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U.S. CHAMBER OF COMMERCE

Statement of the U.S. Chamber of Commerce

ON: MANDATE MADNESS: WHEN SUE AND SETTLE JUST ISN'T ENOUGH

TO: HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, SUBCOMMITTEE ON TECHNOLOGY, INFORMATION POLICY, INTERGOVERNMENTAL RELATIONS AND PROCUREMENT REFORM

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The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

**BEFORE THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
SUBCOMMITTEE ON TECHNOLOGY, INFORMATION POLICY,
INTERGOVERNMENTAL RELATIONS AND PROCUREMENT REFORM
OF THE U.S. HOUSE OF REPRESENTATIVES**

“Mandate Madness: When Sue and Settle Just Isn’t Enough”

**Testimony of William L. Kovacs
Senior Vice President, Environment, Technology & Regulatory Affairs
U.S. Chamber of Commerce**

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Good morning, Chairman Lankford, Ranking Member Connolly, and members of the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform. My name is William L. Kovacs and I am senior vice president for Environment, Technology and Regulatory Affairs at the U.S. Chamber of Commerce. The Chamber is the world’s largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region. You have asked me to come before the Subcommittee today to discuss the impact of sue and settle agreements on job creation. On behalf of the Chamber and its members, I thank you for the opportunity to testify here today on this most important topic.

I. Introduction

The abuse of citizen suit provisions in 20 environmental statutes and the use of “sue and settle” agreements – out of court settlements that get around the public participation and transparency protections of the Administrative Procedure Act (APA)¹ – have become primary tools used by certain agencies to issue many more regulations than would otherwise be written. The direct result of these tactics is to significantly dampen job creation. If this nation is ever to begin creating the jobs needed by the 23 million citizens who are out of work or underemployed, we need to begin building again. And to begin building we need a transparent and certain regulatory process.

Sue and settle occurs when an activist organization and a federal agency enter into behind closed-doors settlement negotiations in which the agency agrees to undertake the actions requested – usually the implementation of a regulation – and requests the court to enter a consent decree as a judgment against the agency. What is most disturbing however, about sue and settle, is the fact that the federal agencies do not even maintain organized records of the number and types of lawsuits brought against them. And until this Congress, there has not been any oversight of the issue. In short, federal agencies have not provided Congress and the public a comprehensive list:

- of all the litigation in which they are involved;

¹ Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*

- of the new regulations they agreed to initiate through a consent decree; or
- of all the attorneys' fees they paid to private litigants under the Judgment Fund or the Equal Access to Justice Act, as part of the entry of a voluntary consent decree.

Accordingly, Congress should (1) pass the Sunshine for Regulatory Decrees and Settlements Act of 2012,² which has passed out of the House Judiciary Committee, (2) improve oversight over citizen suits, (3) move the current citizen suit provisions from the various scattered statutes to Title 28 and the direct jurisdiction of the Judiciary Committee, (4) ensure that agencies do not give up their discretionary power contrary to law, and (5) require the Environmental Protection Agency to undertake the congressionally mandated studies on potential job loss and shifts in employment due to its regulations.

While my testimony today will focus on the adverse impacts on the transparency and fairness of the regulatory process caused by the abuses of sue and settle and citizen suits, I want to briefly draw your attention to another way that litigation undermines the regulatory process and as a result has adverse impacts on job creation. Specifically, the current permitting process for projects is broken, making it very difficult if not impossible to create jobs across the country.

The Chamber conducted a study, entitled *Project No Project*, which examined 351 energy projects nationwide being impacted by the current permitting process.



² H.R. 3862, Sunshine for Regulatory Decrees and Settlements Act of 2012, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.03862>:

If all 351 projects were allowed to move forward the impact would be over one trillion dollars in economic activity and over 1.8 million new jobs created annually during the construction period. To provide context, 1.8 million more jobs would lower the unemployment rate from May's 8.2 percent to 7.0 percent. The critical point is that, as our current energy plants retire and key infrastructure such as ports and highways are needed, we must build *something*; unfortunately, however, right now we are building very little. More information can be found on the *Project No Project* web site at <http://www.projectnoproject.com>.

II. How the Sue and Settle Process and the Abuse of Citizen Suit Provisions Limit Public Participation While Increasing the Number of Economically Significant Regulations

A. What is Sue and Settle?

Sue and settle refers to a process whereby friendly advocacy groups sue federal agencies and the agencies settle the cases behind closed doors. Only *after* a settlement has been agreed to does the public have a chance to provide any comments. Often this is a pointless exercise because the meaningful decisions have already been made.

Agencies develop major public policy by entering into consent decrees and settlement agreements without the public having any means to voice whether such actions are appropriate. Often agencies will agree to issue regulations on a fast-track schedule as part of the settlement agreement.

The public does not have a meaningful voice in the agency determination to propose a regulation. While there will be a notice and comment period as required under the APA before the regulation is final, agencies are unlikely to change the regulations in a manner that could threaten the consent decree that has been entered into with environmental organizations. As a result, the limited protections that do exist for public participation are rendered meaningless.

B. Regulations that Otherwise Would Not Have Existed

Courts treat consent decrees between an environmental organization and an agency in the same manner as a consent decree between two private individuals. This is a primary reason why sue and settle is such a major problem. Two private individuals voluntarily enter into agreements acting in their own self-interests. It is appropriate in that situation for a court to defer to their agreement, but the same principle applied to government agency sue and settle agreements enables the agency to avoid meaningful public input.

An environmental organization and government agency may be taking voluntary action, but these organizations and agencies are supposed to be serving the interests of a third party: the public. An agency is not a private individual, it is an arm of the

government with a fiduciary obligation to represent the interests of all the people, but the settlement process enables a few individuals within the agency to substitute their private or political agenda for the general public interest. Environmental groups often are only able to bring lawsuits against agencies because they are supposed to be acting as private attorneys general. To serve the interests of the public, they are supposed to be ensuring that agencies perform nondiscretionary acts that the agency is required to take under statute. Instead, the environmental groups act in their own self-interests. The consent decree reflects not what best serves the public, including job creation, but instead what serves the narrow goals of the environmental organizations and sometimes that of the agencies, without regard for jobs or the interests of the public and regulated community.

Courts do not look at whether agencies are even obligated to enter into a consent decree. As noted in a recent case, *American Nurses Association v. Jackson*,³ courts do not provide the necessary oversight over consent decrees between environmental organizations and the federal agencies. The District Court of the District of Columbia wrote:

It is the Administrator's legal position that she is under a mandatory, nondiscretionary duty to issue emission standards for coal- and oil-fired EGUs [electric generating units]...by entering this consent decree the Court is only accepting the parties' agreement to settle, not adjudicating whether the EPA's legal position is correct.⁴

Therefore, courts are approving consent decrees merely on a claim by the agency that it has a nondiscretionary duty to take the requested actions. The courts are not even questioning whether the agency is acting within its statutory authority or requiring proof of the underlying basis for settlement. Once the consent decree is entered, agencies can promulgate more regulations than otherwise would have existed, simply by using the environmental group's lawsuit as justification for the regulations. The agencies may even welcome such lawsuits. They also may not welcome such lawsuits, but because of the threat of litigation they may just settle a suit. Regardless of the reason, the result is more regulation that imposes a greater burden on the regulated community and hurts the businesses that are creating jobs.

C. Regulations that Include New Requirements that are Not Mandated by Statute or Exceed Statutory Limits

Agencies often develop regulations that they are not mandated to promulgate. Through the sue and settle process, new regulatory requirements have been created beyond what the underlying environmental statute requires. The environmental groups are not just compelling agencies to act within clear statutory parameters. These organizations use regulatory agreements to create law, albeit with agency approval, that can hinder economic growth.

³ *American Nurses Association v. Jackson*, Civil Action No. 08-2198, (D.D.C.), April 15, 2010.

⁴ *Id.*

D. Deadlines that are Used as Pretexts by Agencies to Impose Substantive Requirements on Regulated Entities

Even when agencies agree in consent decrees to procedural terms, such as deadlines, this can be used as a means to change the substantive nature of regulations. As noted in the discussion of the Environmental Protection Agency's (EPA) regional haze program in section IV, federal agencies will agree to unrealistic deadlines in consent decrees. For the regional haze program (an aesthetic program addressing visibility), states must file with the EPA their own plans to control regional haze. This program was abused through the use of sue and settle.

Environmental groups sued EPA to act on state regional haze plans. At the last second, EPA informed the states that there was something wrong with their submissions, such as inadequate cost estimates. Since there was inadequate time to fix the problems, EPA stepped in and imposed its own regional haze programs on the states. The federal programs are far costlier than the state programs. Even worse, any benefits are minimal at best, but the cost to states and employers within those states is significant.

E. What is a Citizen Suit?

Citizen suits are often the means by which sue and settle cases are brought. The primary problem with citizen suits is their purpose has been changed from compelling nondiscretionary acts to compelling agencies to give up discretionary power. If this problem were addressed, the costly new regulations that are imposed through sue and settle could be a thing of the past. Private entities that create jobs would not have to bear the brunt of poorly conceived regulations that were never properly vetted through the regulatory process.

In 1970, Congress enacted the first citizen suit provision,⁵ which was contained within the Clean Air Act of 1970 (CAA).⁶ Since that time, this new approach to enforcing federal law has become a staple of most environmental statutes.

A citizen suit allows a private citizen to sue any person (including the government) for violating environmental laws. Further, the private citizen can sue the federal government for failure to take nondiscretionary acts or duties that are required by an environmental statute.⁷

Citizen suits were not designed to enrich the plaintiffs but to serve the interests of the public.⁸ Therefore, plaintiffs are not awarded damages, but can receive injunctive relief to secure the desired action and may be entitled to litigation costs, including

⁵ See e.g. Barton H. Thompson, Jr., Symposium: Innovations in Environmental Policy: *The Continuing Innovation of Citizen Enforcement*, 2000 U. Ill. L. Rev. 185 (2000).

⁶ Clean Air Amendments of 1970, Pub. L. No. 91-604.

⁷ See e.g. 42 U.S.C. § 7604. For a brief discussion of these two types of citizen suit lawsuits, see e.g. Daniel P. Selmi, *Jurisdiction to Review Agency Inaction Under Federal Environmental Law*, 72 Ind. L.J. 65 (1996) at 72-73.

⁸ See *supra* note 5 at 198; See also *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983).

attorney and expert witness fees, when a court deems it is appropriate.⁹ In many of the sue and settle cases that result in a consent decree the federal agency agrees as part of the consent decree to pay the attorneys' fees incurred by the environmental organization.

Under some environmental statutes, plaintiffs also can trigger penalties on polluters. These penalties though are not given to the plaintiffs but instead are placed in a United States Treasury fund that helps finance compliance and enforcement activities.¹⁰

F. Lack of Congressional Oversight Over Citizen Suits

There needs to be much greater oversight over citizen suits. The judiciary committees should have oversight over these numerous provisions. Since the enactment of the first citizen suit provision in the CAA, the judiciary committees have not had the chance to weigh in and provide the necessary expertise on citizen suits.

The inclusion of a citizen suit provision was far from a given when it was being considered in the CAA. The House version of the bill did not include a citizen suit provision.¹¹ The Senate bill did include such a provision,¹² but serious concern was expressed during the Senate floor debate.

After acknowledging the importance of the bill, Senator Hruska (R-NE), who was ranking member of the Senate Judiciary Committee, expressed his concerns about the citizen suit provision. Two primary concerns were the limited review time and the failure to involve the Senate Judiciary Committee:

Frankly, inasmuch as this matter [the citizen suit provision] came to my attention for the first time not more than 6 hours ago, it is a little difficult to order one's thoughts and decide the best course of action to follow.

Had there been timely notice that this section was in the bill, perhaps some Senators would have asked that the bill be referred to the Committee of the Judiciary for consideration of the implications for our judicial system.¹³

The citizen suit provision in the CAA was never considered by either the House or Senate Judiciary Committees.¹⁴ The same is true for the citizen suit provision in the Clean Water Act, which was enacted just two years later.¹⁵

⁹ See e.g. 42 U.S.C. § 7604.

¹⁰ *Id.*

¹¹ See e.g. "A Legislative History of the Clean Air Amendments, Together with a Section-by-Section Index," Library of Congress, U.S. Govt. Print. Off., 1974-1980, Conference Report, at 205-206.

¹² *Id.*

¹³ *Id.* Senate debate on S. 4358 at 277.

¹⁴ "A Legislative History of the Clean Air Amendments, Together with a Section-by-Section Index," Library of Congress, U.S. Govt. Print. Off., 1974-1980; The legislative history was also searched using Lexis.

As shown in Figure 1, there are at least 20 environmental statutes that have citizen suit provisions.¹⁶ Every major environmental statute has a citizen suit provision except the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).¹⁷ Based on our research, the House and Senate Judiciary Committees never addressed any of the bills that created the various citizen suit provisions and greatly expanded access to the federal courts.¹⁸ In addition, while there was a Senate Judiciary Committee hearing over 25 years ago on Superfund that discussed various issues, including citizen suits, there has never been a House or Senate Judiciary Committee hearing focused on citizen suits and their impact on the federal court and regulatory system since the creation of the first citizen suit provision in 1970.¹⁹

¹⁵ “A Legislative History of the Water Pollution Control Act Amendments of 1972, Together with a Section-By-Section Index,” Library of Congress, U.S. Govt. Print. Off., 1973-1978; The legislative history was also searched using Lexis.

¹⁶ Act to Prevent Pollution from Ships, 33 USC § 1910; Clean Air Act, 42 USC § 7604; Clean Water Act, 33 USC § 1365; Superfund Act, 42 USC § 9659; Deepwater Port Act, 33 USC § 1515; Deep Seabed Hard Mineral Resources Act, 30 USC § 1427; Emergency Planning and Community Right-to-Know Act, 42 USC § 11046; Endangered Species Act, 16 USC § 1540(g); Energy Conservation Program for Consumer Products, 42 USC § 6305; Marine Protection, Research and Sanctuary Act, 33 USC § 1415(g); National Forests, Columbia River Gorge National Scenic Area, 16 USC § 544m(b); Natural Gas Pipeline Safety Act, 49 USC § 60121; Noise Control Act, 42 USC § 4911; Ocean Thermal Energy Conservation Act, 42 USC § 9124; Outer Continental Shelf Lands Act, 43 USC § 1349(a); Powerplant and Industrial Fuel Use Act, 42 USC § 8435; Resource Conservation and Recovery Act, 42 USC § 6972; Safe Drinking Water Act, 42 USC 300j-8; Surface Mining Control and Reclamation Act, 30 USC § 1270; Toxic Substances Control Act, 15 USC § 2619.

¹⁷ Meltz, Robert, “The Future of Citizen Suits After Steel Co. and Laidlaw,” Congressional Research Service, January 5, 1999.

¹⁸ The legislative histories for each bill that created the citizen suits were analyzed primarily using Thomas (the Library of Congress legislative web site). Since Thomas does not include bills before 1973, legislative histories were examined through other means, such as the Library of Congress documents cited previously for the Clean Air Act and Clean Water Act. A legislative history search also was conducted using Lexis. The only bills considered are those that created the citizen suits. For example, it does not include a bill that may have amended a citizen suit provision. The bills creating the provisions, as opposed to amending them, generally are the primary opportunity for a committee to address the merits of citizen suits.

¹⁹ In 1985, the Senate Judiciary Committee did hold a hearing on the Superfund Improvement Act of 1985 that among other things did discuss citizen suits (S. Hrg. 99-415). The hearing covered a wide range of issues, such as financing of waste site clean-up, liability standards, and joint and several liability. To find hearing information, a comprehensive search was conducted using ProQuest Congressional at the Library of Congress. The search focused on hearings from 1970-present that addressed citizen suits.

Figure 1

Statutes and Citizen Suit provisions, including whether the original bill creating the citizen suit provision was heard by the Senate or House Judiciary Committee.

Was the original bill creating the citizen suit provision heard by the Senate or House Judiciary Committee?

Statute	Provision	Yes	No
Act to Prevent Pollution from Ships	33 USC § 1910		<input checked="" type="checkbox"/>
Clean Air Act	42 USC § 7604		<input checked="" type="checkbox"/>
Clean Water Act	33 USC § 1365		<input checked="" type="checkbox"/>
Superfund Act	42 USC § 9659		<input checked="" type="checkbox"/>
Deepwater Port Act	33 USC § 1515		<input checked="" type="checkbox"/>
Deep Seabed Hard Mineral Resources Act	30 USC § 1427		<input checked="" type="checkbox"/>
Emergency Planning and Community Right-to-Know Act	42 USC § 11046		<input checked="" type="checkbox"/>
Endangered Species Act	16 USC § 1540(g)		<input checked="" type="checkbox"/>
Energy Conservation Program for Consumer Products	42 USC § 6305		<input checked="" type="checkbox"/>
Marine Protection, Research and Sanctuary Act	33 USC § 1415(g)		<input checked="" type="checkbox"/>
National Forests, Columbia River Gorge National Scenic Area	16 USC § 544m(b)		<input checked="" type="checkbox"/>
Natural Gas Pipeline Safety Act	49 USC § 60121		<input checked="" type="checkbox"/>
Noise Control Act	42 USC § 4911		<input checked="" type="checkbox"/>
Ocean Thermal Energy Conservation Act	42 USC § 9124		<input checked="" type="checkbox"/>
Outer Continental Shelf Lands Act	43 USC § 1349(a)		<input checked="" type="checkbox"/>
Powerplant and Industrial Fuel Use Act	42 USC § 8435		<input checked="" type="checkbox"/>
Resource Conservation and Recovery Act	42 USC § 6972		<input checked="" type="checkbox"/>
Safe Drinking Water Act	42 USC 300j-8		<input checked="" type="checkbox"/>
Surface Mining Control and Reclamation Act	30 USC § 1270		<input checked="" type="checkbox"/>
Toxic Substances Control Act	15 USC § 2619		<input checked="" type="checkbox"/>

Citizen suits are inherently a legal matter, and therefore need the expertise of the judiciary committees. Some of the most important legal questions are brought up as a result of citizen suits. For example, the issue of standing is central to citizen suits. The relationship between citizen suits and standing is unique because citizen suit provisions give plaintiffs unusually wide latitude to sue in federal court. However, this statutory

expansion of standing does not allow federal courts to ignore Article III of the Constitution.²⁰

G. Undermining the Purpose of Citizen Suits: Ignoring the Nondiscretionary Language

Citizen suits give plaintiffs the power to compel agencies to take nondiscretionary actions. The Clean Air Act (CAA) language states:

[A]ny person may commence a civil action on his own behalf—

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.²¹

The plain language of the statute is clear: citizen suits may be brought to compel *nondiscretionary* acts or duties. On its face, these refer to acts or duties that the Administrator has no choice but to perform. The purpose of this provision is to make sure that agencies do not sit on their hands and ignore their statutory obligations.

The CAA legislative history clarifies the meaning of this provision. In the House debate on the conference report, Representative Springer, who was a conferee, explained:

Citizen suits may be instituted against the administrator only for failure to act where he must. In other words wherever he is given discretion in the act, he may not be sued. He may be sued only for those matters imposed in the bill upon the administrator as a matter of law.²²

“Mandatory” is used in the legislative history to describe the government actions that are at issue.²³ Federal courts have used “mandatory” as well.²⁴ The courts also have used stronger language to clarify the meaning of nondiscretionary acts, including calling them “clear-cut” requirements²⁵ and “purely ministerial acts.”²⁶

Put simply, the plain language of the statute, the legislative history, and case law have gone out of their way to make sure that citizen suits do not allow plaintiffs to compel an agency to perform a discretionary act. In practice though, this is precisely what happens many times in sue and settle consent decrees. The nondiscretionary limitation is effectively eliminated when agencies enter into consent decrees because courts allow plaintiffs to dictate terms that are at the discretion of agencies.

²⁰ U.S. Const. art. III.

²¹ See e.g. 42 U.S.C. § 7604(a)(2).

²² *Supra* note 14, House Debate on the Conference Report, at 117.

²³ *Id.* at 112 (House Debate on the Conference Report, statement of Rep. Staggers who brought the conference report to the floor). See also the Conference Report at 206.

²⁴ See e.g. *Kennecott Copper Corporation v. Costle*, 572 F. 2d 1349 (9th Cir. 1978).

²⁵ See e.g. *Sierra Club v. Thomas*, 828 F.2d 783, (D.C. Cir. 1987).

²⁶ See e.g. *Environmental Defense Fund v. Thomas*, 870 F.2d 892 (2th Cir. 1989).

Courts do not review whether an act or duty is discretionary or nondiscretionary when the plaintiff and the agency come before the court with a settlement agreement. While plaintiffs serve an oversight function over agencies to ensure that they perform their required functions, there is inadequate judicial or congressional oversight as to whether these same agencies are properly entering into consent decrees. Agencies should have discretion when to enter into a consent decree, but that does not entitle agencies to have discretion to ignore the express language of citizen suit statutes.

Courts generally view their role differently when adjudicating a citizen suit case in which the agency is actively defending its actions as opposed to a situation in which the court is asked by the agency to approve a consent decree.²⁷ As a result, two types of citizen suit cases are created.

In citizen suits, the plaintiff is empowered to bring the case in the first place to serve the public. Both parties, when entering into consent decrees, are supposed to be serving the public. But under sue and settle agreements, the consent decree flips the whole concept of citizen suits on its head. As a result, a legal process designed to protect the public has effectively become a means to protect the interests of special interest actors and the special interests of the agencies. The public is even excluded from having a voice in a process that is supposed to serve the public interest. The loser from this distorted process is the public because sound policy is ignored.

III. Sue and Settle: How Did We Get Here?

To fully appreciate the tremendous impact that the sue and settle process and the abuse of citizen suit provisions has on the federal regulatory process, one needs to review how the federal administrative state has expanded so greatly while the powers of Congress to manage the administrative state have so diminished.

The very first sentence of Article I of the U.S. Constitution reads: “All legislative powers herein granted shall be vested in a Congress of the United States.”²⁸ Congress makes the nation’s laws, and the Executive Branch carries them out. Over time, however, this separation of powers has eroded to such an extent that federal agencies can now use the regulatory process to “legislate by regulation.” And at times, agency regulations create broad new policies that impact many industries in the regulated community; these policies can literally determine the fate of industrial sectors, the well-being of thousands of families and the competitiveness of the nation. Given the current political climate, Congress cannot easily get its power back.

Congress has long recognized the challenges posed by the power of Executive Branch agencies. Therefore, it has repeatedly attempted to create statutory safeguards to ensure the regulatory state is transparent and accountable, and to ensure agency power is

²⁷ See, for example, *American Nurses Association v. Jackson*, Civil Action No. 08-2198, (D.D.C.), April 15, 2010.

²⁸ U.S. Const. art. I.

properly cabined within appropriate constitutional and statutory limits. For example, in 1946, Congress enacted the Administrative Procedure Act (APA) requiring agencies to regulate openly and with notice to and comment from the public, and subject to judicial review.²⁹ Over time, the procedural protections in the APA grew in importance as Congress passed vague laws delegating agencies with ever more expansive power. However, increased judicial deference to agency decisions and Congress' general avoidance of its oversight authority over regulatory actions combined to severely limit the operational checks on the regulatory power of federal agencies.

By the late 1970s, it had become clear that the delegation of congressional authority to the agencies to “fill in the legislative blanks,” the lack of congressional oversight over the agencies, and judicial deference to agency decisions were fundamentally altering the original constitutional balance between the legislative and executive branches of government. Starting in 1980, Congress began enacting laws to restore the balance and to check executive power.³⁰ Over the past three decades, Congress has repeatedly attempted to rein in the Executive Branch agencies,³¹ but it would be an understatement to assert that efforts to control expanding agency power have been of little impact. Agencies are just too skilled at manipulating the regulatory system.

Regulations are a necessary part of a complex society. But an unbalanced regulatory process, which allows sue and settle agreements, has led to an unprecedented increase in major, economically significant regulations, some of which are harming the economy and inhibiting job creation, and to the erosion of the carefully calibrated constitutional system of checks and balances that is the foundation for our system of government.

IV. Specific Examples of How Sue and Settle Hurts Job Creators

Since 2009, EPA has aggressively used out-of-court settlements as the legal basis for sweeping new rulemakings that, whether viewed separately or together, have a tremendous impact on the U.S. economy and its ability to provide jobs. This is particularly true where EPA enters into settlement agreements that purport to expand Federal regulatory authority well beyond the limits of the statutes the agency administers, e.g., the Clean Air Act, the Clean Water Act, etc. Notable examples of this disturbing trend and the devastating impacts these actions have on our economy include:

A. Reconsideration of the 2008 Ozone National Ambient Air Quality Standards (NAAQS)

Environmental advocacy groups sued EPA in 2008 challenging the just-promulgated NAAQS for ground-level ozone, which had been lowered from 84 parts per

²⁹ *Supra*, note 1.

³⁰ *See e.g.* Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612.

³¹ *See e.g.* Congressional Review Act of 1996, 5 U.S.C. §§ 801-808 and H.R. 10, “Regulations from the Executive in Need of Scrutiny Act of 2011 (REINS Act),” <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.10>: The Senate version of the REINS Act is S. 299.

billion (ppb) to 75 ppb.³² In 2009, EPA announced that it would reconsider the 2008 standard, and an environmental advocacy group agreed to place its lawsuit on hold. EPA subsequently developed a new ozone NAAQS in the range between 60 and 70 ppb. EPA estimated that the reconsidered ozone standard would cost up to **\$90 billion per year** to implement nationwide.³³ Industry estimated that the ozone standard would result in the loss of up to **7.3 million jobs** throughout the economy by 2020.³⁴ The White House ultimately forced EPA to postpone the ozone reconsideration in September 2011. Nevertheless, EPA was content to use the environmental advocacy groups lawsuit as the impetus for agreeing to significantly tighten a NAAQS standard less than a year after it had been finalized, and well before it had been implemented. The resulting regulatory uncertainty caused by EPA's unprecedented and ill-advised action makes businesses reluctant to commit capital to expansion, modernization, and hiring until it is clear what EPA will eventually do.

B. Regional Haze and the Takeover of State Programs

EPA's regional haze program, established decades ago by the Clean Air Act, seeks to remedy visibility impairment at federal national parks and wilderness areas. Because regional haze is an aesthetic requirement, not a health standard, Congress emphasized that **the states** – and not EPA – should decide which measures are most appropriate to address haze within their states.³⁵ However, EPA has relied on settlements in cases brought by environmental advocacy groups to usurp state authority and federally impose a strict new set of emissions controls costing 10 to 20 times more than the technology chosen by the states. Beginning in 2009, advocacy groups filed lawsuits against EPA alleging that the agency had failed to perform its nondiscretionary duty to act on state regional haze plans. Rather than defend these cases, EPA simply chose to settle. In five separate consent decrees negotiated with the groups and, importantly, **without notice to the states that would be affected**, EPA agreed to commit itself to specific deadlines to act on the states' plans.³⁶ Next, on the eve of the deadlines it had agreed to, EPA found that each of the state haze plans was in some way deficient. Because the deadlines did not give the states time to resubmit revised plans, EPA claimed that it had no choice but to impose its preferred controls federally. By using the sue and settle process and agreeing to a court-imposed deadline for action, EPA manufactured a way to reach into the state haze decision-making process and supplant the states as

³² Legal challenges to the 2008 Ozone NAAQS were consolidated as *State of Mississippi, et al. v. EPA*, No. 08-1200 (D.C. Cir. 2008).

³³ Letter from President Barack Obama to House Speaker John Boehner, August 30, 2011, available at www.whitehouse.gov.

³⁴ Donald Norman, Manufacturers Alliance, Economic Report, *Economic Implications of EPA's Proposed Ozone Standard* (September 2010), available through <http://www.nam.org>.

³⁵ See 42 U.S.C. § 7491 (b)(2)(A).

³⁶ The five consent decrees are: *Nat'l Parks Cons. Ass'n et al. v. Jackson*, No. 1:11-cv-01548 (D.D.C. Aug. 18, 2011); *Sierra Club v. Jackson*, No. 1-10-cv-02112-JEB (D.D.C. Aug. 18, 2011); *WildEarth Guardians v. Jackson*, No. 1:11-cv-00743-CMA-MEH (D.Col. June 16, 2011); *WildEarth Guardians v. Jackson*, No. 4-09-CV02453 (N.D.Cal. Feb. 23, 2010); *WildEarth Guardians v. Jackson*, No. 1:10-cv-01218-REB-BNB (D.Col. Oct. 28, 2010).

decision makers, despite the protections of state primacy built into the regional haze program by Congress.

So far, the federal takeover of the states' regional haze program has cost eight states some **\$642 million** over and above what they were planning to spend for visibility improvements.³⁷ Additional states in all parts of the country will be required to follow suit. And because the federal haze requirements do nothing to improve public health or perceptibly improve visibility in the affected states, citizens of those states are literally being required to spend their money for nothing. The federalized regional haze requirements will cost jobs to be lost at the numerous facilities that must either install costly new equipment in the name of visibility or shut down. Moreover, increases in the cost of electricity and products such as cement caused by the regional haze rules will further strain the weak U.S. economy.

C. Chesapeake Bay Clean Water Act Rules

In response to a lawsuit filed against EPA in January 2009 by environmental advocacy groups, which alleged that EPA had failed to take measures adequately to protect the Bay, EPA agreed in May 2010 to establish a suite of new regulations for the Bay by December 2010.³⁸ In the settlement agreement, the agency obligated itself to establish stringent new Total Maximum Daily Load (TMDL) standards for the Bay, create a framework for implementation, expand EPA's review of watershed permits, and write new regulations for concentrated animal feedlot operations and stormwater discharges. These actions, the direct result of a settlement of the case, create a rigid federal program to address water quality in the Bay, despite ample evidence that voluntary measures being taken by the states, localities, agricultural operations, and private interests had significantly improved the health of the Bay over the past 25 years. If these voluntary efforts had been allowed to continue, the improvement goal identified by EPA for nitrogen was likely to be achieved by 2027, the phosphorus goal by 2023, and the sediment goal by 2035.³⁹ In other words, the Bay was on pace to achieve its improvement goals with or without the new federal program.

The federal program for the Chesapeake Bay is major in its scope and economic impact. The TMDLs, which essentially sets land use-type limits on businesses, farms, and communities on the Bay based on their calculated daily pollutant discharges, cover the entire 64,000 square mile Chesapeake Bay watershed and its tidal tributaries. EPA's displacement of state authority to implement TMDLs is estimated to cost Maryland more than **\$11 billion**,⁴⁰ with an additional **\$7 billion** for Virginia.⁴¹ Maryland industries alone

³⁷ See William Yeatman, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs* (DRAFT)(August 2012).

³⁸ *Fowler v. EPA*, No. 1:09-cv-00005-CKK (D.D.C. Jan. 2009).

³⁹ See U.S. Senate Committee on Environment and Public Works, *Clouded Waters: A Senate Report Exposing the High Cost of EPA's Water Regulations and Their Impacts on State and Local Budgets* (Minority Report) (June 30, 2011), at 2-3.

⁴⁰ Sage Policy Group, Inc., *The Impact of Phase I Watershed Implementation Plans o Key Maryland Industries* (April 2011).

⁴¹ *CHESAPEAKE BAY JOURNAL*, January 2011, available at www.bayjournal.com/article.cfm?article=4002.

are expected to suffer an economic loss of \$10 billion through 2017, with the commensurate loss of **65,000 jobs**.⁴² The federal takeover of the Chesapeake Bay program is unprecedented in its scope and impact, yet by relying solely on the consent agreement as the source of its regulatory authority, EPA did not have to seek public input, or explain the basis for its actions in the Clean Water Act, or give stakeholders an opportunity to evaluate the science which the agency relies on in setting the TMDLs. It is also very likely that the assigned pollutant loads for farms, businesses, and communities are based on incorrect data derived from faulty modeling. Because the TMDL rulemakings resulted from a settlement agreement which set tight timelines for action, the public never had access to the information that would be necessary to comment effectively on the modeling and the assumptions used to set the TMDLs. EPA would have been better served to promulgate the Chesapeake Bay program rules through the normal Administrative Procedure Act notice and comment rulemaking process.

D. Utility MACT Rule

Following the February 2008 rejection of EPA's Clean Air Mercury Rule by the Court of Appeals, environmental advocacy groups sued EPA on December 18, 2008 seeking to force EPA to set MACT standards under Section 112.⁴³ EPA had sought to avoid promulgating a MACT standard when it originally promulgated the Clean Air Mercury Rule. On April 15, 2010, EPA and the environmental plaintiffs entered into a consent decree requiring EPA to issue MACT standards under Section 112 for coal- and oil-fired electric generating units, also known as the "Utility MACT" rule. Although the rule is supposed to reduce emissions of mercury and other toxic air pollutants, more than 99.9 percent of the rule's purported health benefits come from requiring further reductions in fine particulate matter (which is already adequately regulated under several existing EPA rules). The Utility MACT rule is expected to force 25 percent or more of the country's power stations to be shut down. Power plants that don't shut down will be required to install costly new technology to control particulates. According to recent industry analyses, American energy businesses are more likely to face a total of **\$32 billion** in costs to comply with the Utility MACT rule.⁴⁴ This is reflected in recent annual reports from two dozen energy producers that have announced power plant closures. These companies' compliance costs alone will be **three times higher than EPA's estimate for Utility MACT for the entire country (\$9.6 billion)**.⁴⁵ Of the 24 companies that have reported Utility MACT cost estimates, some have announced direct layoffs from the rule, totaling 5,100 jobs so far. Further, according to recently-announced power plant retirements, more than **9,100** jobs are being directly affected by Utility MACT.⁴⁶ More will follow as the impacts of Utility MACT ripple out to affected businesses and communities.

⁴² Sage Policy Group, Inc., *The Impact of Phase I Watershed Implementation Plans o Key Maryland Industries* (April 2011).

⁴³ *American Nurses Association v. Jackson*, Case No. 1:08-cv-01298 (D. D.C. 2008).

⁴⁴ Sam Batkins, *American Action Forum* (June 6, 2012) available at <http://americanactionforum.org/topic/american-energy-companies-report-over-three-times-higher-utility-impact-mact-compliance-costs-epa-pro>.

⁴⁵ *Id.*

⁴⁶ *Id.*

E. FWS Critical Habitat Designation

EPA is not the only federal agency to embrace a “sue and settle” approach. The U.S. Fish and Wildlife Service (FWS) used an out of court settlement in 2009 to designate a large critical habitat area under the Endangered Species Act.⁴⁷ In 2008, environmental advocacy groups sued FWS to protest the exclusion of 13,000 acres of national forest land in Michigan and Missouri from the final “critical habitat” designation for the endangered Hine’s emerald dragonfly under the Endangered Species Act. FWS initially disputed the case. However, while the case was pending, the new administration took office, changed its mind, and settled with the plaintiffs on February 12, 2009. FWS agreed under the settlement to a remand without vacatur of the critical habitat designation in order to reconsider the federal exclusions from the designation of critical habitat for the Hine’s emerald dragonfly. On April 30, 2009, FWS doubled the size of the critical habitat from 13,000 acres to 26,000 acres, exactly what the plaintiffs sought in the lawsuit. FWS also agreed to pay \$30,000 in attorney’s fees and costs to the plaintiffs. The critical habitat designation agreed to by FWS effectively restricts development of all kinds within the 26,000 acre areas. While the cost of the critical habitat designation and its potential impact on jobs can be debated, it is clear that the designation carries a significant impact. The inability to build, or farm, or otherwise use those lands clearly has an economic effect. By simply agreeing to designate the critical habitat, FWS avoided the economic review and impacts analyses that would have been required if the agency had gone through an ordinary notice and comment rulemaking.

F. What is the Larger Economic Impact of These Regulations?

In evaluating the larger impact to the economy of the sue and settle approach to regulation, it is important to remember that much more is at stake than the immediate cost of each new rule an agency agrees to issue or the net number of jobs that will be affected by each new rule. The immediate reality is that these new regulations will deter investment that creates new jobs and dislocate workers from the jobs that they now have. Whatever the future benefits may be, EPA’s rush to regulate means that today more workers are losing jobs, families are losing income, and those least able to afford it are saddled with the burden of job search, relocation, and retraining.

The workers who lose their jobs today because regulation forces the plants where they have invested their working lives to shut down typically do not have the skills needed to take the new jobs that EPA promises will materialize. And typically those new jobs are also in the wrong places. For example, the basic idea that a job lost today at a power plant in Ohio that shuts down will be replaced within a year or two by a new job at an electric vehicle plant in Michigan is little comfort for workers who need to feed their families and to make their mortgage payments in Ohio today.

Data from the Bureau of Labor Statistics’ latest (January 2010) Displaced Worker Survey underscores the challenges facing workers who are targeted for job losses by

⁴⁷ Northwoods Wilderness Recovery v. Kempthorne, No. 1:08-cv-1407 (N.D. Ill. 2008).

EPA. BLS looked at 6.9 million workers who lost jobs from January 2007 through December 2009 and found that in January 2010 over half still had not found another job. Many workers had experienced one to three years of unsuccessful job search. Others dropped out of the labor market in frustration and even quit looking. And it is important to note that the challenge of finding re-employment by displaced workers is not just the result of the recent recession. The previous BLS survey which covered the expansion years of 2005 through 2007 found that one-third of displaced workers did not find another job within three years. The BLS data clearly shows that EPA cannot justify ignoring employment displacement impacts by assuming that displaced workers quickly find new employment at the same wage rate. In short, EPA does not now count the loss of a job as a cost. The government's own survey evidence shows that destroying jobs has long-lasting adverse impacts on workers. When an agency of the federal government proposes a policy that it knows will result in employment dislocation for some citizens, at the very least the costs of job displacement should be recognized in the cost benefit analysis that justifies the regulation, and a decent respect for the families whose livelihoods are affected should require that the agency actively address how the burden of job dislocation will be mitigated. The burden that is being placed on workers today is compounded by the likelihood that new jobs, when and if they materialize, will pay less than the jobs that were destroyed. The same BLS survey found that among the minority who did find new jobs, 55 percent reported lower earnings in the new job than in the job that was lost (in the previous survey round of January 2008, 45 percent of reemployed workers reported lower earnings than in the previous job).⁴⁸

Recent studies discuss the startling human disaster impacts of unemployment. For example, the prospects of re-employment of older workers deteriorate sharply the longer they are unemployed. A 50 – 61 year old worker unemployed for 17 months has only a nine percent chance of securing a job in the next three months and workers over 62 have only a six percent chance of finding a new job.⁴⁹ Another study finds mid-career workers who lose long-held jobs and experience long term unemployment can expect to live one and one – half years less than a continuously employed worker.⁵⁰ Moreover, the rate of suicides for unemployed workers also increases by up to ten percent.⁵¹ These are real people, and not EPA's computer modeled people.

⁴⁸ "Worker Displacement: 2007-2009." U.S. Bureau of Labor Statistics (USD-10-1174) August 26, 2010, at <http://www.bls.gov/news.release/pdf/disp.pdf> The BLS Displaced Worker Survey focuses on "long-tenured" employees who lose their jobs because of plant closures or relocation, shift elimination, or decline in demand for the product. The survey tracks workers who lost jobs that they had previously held for three or more years. This category fits well with the experience of workers who are in industries most affected by EPA regulations.

⁴⁹ Dean Baker and Kevin Hassett, "The Human Disaster of Unemployment," New York Times, May 12, 2012, <http://www.nytimes.com/2012/05/13/opinion/sunday/the-human-disaster-of-unemployment.html?pagewanted=all>.

⁵⁰ Daniel Sullivan and Till von Wachter, "Job Displacement and Mortality: An Analysis Using Administrative Data: Quarterly Journal of Economics, Vol. 124 (2009), number 3 (Aug), pp. 1265-1306 at <http://qje.oxfordjournals.org/content/124/3/1265.short>.

⁵¹ *Supra*, note 49. See also Annie Lowery, "Death and Joblessness," Washington Independent, August 17, 2010 at <http://washingtonindependent.com/94925/death-and-joblessness>.

EPA needs to consider more than the supposed net impacts of its regulations. While EPA's regulations have both benefits and costs, the reality is that the winners and the losers are not the same people and usually not even in the same communities. EPA's regulatory decisions create massive shifts in the structure of the economy, benefiting some workers, some communities and some industries and imposing costs or complete destruction on others. Even if EPA's redistributive mandates yield a net benefit for society as a whole over time, the rapidity of change that EPA mandates and the nationwide scope of change is a tremendous shock to the economic system. EPA needs to consider how it can lessen the burdens it is placing on the workers, families and communities that it targets for losses. EPA could reduce the economic shocks of its mandate by adopting more gradual approaches that phase in new standards over longer periods of time and that apply new standards only to new facilities, allowing existing facilities and the communities that depend on them to live out their natural lives. EPA could learn from the experience of the diffusion of technological change. New technologies yield net benefits to society, but their efficiency gains also come with costs as jobs and industries dependent on old technology are replaced. But in the case of technological change, the typical experience is gradual adjustment that cushions the shocks of economic change. EPA should endeavor to make its program of environmental change resemble more closely the successful experience of adoption of technological change. In addition to gradual schedules for adoption of new standards and "grandfathering" of older facilities, such an approach might also feature greater reliance on voluntary compliance, demonstrations, and incentive programs. A more gradual approach to regulation implementation would yield the added benefit of facilitating empirical study of effects to ensure that policies really are effective and on the right track.

Unfortunately, the sue and settle system makes it difficult, if not impossible for EPA to make such strategic choices. Consent decrees and court orders dramatically accelerate the regulatory juggernaut. Rather than developing regulatory policy in a coordinated, deliberate fashion that includes public participation, rules are hastily issued, one on top of the other. This scattershot approach to regulation makes the shocks to the economic system immediate and more pervasive than would otherwise happen.

Finally as far back as 1977, Congress, in section 321 of the Clean Air Act, anticipated the negative impacts of regulations on jobs and it mandated the Administrator of EPA to "conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision of this Act and applicable implementation plans, including where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement."⁵² Thereafter, Congress imposed similar mandates in the Clean Water Act⁵³; the Toxic Substances Control Act⁵⁴; CERCLA⁵⁵ and the Resource Conservation

⁵² 42 U.S.C. § 7621(a).

⁵³ 33 U.S.C. § 1367(e).

⁵⁴ 15 U.S.C. § 2623(a).

⁵⁵ 42 U.S.C. § 9610(e).

and Recovery Act.⁵⁶ Had these studies been conducted, EPA and Congress would better understand how regulations impact job loss and the impacts of job loss on the communities where the losses occur; unfortunately EPA has failed to implement the clear intent of Congress and has ignored being able to appreciate the hard facts of job loss caused by its regulatory madness.

V. Recommendations

The sue and settle problem can be fixed by ensuring that existing law works as intended. Solutions do not require undermining the government's ability to settle lawsuits or restricting citizen suits. The problem requires solutions based on good government principles. This includes transparency, public participation, and strong government oversight.

A. **Sunshine for Regulatory Decrees and Settlements Act of 2012 (H.R. 3862)**

There already is a strong bill that would go a long way to addressing many of the problems associated with sue and settle. Representative Benjamin Quayle (R-AZ) introduced the Sunshine for Regulatory Decrees and Settlements Act of 2012, which passed out of the House Judiciary Committee. It would do several very important things:

- Require disclosure of proposed consent decrees and settlement agreements before they are filed with a court;
- Give the public a chance to provide comments before proposed sue and settle agreements are filed with a court, thereby allowing the public to have a meaningful voice;
- Make it easier for affected parties to intervene in legal actions;
- Require agencies to give proper notice of proposed sue and settle agreements.
- Ensure that agencies, in sue and settle agreements, have sufficient time to comply with all statutory requirements.
- Require agencies to give annual reports to Congress regarding the number, identity, and content of complaints and sue and settle agreements, along with attorney's fees and costs awarded in connection with the sue and settle agreements.⁵⁷

With passage of H.R. 3862, the public and Congress would know how often sue and settle agreements are used. The public would get a chance to have a voice in the process and environmental groups and agencies would not be able to do an end-run around the procedural protections that are supposed to apply to regulations under the Administrative Procedure Act. By having public participation, the agencies would formulate better public policy and would better consider the impact regulations have on jobs and employers.

⁵⁶ 42 U.S.C. § 6971(e).

⁵⁷ *Supra*, note 2.

B. Improve Oversight over Citizen Suits: Move Citizen Suit Provisions to Title 28 and Under the Jurisdiction of the Judiciary Committee

The House and Senate Judiciary Committees should have jurisdiction to oversee citizen suit provisions. This would strengthen the oversight over citizen suits by having the committee with the legal expertise and clear jurisdictional charge overseeing this inherently legal matter. To ensure that such jurisdiction exists, citizen suit provisions would need to be included in statutes under the jurisdiction of these committees.

Existing citizen suit provisions would fit perfectly into Title 28 of the United States Code, which addresses the federal judiciary and judicial procedure.⁵⁸ Moving the existing citizen suit language to Title 28 would be easy since the language throughout the various environmental statutes is generally identical.

C. Ensure that Agencies Do Not Give Up Discretionary Power Contrary to Law

Congress has made it clear that citizen suits may only be used to compel agencies to perform nondiscretionary acts or duties. When cases are adjudicated, courts and agencies ensure that the will of Congress is respected through judicial rulings and the defense of the agency. Unfortunately, in sue and settle cases, courts allow agencies to give up discretionary power when there are consent decrees and settlement agreements. To address this concern, courts must actively supervise consent decrees entered into by agencies.

Moreover, if agencies were precluded from improperly giving up discretionary power through consent decrees, agencies would not be able to agree to regulations not mandated by law or develop new regulatory requirements that are not contained within environmental statutes. There would be no way for a single environmental group to create major public policy by doing an end-run around the regulatory process.

D. EPA Must Conduct Employment Loss Studies

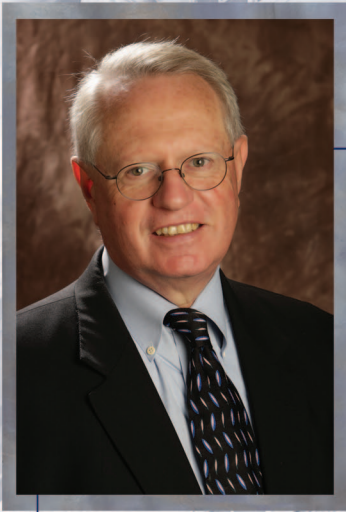
EPA must comply with the intent of Congress and undertake the mandated continuing evaluations of potential loss or shifts of employment caused by its regulations. Only by undertaking these studies can EPA begin to understand how its regulations impact real people, in real communities. Moreover, since the Bureau of Labor Statistics prepares Worker Displacement Studies every several years, Congress may want to consider having EPA fund a new section of the study that addresses job loss from regulation.

In the final analysis, many activities cause job loss, e.g. technological change, competition, but those changes are caused by market forces and take place over time with the market constantly reallocating jobs and resources. But government regulations are different from market forces. They are direct and blunt instruments intentionally applied

⁵⁸ 28 U.S.C. §1 *et. seq.*

against specific industries, in specific areas of the country and designed to change industry practices and employment in the specific industry. As such, EPA must be conscious that its regulations can have severe negative impacts on jobs and it must continuously evaluate these impacts. To address EPA's 35 year indifference to Congress' mandate, EPA should be required to undertake an evaluation of the cumulative impacts of all economically significant regulations it has issued in the last three years on job loss and shifts in employment. If performed this action it would only be doing what Congress mandate it do.

Again, thank you for the opportunity to testify today. I am happy to answer any questions that you may have.



William L. Kovacs

Senior Vice President, Environment, Technology & Regulatory Affairs, U.S. Chamber of Commerce

William L. Kovacs provides the overall direction, strategy, and management for the Environment, Technology & Regulatory Affairs Division at the U.S. Chamber of Commerce.

Since coming to the Chamber in March 1998, Kovacs has transformed a small division concentrated on a handful of issues and committee meetings into one of the most significant in the organization. The Environment, Technology & Regulatory Affairs Division initiates and leads multidimensional, national issue campaigns on comprehensive energy legislation, complex environmental rulemakings, telecommunications reform, emerging technologies, and the systematic application of sound science to the federal regulatory process among others.

Kovacs has focused on finding new leadership opportunities for the Chamber. He pioneered the use of cybercasting for Chamber events, recruited and assembled the first science team to work in tandem with policy staff to ensure that federal regulations are based on sound science, formed and chaired the Chamber's Technology Coordinating Group, and helped develop numerous national coalitions in the areas of environment, energy, regulatory affairs, and technology.

Before joining the Chamber, Kovacs was director of worldwide legal affairs for Sunshine Makers, Inc., manufacturer of the Simple Green line of nontoxic cleaning products. Previously, he held the position of partner in several Washington, D.C., law firms where his practice focused on environmental law.

In government service, Kovacs served as vice chairman and chairman of the Commonwealth of Virginia's Hazardous Waste Facilities Siting Board, as chief counsel and staff director for the House Subcommittee on Transportation and Commerce, and as legislative director and counsel for a member of Congress.

During his tenure as chief counsel, Kovacs was the primary counsel on two landmark laws that were enacted in a single session of Congress: the Resource Conservation and Recovery Act, the primary federal law that regulates solid and hazardous waste; and the Rail Revitalization and Regulatory Reform Act, which reorganized the bankrupt Penn Central Railroad into Conrail, the largest corporate reorganization in the United States at that time.

Kovacs is a frequent commentator on national environmental, energy, and regulatory issues that impact the business community. He is regularly quoted in the nation's leading newspapers and appears on talk radio and television as a spokesperson for American business. He is listed in *Who's Who in the World*, *Who's Who in America*, *Who's Who in American Law*, and *Who's Who in Emerging Leaders*.

Kovacs has a law degree from the Ohio State University College of Law and a bachelor of science degree from the University of Scranton, magna cum laude.



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Committee on Oversight and Government Reform
Witness Disclosure Requirement - "Truth in Testimony"
Required by House Rule XI, Clause 2(g)(5)

Name: William L. Kovacs

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2009. Include the source and amount of each grant or contract.

NONE

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

U.S. Chamber of Commerce
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Washington, DC 20062

Relationship: Senior Vice President,

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2009, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

NONE

I certify that the above information is true and correct.

Signature:

William L. Kovacs

Date:

6/25/12