, aggressive deadlines contained within settlements, as was the case with EPA's Mercury Rule, may provide the agency with a practical excuse (albeit not a legal excuse) to play fast and loose with the Administrative Procedure Act and other procedural requirements, reducing the opportunity for public participation in rulemaking and, substantively, likely resulting in lower-quality regulation. Although a settlement deadline does not excuse an agency's failure to observe procedural regularities, courts are typically deferential in reviewing regulatory actions and are reluctant to vacate rules tainted by procedural irregularity in all but the most egregious cases, where agency misconduct and party prejudice are manifest. In practical terms, members of the public and regulated entities whose procedural rights are

compromised by overly aggressive settlement schedules can rarely achieve proper redress.

- **Practical Obscurity.** Settlements and consent decrees are often faulted as “secret regulation,” because they occur outside of the usual process designed to guarantee public notice and participation in policymaking.¹⁵ As one recent article argues, “[W]hen the government is a defendant, the public has an important interest in understanding how its activities are circumscribed or unleashed by a decree,” but too often these settlements are not subject to any public scrutiny.¹⁶ And even when the public is technically provided notice, that notice may be far less effective than would ordinarily be required under the Administrative Procedure Act. The result is that the agency may make very serious policy determinations that affect the rights of third parties without subjecting its decisionmaking process to the public scrutiny and participation that such an action would otherwise entail. This is so despite the fact that a settlement or consent decree may be more binding on an agency than a mere regulation, which it may alter or abandon without a court’s permission.
- **Eliminating Flexibility.** Abusive settlements may reduce the government’s flexibility to alter its plans and to select the best policy response to address any given problem. The Supreme Court has recently clarified that agencies need not provide any greater justification for a change in policy than for adopting a new policy, recognizing the value of flexibility in administering the law.¹⁷ It is unusual, then, that when an agency acts pursuant to a settlement, it has substantially less discretion to select other means that may be equally effective in satisfying its statutory or constitutional obligations. In effect, settlements have the potential to “freeze the regulatory processes of representative democracy.”¹⁸ This is what the Reagan Administration learned when it entered office to find that its predecessor had already traded away its

¹⁵ See, e.g., Margo Schlanger, *Against Secret Regulation: Why and How We Should End the Practical Obscurity of Injunctions and Consent Decrees*, 59 DePaul L. Rev. 515 (2010). Such concerns may be overblown, however, when they concern settlements between private parties or settlements with the government that predominantly affect private rights.

¹⁶ *Id.* at 516.

¹⁷ *FCC v. Fox Television Stations*, 129 S. Ct. 1806 (2009).

¹⁸ *Citizens for a Better Envt. v. Gorsuch*, 718 F. 2d 1117, 1136 (D.C. Cir. 1983) (Wilkey, J., dissenting).

ability to adopt new approaches and respond to changing circumstances.¹⁹

- **Evading Accountability.** What the preceding points share in common is that they all serve to reduce the accountability of government officials to the public. The formal and informal control that Congress and the President wield over agency officials is hindered when they act pursuant to settlements and consent decrees. Their influence is replaced by that of others:

Government by consent decree enshrines at its very center those special interest groups who are party to the decree. They stand in a strong tactical position to oppose changing the decree, and so likely will enjoy material influence on proposed changes in agency policy. Standing guard over the whole process is the court, the one branch of our government which is by design least responsive to democratic pressures and least fit to accommodate the many and varied interests affected by the decree. The court can neither effectively negotiate with all the parties affected by the decree, nor ably balance the political and technological trade-offs involved. Even the best-intentioned and most vigilant court will prove institutionally incompetent to oversee an agency's discretionary actions.²⁰

C. The High Costs of Sue and Settle: Recent Examples

By design, sue and settle facilitates expensive, burdensome rules. First, as described above, it allows agency officials to evade political accountability for their actions by genuflecting to a judicially enforceable consent decree that mandates their action. As a result, officials face less pressure to moderate their approaches to regulation or to consider less burdensome alternatives. This, in turn, presents the risk of collusion and still more-burdensome rules that would be politically untenable but for a consent decree. Second, due to skirting of the notice-and-comment procedure, officials may not even be aware of alternatives. Third, even when alternatives do present themselves, officials may lack the time to analyze and consider them—assuming, of course, that alternative approaches are not barred altogether by one or another provision of the consent decree. In sum, it may be expected that the rules resulting from consent-decree settlements will be, on the whole, less efficient, more burdensome, and more expensive than those adopted through the normal rulemaking process.

¹⁹ See 2012 Testimony, *supra* n.3, at 6–10.

²⁰ *Id.* at 1136–37.

This has been borne out in recent practice:

- **EPA’s Mercury Rule.** My 2012 testimony describes the American Nurses litigation that resulted in a consent decree requiring EPA to propose one of its most complex and expensive rules ever in a matter of months.²¹ Since the rule was finalized, it has been amended and corrected on multiple occasions and reconsidered by the agency in numerous respects.²² The most recent corrections were proposed in February of this year—*three years* after the rule was finalized.²³ The legal challenges to it have been divided into a number of different proceedings, with one—alleging that in its haste EPA failed to properly consider the cost of its actions—currently before the Supreme Court.²⁴ Whether or not the Court ultimately vacates the rule, these events demonstrate the high costs, in terms of legal and regulatory uncertainty, of the compressed timetables that can result from agency settlements.
- **EPA’s Existing Source Performance Standards.** EPA arguably committed to regulate carbon dioxide emissions from new and existing power plants under Section 111 of the Clean Air Act in a 2011 agreement with environmentalist groups and states.²⁵ The settlement provides that EPA “will” propose “emissions guidelines for GHGs from existing [power plants]” and will promulgate “a final rule that takes final action with respect to the proposed rule,” despite considerable doubt as to the agency’s legal authority to regulate at all. In particular, Section 111(d) prohibits EPA from regulating the emission of “any air pollutant...emitted from a source category which is regulated under section [112],” which (following EPA’s Mercury Rule) power plants are.²⁶ Relying in part on the settlement agreement, EPA’s proposal includes an aggressive timetable for implementation that requires states to begin major preparations now and is already affecting planning and investment decisions in the energy sector. In short, whether or not EPA is ultimately found to have authority to regulate existing power plants—a coalition of states has challenged the settlement agreement, a

²¹ 2012 Testimony, *supra* n.3, at 10–12.

²² William Yeatman, This Month in Sue and Settle, Feb. 19, 2015, <http://www.globalwarming.org/2015/02/19/this-month-in-sue-and-settle/>.

²³ 80 Fed. Reg. 8,442 (Feb. 17, 2015).

²⁴ *Michigan v. Environmental Protection Agency*, No. 14-46.

²⁵ Settlement Agreement ¶¶ 1–4, EPA-HQ- OGC-2010-1057-0002.

²⁶ 42 U.S.C. § 7411(d)(1).

coalition of states and private parties has brought an All Writs Act challenge following EPA's issuance of the proposal, and a challenge to any final rule is inevitable—the agency will have used the settlement agreement to achieve much of what it sought to do: reduce the use of coal-fired generation.²⁷

- **EPA's Brick MACT Rule.** A consent decree entered to settle a lawsuit that the Sierra Club brought against the EPA committed the agency to propose and finalize National Emissions Standards for Hazardous Air Pollutants for brick manufacturers on an aggressive timetable. That rule was subject to a lengthy reconsideration and then ultimately vacated, and EPA (pursuant to another consent decree with the Sierra Club) has proposed a replacement that the agency estimates will be substantially more expensive and that may impose new compliance obligations on sources that already made substantial expenditures to comply with the first rule. In testimony before this Subcommittee, the President of the Columbus Brick Company, a small business in Columbus, Mississippi, explained that his industry was excluded from settlement discussions regarding timing issues and that the agency lacks the time to consider flexible alternatives that may ease compliance burdens.²⁸
- **Endangered Species Listing.** In two settlements executed in September 2011, the Fish and Wildlife Service agreed to make listing determinations for 251 species by September 2016 in an order negotiated with two environmentalist groups, Wildearth Guardians and Center for Biological Diversity.²⁹ In so doing, the agency abandoned its statutory

²⁷ See generally Comment from the Attorneys General of the States of Oklahoma, West Virginia, Nebraska, Alabama, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Montana, North Dakota, Ohio, South Carolina, South Dakota, Utah and Wyoming on Proposed EPA Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Docket ID No. EPA-HQ-OAR-2013-0602, available at <http://www.ok.gov/oag/documents/EPA%20Comment%20Letter%20111d%2011-24-2014.pdf>.

²⁸ Hearing on H.R. 1493, the “Sunshine for Regulatory Decrees and Settlements Act of 2013,” June 5, 2013 (written testimony of Allen Puckett III), available at http://judiciary.house.gov/_files/hearings/113th/06052013/Puckett%2006052013.pdf.

²⁹ Stipulated Settlement Agreement re Wildearth Guardians, *In re Endangered Species Act Section 4 Deadline Litigation*, No. 10-377 (D.D.C.); Stipulated Set-

authority to determine that an endangerment finding is warranted, but precluded by higher listing priorities—a status that allows public agencies, private landowners, and other interested parties to take actions to reduce threats and gather data so as to reduce the likelihood of a listing or, at the least, to undertake long-range planning with awareness of possible listings.³⁰ Rather than rely on the best available science and its own judgment to set priorities in an open and transparent manner, the agency instead deferred to these private parties, both in the timing and the substance (by excluding “warranted but precluded” determinations) of its decisions.

Some would wave away these examples—as well as those in my 2012 testimony and 2014 Heritage Foundation monograph³¹—as saying little about the impact of settlement agreements. On the facts, that is a difficult position to maintain. Each of these examples illustrates how settlements can affect agency priorities and, in certain instances, the substance of their decisions. Even a recent Government Accountability Office report that claimed, based on comments by EPA staff, that settlements have only a “limited” impact on EPA rulemaking recognized that they do “affect the timing and order in which rules are issued”—in other words, the agency’s priorities.³² With statutes as capacious as the Clean Air Act and Endangered Species Act, agency priorities determine the regulatory agenda.

Agency priorities are particularly important now, in the waning days of the Obama presidency. This administration has been aggressive in the pursuit of its policy goals through non-legislative means, upsetting settled understandings regarding executive power and statutory constructions to implement policies that it has been unable to convince Congress to enact.³³ The agency offi-

tlement Agreement re Center for Biological Diversity, *In re Endangered Species Act Section 4 Deadline Litigation*, No. 10-377 (D.D.C.).

³⁰ See generally 16 U.S.C. § 1533; Endangered and Threatened Wildlife and Plants; Review of Native Species That Are Candidates for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions, 76 FR 66369, 66370–71 (Oct. 26, 2011) (describing listing process).

³¹ Andrew M. Grossman, Regulation Through Sham Litigation: The Sue and Settle Phenomenon, Heritage Foundation Legal Memorandum No. 110, Feb. 25, 2014.

³² U.S. Government Accountability Office, Impact of Deadline Suits on EPA’s Rulemaking Is Limited, December 2014.

³³ See generally Examining the Proper Role of Judicial Review in the Regulatory Process: Hearing before the Senate Subcommittee on Regulatory Affairs

cials responsible for carrying out this agenda have every incentive to attempt to force it on their successors through the use of settlements and consent decrees. There is precedent: in its final months, the Carter Administration entered into settlements that served to tie the hands of Reagan Administration officials on major policy question, including construction of public works, issuance of environmental regulations targeting particular industries, and education funding, among others.³⁴ Vigorous oversight is necessary to ensure that the next administration, which may have very different priorities than this one, is not stymied in its ability to exercise its policy discretion and is not bound by its predecessor's unwise policy choices.

III. Opportunities for Reform

Congress can and should adopt certain common-sense policies that provide for transparency and accountability in settlements and consent decrees that compel future government action. Any legislation that is intended to address this problem in a comprehensive fashion should include the following features, with respect to settlements that commit the government to undertake future action that affects the rights of third parties:

- **Transparency.** Proposed settlements should be subject to the usual notice and comment requirements, as is generally the case under the Clean Air Act.³⁵ To aid Congress and the public in its understanding of this issue, agencies should be required to make annual reports to Congress on their use of settlements. In addition, Treasury should be required to report the details of cases that result in payments by the Judgment Fund.³⁶

and Federal Management of the Committee on Homeland Security and Governmental Affairs, Apr. 28, 2015 (written testimony of Andrew M. Grossman), at 22–25, available at http://object.cato.org/sites/cato.org/files/pubs/pdf/grossman_-_judicial_review_testimony.pdf (describing aggressive statutory interpretations under the Obama Administration)

³⁴ See 2012 Testimony, *supra* n.3, at 6–10.

³⁵ Clean Air Act § 113(g), 42 U.S.C. § 7413(g). Note that this provision, however, does not require EPA to respond to comments, only that, “as appropriate,” it “shall promptly consider” them.

³⁶ To that end, the Judgment Fund Transparency Act, H.R. 1669, would require Treasury to publish the following for each disbursement from the Judgment Fund:

- (1) The name of the specific Federal agency or entity whose actions gave rise to the claim or judgment.

- **Robust Public Participation.** As in any rulemaking, an agency or department should be required to respond to the issues raised in public comments on a proposed settlement, justifying its policy choices in terms of the public interest; failure to do so would prevent the court from approving the consent decree. These comments, in turn, would become part of the record before the court. Parties who would have standing to challenge an action taken pursuant to a settlement should have the right to intervene in a lawsuit where one may be lodged. As described below, these interveners should have the right to demonstrate to the court that a proposed settlement is not in the public interest.
- **Sufficient Time for Rulemaking.** The agency should bear the burden of demonstrating that any deadlines in the proposed decree will allow it to satisfy all applicable procedural and substantive obligations and further the public interest.
- **A Public Interest Standard.** Especially for settlements that concern future rulemaking, those parties in support of the settlement should bear the burden of demonstrating that it is in the public interest. In particular, they should have to address (1) how the proposed settlement would affect the discharge of other uncompleted nondiscretionary duties; and (2) why taking the regulatory actions required under the settlement, to the delay or exclusion of other actions, is in the public interest. The court, in turn, before ruling on the motion to enter the set-

(2) The name of the plaintiff or claimant.

(3) The name of counsel for the plaintiff or claimant.

(4) The amount paid representing principal liability, and any amounts paid representing any ancillary liability, including attorney fees, costs, and interest.

(5) A brief description of the facts that gave rise to the claim.

(6) A copy of the original or amended complaint or written claim, and any written answer given by the Federal Government to that complaint or claim.

(7) A copy of the final action by a court regarding the claim (whether by decree, approval of settlement, or otherwise), or of the settlement agreement in any action not involving a court.

(8) The name of the agency that submitted the claim.

A companion bill, S. 350, has been introduced in the Senate.

tlement, would have to “satisfy itself of the settlement’s overall fairness to beneficiaries and consistency with the public interest.”³⁷

- **Accountability.** Before the government enters into a settlement that affects the rights of third parties, the Attorney General or agency head (for agencies with independent litigating authority) should be required to certify that he has reviewed the decree’s terms, found them to be consistent with the prerogatives of the Legislative and Executive Branches, and approves them. In effect, Congress should implement the Meese Policy,³⁸ consistent with the Executive Branch’s discretion, by requiring accountability when the federal government enters into consent decrees or settlements that cabin executive discretion or require it to undertake future actions.
- **Flexibility.** Finally, Congress should act to ensure that settlements do not freeze into place a particular official’s or administration’s policy preferences, but afford the government reasonable flexibility, consistent with its constitutional prerogatives, to address changing circumstances. To that end, if the government moves to terminate or modify a settlement or consent decree on the grounds that it is no longer in the public interest, the court should review that motion *de novo*, under the public interest standard articulated above.

These principles are reflected in the Sunshine for Regulatory Decrees and Settlements Act, H.R. 712 and S. 378. That bill represents a leap forward in transparency, requiring agencies to publish proposed settlements before they are filed with a court and to accept and respond to comments on proposed settlements. It also requires agencies to submit annual reports to Congress identifying any settlements that they have entered into. The bill loosens the standard for intervention, so that parties opposed to a “failure to act” lawsuit may intervene in the litigation and participate in any settlement negotiations. Most substantially, it requires the court, before approving a proposed consent decree or settlement, to find that any deadlines contained in it allow for the agency to carry out standard rulemaking procedures. In this way, the federal government could continue to benefit from the appropriate use of settlements and consent decrees to avoid unnecessary litigation, while ensuring that the public interest in transparency and sound rulemaking is not compromised.

Other proposed legislation focuses on settlements under specific statutory regimes. For example, the Endangered Species Act (ESA) Settlement Re-

³⁷ *United States v. Trucking Employers, Inc.*, 561 F.2d 313, 317 (D.C. Cir. 1977) (internal quotation marks and citation omitted).

³⁸ Memorandum from Edwin Meese III Regarding Department Policy Regarding Consent Decrees and Settlement Agreements, Mar. 13, 1986.

form Act³⁹ would amend the ESA to provide, in cases seeking to compel the Fish and Wildlife Service to make listing determinations regarding particular species, many of the procedural reforms contained in the Sunshine for Regulatory Decrees and Settlements Act, such as broadening intervention rights to include affected parties and allowing them to participate in settlement discussions. In addition, as particularly relevant in this kind of litigation, the bill would require that notice of any settlement be given to each state and county in which a species subject to the settlement is believed to exist and gives those jurisdictions a say in the approval of the settlement. In effect, this proposal would return discretion for the sequencing and pace of listing determinations under the ESA to the Fish and Wildlife Service, which would once again be accountable to Congress for its performance under the ESA.

Similarly, the Reducing Excessive Deadline Obligations Act of 2013,⁴⁰ which was introduced in the last Congress and passed the House, would have amended the Resource Conservation and Recovery Act to remove a nondiscretionary duty that EPA review and, if necessary, revise all current regulations every three years and the Comprehensive Environmental Response Compensation and Liability Act to remove a 1983 listing deadline that has never been fully satisfied.⁴¹ The effect of these amendments would have been to reduce the opportunity for citizen suits seeking to set agency priorities under these obsolete provisions.

These bills suggest that, rather than proceeding in a piecemeal fashion, Congress may wish to consider a more comprehensive approach that limits the ability of third parties to compel Executive Branch action. Suing to compel an agency to act on a permit application or the like is different in kind from seeking to compel it to issue generally applicable regulations or take action against third parties. As Justice Anthony Kennedy has observed, “Difficult and fundamental questions are raised” by citizen-suit provisions that give private litigants control over actions and decisions (including the setting of agency priorities) “committed to the Executive by Article II of the Constitution of the United States.”⁴² Constitutional concerns aside, at the very least, the ability to compel agency action through litigation and settlements gives rise to the policy concerns identified above, suborning the public interest to special interests and sacrificing accountability.

³⁹ H.R. 585; S. 293.

⁴⁰ H.R. 2279 (113th Cong.).

⁴¹ *See generally* Reducing Excessive Deadline Obligations Act of 2013, House Report 113-179 (113th Cong.).

⁴² *Friends of the Earth, Inc. v. Laidlaw Env't'l Servs. (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring).

The sue-and-settle phenomenon is facilitated by the combination of broad citizen-suit provisions with unrealistic statutory deadlines that private parties may seek enforced through citizen suits. According to William Yeatman of the Competitive Enterprise Institute, “98 percent of EPA regulations (196 out of 200) pursuant to [Clean Air Act] programs were promulgated late, by an average of 2,072 days after their respective statutorily defined deadlines.”⁴³ Furthermore, “65 percent of the EPA’s statutorily defined responsibilities (212 of 322 possible) are past due by an average of 2,147 days.”⁴⁴ With so many agency responsibilities past due, citizen-suit authority allows special-interest groups (whether or not in collusion or philosophical agreement with the agency) to use the courts to set agency priorities. Not everything can be a priority, and by assigning so many actions unrealistic and unachievable non-discretionary deadlines, Congress has inserted the courts into the process of setting agency priorities, but without providing them any standard or guidance on how to do so. It should be little surprise, then, that the most active repeat players in the regulatory process—the agency and environmentalist groups—have learned how to manipulate this situation to advance their own agendas and to avoid, as much as possible, accountability for the consequences of so doing.

Two potential solutions suggest themselves. First, a deadline that Congress does not expect an agency to meet is one that ought not to be on the books. If Congress wants to set priorities, it should do so credibly and hold agencies to those duties through oversight, appropriations, and its other powers. In areas where Congress has no clear preference as to timing, it should leave the matter to the agencies and then hold them accountable for their decisions and performance. What Congress should not do is empower private parties and agencies to manipulate the litigation process to set priorities that may not reflect the public interest while avoiding the political consequences of those actions. To that end, Congress should seriously consider abolishing all mandatory deadlines that are obsolete and all recurring deadlines that agencies regularly fail to observe.⁴⁵

⁴³ William Yeatman, EPA’s Woeful Deadline Performance Raises Questions about Agency Competence, Climate Change Regulations, “Sue and Settle,” July 10, 2013, <http://cei.org/sites/default/files/William%20Yeatman%20-%20EPA%27s%20Woeful%20Deadline%20Performance%20Raises%20Questions%20About%20Agency%20Competence.pdf>.

⁴⁴ *Id.*

⁴⁵ One commentator endorses allowing agencies to set their own non-binding deadlines, subject to congressional oversight. Alden F. Abbott, The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal, 39 Admin. L. Rev. 171, 200–02 (1987).

Second, Congress should consider narrowing citizen-suit provisions to exclude “failure to act” claims that seek to compel the agency to consider generally applicable regulations or to take actions against third parties. As a matter of principle, these kinds of decisions regarding agency priorities should be set by government actors who are accountable for their actions, not by litigants and not through abusive litigation.

IV. Conclusion

Settlements that govern the federal government’s future actions raise serious constitutional and policy questions and are too often abused to circumvent normal political process and evade democratic accountability. Congress can and should address this problem to ensure that such consent decrees are employed only in circumstances where they advance the public interest, as determined by our public institutions, not special interests.

I thank the subcommittee for the opportunity to testify on these important issues.