



Statement of the U.S. Chamber of Commerce

**ON: Hearing on Examining “Sue and Settle” Agreements:
Part I.**

**TO: U.S. House Committee on Oversight and Government
Reform, Subcommittee on the Interior, Energy and
Environment and Subcommittee on Intergovernmental
Affairs**

DATE: May 24, 2017

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political and social system based on individual freedom,
incentive, initiative, opportunity and responsibility.

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

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

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**BEFORE THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM OF
THE U.S. HOUSE, SUBCOMMITTEE ON THE INTERIOR, ENERGY AND
ENVIRONMENT AND SUBCOMMITTEE ON INTERGOVERNMENTAL AFFAIRS**

Hearing on Examining “Sue and Settle” Agreements: Part I

Testimony of William L. Kovacs

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U.S. Chamber of Commerce**

May 24, 2017

Good afternoon, Chairmen Farenthold and Palmer, Ranking Members Plaskett and Demings, and distinguished Members of the Subcommittees. My name is William L. Kovacs and I am senior vice president for Environment, Technology and Regulatory Affairs at the U.S. Chamber of Commerce. My statement details the Chamber’s strong support for H.R. 469, the “Sunshine for Regulatory Decrees and Settlements Act of 2017.” By requiring agencies to be more transparent, responsive and accountable to the public, the bill helps to ensure that the regulatory process is open and fair to all.

A. Background

Over the past decade, the business community has expressed growing concern about interest groups using lawsuits against federal agencies and subsequent consent decrees approved by a court as a “short cut” technique to influence agencies’ regulatory agendas. These sue and settle agreements occur when an agency chooses not to defend lawsuits brought by activist groups, and the agency agrees to legally-binding, court-approved settlements negotiated behind closed doors – with no participation by other affected parties or the public.¹

The Chamber appreciates the decision by new Environmental Protection Agency (“EPA”) Administrator Scott Pruitt to end the practice of sue and settle. The Administrator stated that “[r]egulation through litigation is simply wrong.”² While Administrator Pruitt’s new policy is a much-welcomed and needed step in the right direction, it is important to note the history of sue and settle agreements to ensure that practice does not occur again and to examine the future trends in environmental lawsuits.

In 2011, the U.S. Chamber set out to determine how often sue and settle agreements actually happen and to identify major sue and settle cases.

¹ The coordination between outside groups and agencies is aptly illustrated by a November 2010 sue and settle case where EPA and an outside advocacy group filed a consent decree and a joint motion to enter the consent decree with court *on the same day* the advocacy group filed its Complaint against EPA. See *Defenders of Wildlife v. Perciasepe*, No. 12-5122, slip op. at 6 (D.C.Cir. Apr. 23, 2013).

² Kimberly A. Strassel, “Scott Pruitt’s Back-to-Basics Agenda for the EPA,” *The Wall Street Journal* (Feb. 17, 2017) available at <https://www.wsj.com/articles/scott-pruitts-back-to-basics-agenda-for-the-epa-1487375872>.

The Chamber's July 2012 report, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs*,³ illustrated how the U.S. Environmental Protection Agency has used sue and settle agreements with activist groups to override state decisions—and force more costly and burdensome regional haze requirements on the states.

Subsequently, the Chamber's May 2013 report, *Sue and Settle: Regulating Behind Closed Doors*,⁴ catalogued scores of sue and settle agreements that imposed major new regulatory burdens. In total, the report found that between 2009 and 2012, a total of 71 lawsuits against EPA and other federal agencies were settled under circumstances that categorize them as sue and settle cases. These agreements resulted in over 100 regulatory actions, with some of these actions imposing \$1 billion or more in annual costs and burdens on businesses, consumers, and local communities.⁵ The report discussed the public policy implications of having the priorities of a federal agency determined by consent decrees.

The Chamber's most recent report, *Sue and Settle Updated: Damage Done 2013-2016* (which is included as Attachment A to this testimony), updates our 2013 report and catalogues the sue and settle agreements made under the Clean Air Act for that time period.

Together these reports demonstrate how sue and settle agreements distort the regulatory process and undercut the public's role in rulemaking that Congress required through the Administrative Procedure Act.⁶ As a result of the sue and settle process, the agency intentionally gives up its discretion to perform its duties in a manner that it believes serves the public interest best, and agrees to bind itself to the terms of settlement agreements. In doing so, the agency agrees to prioritize the demands of activist groups over and above competing interests—including committing congressionally-appropriated funds. This process also allows agencies to avoid the normal protections built into the rulemaking process – review by the Office of Management and Budget and the public, and compliance with executive orders – at the critical moment when the agency's new obligations are created.

Because sue and settle agreements developed through the imposition of a court-approved consent decree bind an agency to meet a specified deadline for regulatory action – a deadline the agency often cannot meet – the agreement essentially reorders the agency's priorities and its allocation of resources. The realignment of an agency's duties and priorities at the behest of an individual special interest group runs counter to the larger public interest and the express will of Congress.

B. Sue and Settle Developments Since 2013

The Chamber's updated analysis of sue and settle agreements since 2013 found that EPA's practice of agreeing to the tactic had not diminished-- and had actually expanded under

³ U.S. Chamber of Commerce, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs* (July 2012) available at https://www.uschamber.com/sites/default/files/documents/files/1207_ETRA_HazeReport_lr_0.pdf.

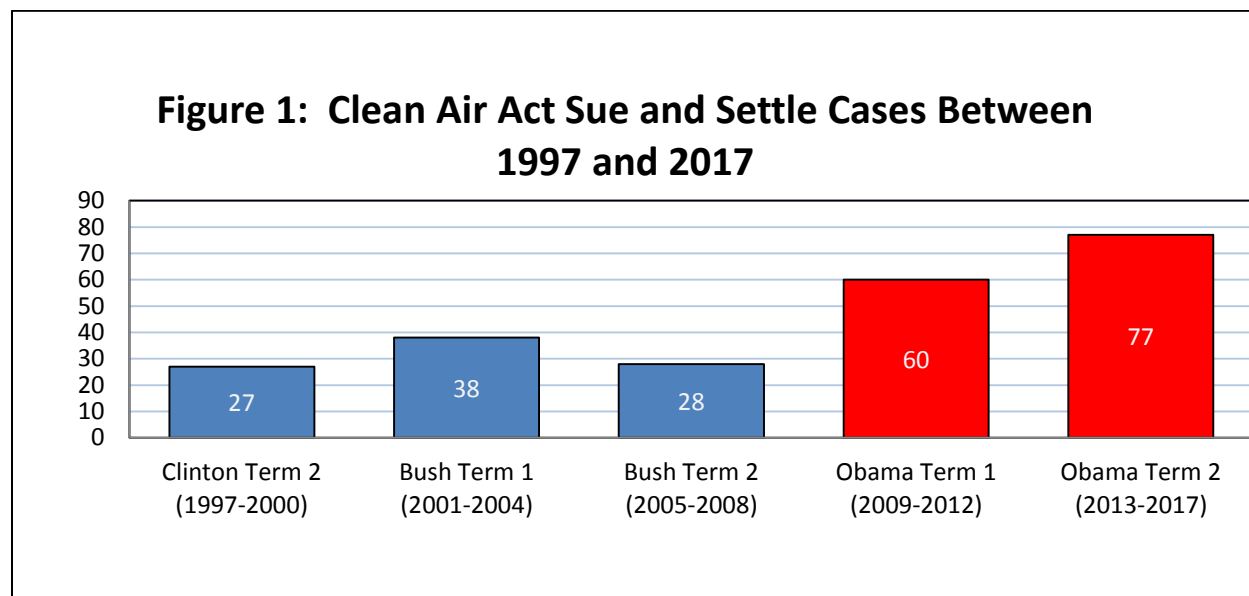
⁴ U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors* (May 2013) available at <https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf>.

⁵ *Id.* at 15-20.

⁶ 5 U.S.C. §§ 500 *et seq.*

the previous administration. Based on *Federal Register* notices of draft consent decrees in cases where the EPA was sued under the Clean Air Act, our May 2013 study found that the agency negotiated a total of **60** Clean Air Act (“CAA”) sue and settle agreements between 2009 and 2012.⁷

From 2013 to 2016, advocacy groups have used these tactics even more frequently. As shown in Figure 1, between January 2013 and January 2017, EPA agreed to an additional **77** CAA consent decrees. Thus, over the last 8 years EPA welcomed substantially more CAA settlements (139) than previous administrations did over the preceding 12-year period (93).



Source: EPA, *Federal Register*

The economic impact of these settlements is often profound and widespread:

Sue and Settle Agreements Result In Costly New Regulatory Burdens	
•	Chesapeake Bay Clean Water Act rules - up to \$6 billion cost for states to comply. ⁸
•	2013 Revision to the PM2.5 NAAQS - up to \$350 million annual costs. ⁹
•	2015 Clean Power Plan – between \$5.1 billion and \$8.4 billion annual costs. ¹⁰
•	2015 Startup, Shutdown & Malfunction (SSM) rule – nearly \$ 12 million annual costs. ¹¹

⁷ U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors* (May 2013) available at <https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf> at 14.

⁸ Chesapeake Bay Program, *Funding and Financing*, “State Funding” (2012), see www.chesapeakebay.net/about/how/funding (the six states and the District of Columbia anticipated combined expenditures of \$2.4 billion in their 2011 milestone, or as much as \$6 billion over a decade).

⁹ EPA, “Overview of EPA’s Revisions to the Air Quality Standards for Particulate Matter” (2012).

¹⁰ EPA, Regulatory Impact Analysis, Clean Power Plan Final Rule, Exec. Summary (October 23, 2015) at ES-9. Currently the Clean Power Plan is under a stay order which was handed down by the United States Supreme Court on February 9, 2016.

¹¹ North Carolina Department of Environmental Quality, Division of Air Quality, *Fiscal and Regulatory Analysis for Amendments Concerning SSM Operations* (May 12, 2016) available at [https://ncdenr.s3.amazonaws.com/s3fs-public/Environmental Management Commission/EMC Meetings/2016/May2016/Attachments/AttachmentB_to16-20_SSM SIP Call.pdf](https://ncdenr.s3.amazonaws.com/s3fs-public/Environmental%20Management%20Commission/EMC%20Meetings/2016/May2016/Attachments/AttachmentB_to16-20_SSM_SIP_Call.pdf). EPA did not conduct a regulatory impact analysis for the Startup, Shutdown & Malfunction (SSM) SIP Call, saying it could not estimate how each state will act to revise its SIP. However, North Carolina estimated that the SIP Call

- 2011-2016 Regional Haze rules - more than **\$5 billion** additional cost to comply.¹²
- 2016 OSM Stream Protection rule – **\$3-\$6 billion** in lost state tax revenues on coal.¹³

Moreover, many of the major sue and settle agreements entered into since 2009 are only now having impacts that can be felt. For example, in December 2010, EPA entered into a sue and settle agreement that obligated the agency to issue a rule limiting greenhouse gas (GHG) emissions from electric utilities.¹⁴ The GHG rules ultimately finalized by EPA in 2015 under the Clean Power Plan will, under EPA’s *own* economic analysis, impose between **\$5.1 billion and \$8.4 billion** in annual compliance costs on businesses, communities, and states.¹⁵ Enforcement of the rules was stayed by the United States Supreme Court on February 9, 2016 pending judicial review.¹⁶

Likewise, in March 2010, the Department of the Interior’s Office of Surface Mining (“OSM”) entered into a settlement with advocacy groups to revise its Stream Protection Rule affecting coal mining operations near streams. OSM published the final Stream Protection Rule on December 20, 2016.¹⁷ The National Mining Association had estimated that the Stream Protection Rule would potentially cost between 112,757 and 280,809 mining-related jobs in coal-producing states. Equally important, the rule was anticipated to result in a loss of between **\$3.1 billion and \$6.4 billion in tax revenues for governments**, including already hard-hit state and local governments in states like Kentucky and West Virginia.¹⁸ These effects were never fully realized because the President signed a Congressional Review Act resolution of disapproval eliminating the rule on February 16, 2017.¹⁹

Similarly, as the result of a lawsuit filed by activist groups, EPA agreed in May 2010 to impose costly new requirements on the six states and the District of Columbia that contribute most of the runoff to the Chesapeake Bay.²⁰ The Chesapeake Bay Program has estimated the total cost for the states to comply with new federal requirements to be as much as **\$6 billion**.²¹ The Bay states must impose more stringent operating requirements on farmers, businesses and

revisions would cost the state air agency and affected facilities \$337,700 annually to comply. Assuming that North Carolina is representative of the affected states, assigning North Carolina’s costs to the 35 affected states gives an annual cost of the SSM SIP Call of about \$12 million.

¹² U.S. Chamber of Commerce, *EPA’s New Regulatory Front: Regional Haze and the Takeover of State Programs* (July 2012); Testimony of William Yeatman before the House Committee on Science, Space and Technology, Subcommittee on Environment (March 29, 2016), available at: <https://cei.org/content/testimony-william-yeatman-%E2%80%9CEpa%E2%80%99s-regional-haze-program%E2%80%9D-subcommittee-environment-committee>.

¹³ National Mining Association, *Economic Analysis of Proposed Stream Buffer Protection Rule* (October 2015) <http://www.ourenergypolicy.org/wp-content/uploads/2015/10/Final-SPR-Economic-Impact-Report-NMA.pdf>. The Stream Buffer Protection Rule was later vitiated by enactment of a Congressional Review Act resolution of disapproval signed by President Trump on February 16, 2017.

¹⁴ EPA, Notice of Proposed Settlement Agreement, 75 Fed. Reg. 82,392 (Dec. 30, 2010).

¹⁵ EPA, Regulatory Impact Analysis, Clean Power Plan Final Rule, Executive Summary at ES-9 (October 23, 2015).

¹⁶ Order in Pending Case, *Chamber of Commerce, et al. v. EPA, et al.* (Feb. 9, 2016) available at https://www.supremecourt.gov/orders/courtorders/020916zr3_hf5m.pdf

¹⁷ 81 Fed. Reg. 93,066 (December 20, 2016).

¹⁸ National Mining Association, *Economic Analysis of Proposed Stream Buffer Protection Rule* (October 2015) <http://www.ourenergypolicy.org/wp-content/uploads/2015/10/Final-SPR-Economic-Impact-Report-NMA.pdf>

¹⁹ See Pub. Law No. 115-5.

²⁰ *Fowler v. EPA*, No. 10-00005 (settled May 10, 2010).

²¹ Chesapeake Bay Program, *Funding and Financing*, “State Funding” (2012), see www.chesapeakebay.net/about/how/funding (the six states and the District of Columbia anticipated combined expenditures of \$2.4 billion in their 2011 milestone, or as much as \$6 billion over a decade).

other sources within the watershed. For example, Pennsylvania has to “implement over 22,000 acres of additional forest and grass buffers” to meet federal pollutant load requirements.²² In other words, the state must place land use limits on 22,000 acres to satisfy new federal requirements the state was prevented from having any role in crafting.

C. Special Interest Groups and EPA Increasingly Used Sue and Settle between 2013 and 2016 to Exert Direct Control over the States

Between the years 2013 and 2016, EPA and advocacy groups increasingly used sue and settle agreements to exert direct control over **state** decision making, including petitions for EPA to object to a state’s issuance or renewal of an individual facility’s clean air operating permit. EPA agrees to grant or deny the petition within a specified date—and most often subsequently requires the state to modify the permit to satisfy the advocacy group(s). These agreements gave EPA and special interest group a way to rewrite facility permits, thereby exerting direct control over the states.

Other recent sue and settle agreements involve EPA pressuring the states to prioritize specific actions on State Implementation Plans (SIPs), regardless of existing state priorities. As was the case with **federal** agency resource priorities and agendas, special interests now increasingly use “sue and settle” as a way to reprogram **state** resources and policy agendas. For example rules resulting from sue and settle agreement like the Clean Power Plan and the Startup, Shutdown, and Malfunction rule have necessitated states to amend their own implementation plans.²³

Among the most egregious of direct federal actions imposed upon the states via “sue and settle” has been the imposition by EPA of **Federal Implementation Plans (FIPs)**. Under the Clean Air Act, the FIP is designed as a “last-ditch” federal backstop to be used only where a state is unwilling or is unable to develop a required SIP. As noted in our 2012 report *EPA’s New Regulatory Front: Regional Haze and the Takeover of State Programs*, however, EPA is choosing to impose FIPs on states in order to compel specific policy outcomes. Our 2012 report focused on Regional Haze FIPs that EPA imposed on the states of Arizona, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, and Wyoming.²⁴ These FIPs allowed EPA to federalize actions that Congress intended to be decided by the states.²⁵

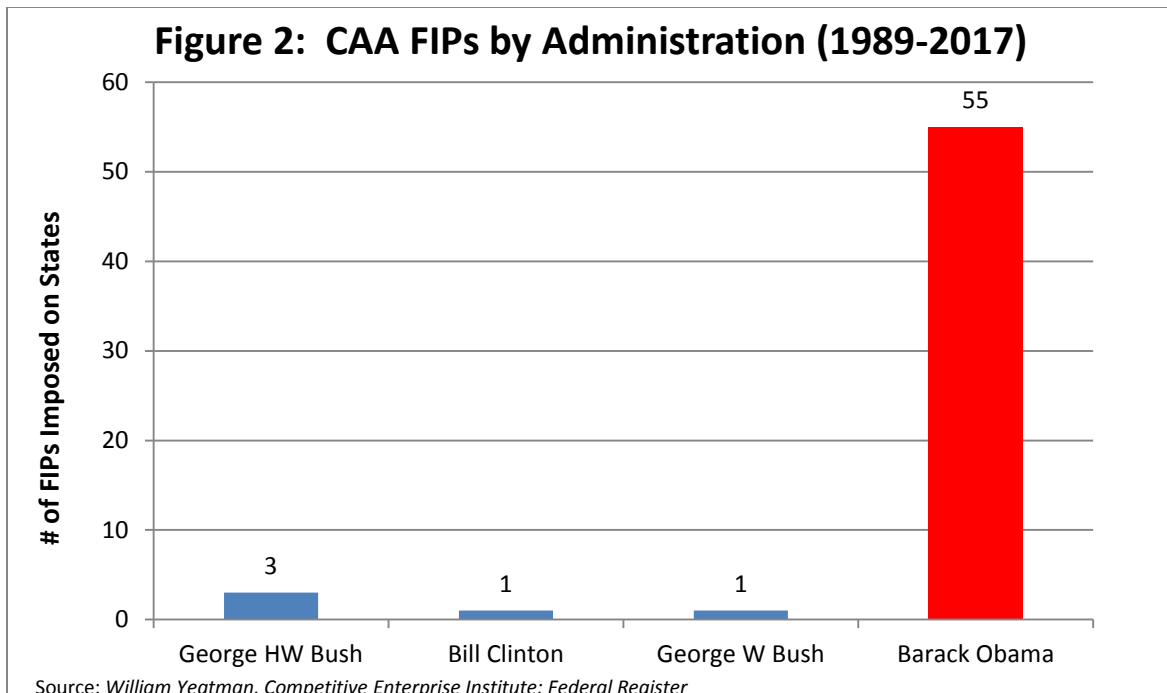
Since 2013, EPA has turned to the FIP as an everyday tool, increasingly relying on it as a means to take direct control of state- and local-level environmental decision making. As Figure 2 clearly shows, the Obama Administration imposed vastly more FIPs on states than all administrations combined since 1989.

²² See EPA, Interim Evaluation of Pennsylvania’s 2014-2015 Milestones and WIP [Watershed Improvement Program] Progress (June 10, 2015) available at https://www.epa.gov/sites/production/files/2015-07/documents/pennsylvania2014-2015interimmilestoneevaluation_61015.pdf at 3.

²³ Letter from Gary C. Rickard, Executive Director, Mississippi Department of Environmental Quality, to Senator James M. Inhofe, Chairman, Senate Committee on Environment and Public Works (Feb. 8, 2016) available at http://www.epw.senate.gov/public/_cache/files/b8c2fe2a-b564-4bfb-aa42-555c0a70612f/mississippi.pdf.

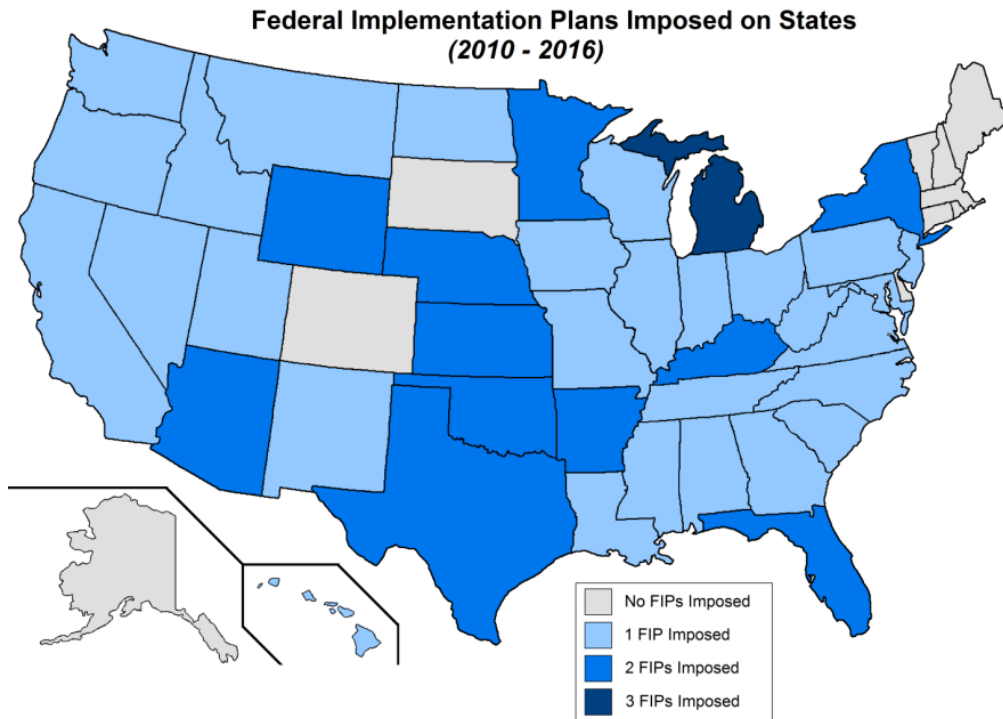
²⁴ U.S. Chamber of Commerce, *EPA’s New Regulatory Front: Regional Haze and the Takeover of State Programs* (July 2012).

²⁵ *Id.* at 5.



These include **17** FIPs dealing with regional haze (all in the wake of sue and settle agreements), **9** FIPs relating to greenhouse gas permitting programs, **28** FIPs for the cross-state air pollution rule, and **1** FIP for oil and gas activities in Indian Country (land located within the boundaries of federally-recognized Indian reservations).

As the U.S. map below clearly illustrates, EPA has not only imposed a very large number of FIPs since 2010, the agency has also imposed FIPs across a wide geographic swath, literally from coast to coast. **Forty of the 50 states** have been hit with at least one FIP since 2010.



Source: *Federal Register*

To make matters worse, since January 2013, based on a list of Notices of Intent to sue made publicly available by EPA, activist groups have notified EPA of their intent to file **more than 180** lawsuits under the Clean Air Act or the Clean Water Act, with more than **125** under the CAA.²⁶ While not all of these Notices of Intent will become lawsuits that, in turn, become sue and settle agreements, experience shows that many will.

D. EPA's Failure to Meet Statutory Deadlines Drives Most Sue and Settle Cases

Under several of the major environmental laws, such as the CAA, and the Clean Water Act, EPA is required to take actions within specific statutory deadlines. The EPA overwhelmingly fails to meet those deadlines, however. For example, according to a 2014 *Harvard Journal of Law & Public Policy* article, “[i]n 1991, the EPA met only **14%** of the hundreds of congressional deadlines” imposed upon it.²⁷

Another study by the Competitive Enterprise Institute examined the EPA’s timeliness to promulgate regulations or review standards under three programs administered through the

²⁶ See EPA, “Notices of Intent to Sue the U.S. Environmental Protection Agency Documents,” available at <https://www.epa.gov/noi>.

²⁷ Henry N. Butler and Nathaniel J. Harris, *Sue, Settle, and Shut Out the States: Destroying Environmental Benefits of Cooperative Federalism*, HARVARD JOURNAL OF LAW & PUBLIC POLICY, Vol. 37, No. 2 at 599 (2014) (available at http://www.harvard-jlpp.com/wp-content/uploads/2014/05/37_2_579_Butler-Harris.pdf) (citing Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law* 54 LAW & CONTEMP. PROBS. 311, 323 (1991) (available at <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1158&context=facpub>). According to Lazarus, “the 14% compliance rate refers to all environmental statutory deadlines, 86% of which apply to EPA.” *Id.* at 324.

CAA: the National Ambient Air Quality Standards, the National Emissions Standards for Hazardous Air Pollutants, and the New Source Performance Standards.²⁸ The 2013 CEI study concluded that since 1993, **“98 percent of EPA regulations (196 out of 200) pursuant to these programs were promulgated late, by an average of 2,072 days after their respective statutorily defined deadlines.”**²⁹

EPA has consistently failed to meet the vast majority of its action deadlines, even in past years when the agency has enjoyed staffing and budget levels well above current levels.³⁰ Given the thicket of interrelated statutory deadlines—some dependent on the completion of others—and the procedural requirements that are a prerequisite to agency action, it is essentially impossible for EPA to meet its continuous deadlines.

When EPA misses deadlines—as it almost always does—advocacy groups can sue the agency via the citizen suit provision in the CAA³¹ for failure to promulgate the subject regulation or to review the standard at issue. Because EPA is out of compliance with the CAA’s statutory deadlines virtually all of the time, advocacy groups are free to pick and choose the rules they believe should be a priority. This gives third party interests a way to dictate EPA priorities and budgetary agendas, particularly when the agency is receptive to settlements. Instead of being able to use its discretion as to how best utilize limited resources, the agency agrees to shift these resources away from critical duties in order to satisfy the narrow demands of outside groups.

E. “Sue and Settle” Goes Far Beyond Simply Enforcing Statutory Deadlines

Activist groups often argue that these lawsuits are really just about deadlines, and that the settlements are only about **when** the agency must fulfill its nondiscretionary duty.³² This argument ignores several critical facts, however. First, by being able to sue and influence agencies to take actions on specific regulatory programs, advocacy groups use “sue and settle” to dictate the policy and budgetary priorities of an agency. Instead of agencies being able to use their discretion as to how best utilize their limited resources, they are forced to shift these resources away from critical duties in order to satisfy the narrow demands of outside groups. Congress has the authority to control EPA’s budget and resource priorities through appropriations, and Congress should not allow advocacy groups to use sue and settle agreements

²⁸ “EPA’s Woeful Deadline Performance Raises Questions about Agency Competence, Climate Change Regulations, “Sue and Settle” by William Yeatman, July 10, 2013 (*emphasis added*)(available at <https://cei.org/web-memo/epas-woeful-deadline-performance-raises-questions-about-agency-competence-climate-change-re>).

²⁹ *Id.*

³⁰ According to EPA, its largest budget (\$10.3 billion) was in FY2010, while its biggest staff roster (18,110) was in FY1999. In FY2016, EPA’s budget was \$8.1 billion, with 15,376 employees. See <https://www.epa.gov/planandbudget/budget>.

³¹ 42 USC § 7604.

³² Advocacy groups point to a December 2014 Government Accountability Office (GAO) report that evaluated seven consent agreements that EPA entered into between May 31, 2008 and June 1, 2013 that resolved deadline suits. The report concluded that these settlement agreements had little or no impact on EPA or its rulemakings because they did not require EPA to modify its discretion, take an otherwise discretionary action, or prescribe a specific substantive rulemaking outcome. The GAO report suffers from several fatal flaws, however, including the fact that GAO relied exclusively on information provided by EPA and DOJ, the report only considered 7 settlement agreements out of more than 60 such settlements identified in the *Federal Register*, the report itself acknowledges that agencies cannot meet compliance obligations under previous settlement agreements, let alone new ones, and the settlement agreements have forced EPA to redirect its resources into meeting agreed-upon deadlines, to the detriment of all other scheduled regulatory actions, which themselves are overdue.

to circumvent the appropriations process.

Second, when advocacy groups and agencies negotiate deadlines and schedules for new rules through the sue and settle process, the ensuing rulemakings are often rushed and flawed. These hurried rulemakings typically require correction through technical corrections, subsequent reconsiderations or court-ordered remands to the agency. It can take months or years for courts to correct these defective rules. One such example is the Mercury Air Toxics (“MATS” or “Utility MACT”) Rule which was rooted in a settlement agreement agreed to during the Obama Administration by the EPA.³³ Even though affected industries were allowed to intervene in the case, EPA and the suing advocacy group did not notify or consult with them about the proposed consent decree. Moreover, even though the District Court for the District of Columbia expressed some concern about the intervenor being excluded from the settlement negotiations, the court still approved the decree in the lawsuit.³⁴ In the final year of President Obama’s first term, EPA released in the *Federal Register* the extremely expensive Utility MACT Rule, which EPA was not previously required to issue, which was estimated to cost \$9.6 billion annually by 2015.³⁵ In 2015, the Supreme Court reversed and remanded the MATS Rule because of EPA’s failure to consider costs in determining the appropriateness of regulating mercury emissions from power plants.³⁶ Unfortunately, in the three years between the release of the MATS rule and the Court’s decision on the merits, the economic damage had been done to the economy via already-invested compliance costs and power plant closures.

Third, by setting accelerated deadlines, agencies very often give themselves insufficient time to comply with the important analytic requirements that Congress enacted to ensure sound policymaking. Setting an unreasonable deadline for one rule draws resources from other agency rulemakings that are also under deadlines.³⁷

Fourth, advocacy groups can also significantly affect the regulatory environment by compelling an agency to issue substantive requirements that are not required by law.³⁸ Even when a regulation is required, agencies can use the terms of sue and settle agreements as a legal basis for allowing special interests to dictate the discretionary terms of the regulations.³⁹ One

³³ *American Nurses Ass’n*, Defendants Notice of Lodging of Proposed Consent Decree (Oct. 22, 2009).

³⁴ *American Nurses Ass’n v. Jackson*, No. 1:08-cv-02198 (RMC), 2010 WL 1506913 (D.D.C Apr. 15, 2010).

³⁵ “National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units,” 77 *Federal Register* (Feb. 16, 2012): 9304, 9306; *see also* Letter from President Barack Obama to Speaker John Boehner (August 30, 2011), Appendix “Proposed Regulations from Executive Agencies with Cost Estimates of \$1 Billion or More.”

³⁶ http://www.supremecourt.gov/opinions/14pdf/14-46_10n2.pdf

³⁷ This is illustrated clearly by sue and settle agreements entered into between advocacy groups and the U.S. Fish and Wildlife Service (FWS). FWS agreed in May and July 2011 to two consent decrees with an environmental advocacy group requiring the agency to propose adding more than 720 new candidates to the list of endangered species under the ESA.³⁷ Agreeing to propose listing this many species all at once imposes an overwhelming new burden on the agency, which requires redirecting resources away from other—often more pressing—priorities in order to meet agreed deadlines. According to the Director of the FWS, in FY 2011 the FWS was allocated \$20.9 million for endangered species listing and critical habitat designation; the agency was required to spend more than 75% of this allocation (\$15.8 million) undertaking the substantive actions required by court orders or settlement agreements resulting from litigation.³⁷ In other words, sue and settle cases and other lawsuits are now driving the regulatory agenda of the Endangered Species Act program at FWS.

³⁸ For example, EPA’s imposition of a timetable and enhanced substantive TMDLs and stormwater requirements on the Chesapeake Bay was not mandated by federal law.

³⁹ Agreed deadlines commit an agency to make one specific rulemaking a priority, ahead of all other rules. According to the director of the Fish and Wildlife Service (“FWS”), in Fiscal Year 2011, the FWS was allocated \$20.9 million for endangered

such example is the timetables and enhanced total maximum daily loads (“TMDL”) established by EPA for the Chesapeake Bay which resulted from a sue and settle agreement.⁴⁰ Some lawmakers even expressed concern that EPA’s actions concerning to the Chesapeake Bay were not authorized by federal law.⁴¹

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

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

F. Notice and Comment After Sue and Settle Agreements Doesn’t Give the Public Real Input

The opportunity to comment on the product of sue and settle agreements, either when the agency takes comment on a draft settlement agreement or takes notice and comment on the subsequent rulemaking, are not sufficient to compensate for the lack of transparency and participation in the settlement process itself. In cases where EPA allows public comment on draft consent decrees, EPA only rarely alters the consent agreement, even after it receives adverse comments.⁴²

Moreover, because the settlement agreement directs the timetable and the structure (and sometimes even the actual substance) of the subsequent rulemaking, interested parties usually have very limited ability to alter the design of the final rule or other action through their comments.⁴³ Rather than hearing from a range of interested parties and designing the rule with their concerns in mind, the agency essentially writes its rule to accommodate the specific demands of a single interest. Through “sue and settle,” advocacy groups achieve their narrow goals at the expense of sound and thoughtful public policy.

species listing and critical habitat designation; the agency spent more than 75% of this allocation (\$15.8 million) taking substantive actions or court orders or settlement agreements resulting from litigation.

⁴⁰ *Fowler v. EPA*, Settlement Agreement (May 19, 2010).

⁴¹ Letter to EPA Administrator Lisa Jackson from House Transportation and Infrastructure Committee Chairman John L. Mica, House Water Resources and Environment Subcommittee Chairman Bob Gibbs, Senate Environment and Public Works Committee Ranking Member James Inhofe, and Senate Water and Wildlife Subcommittee Ranking Member Jeff Session, January 20, 2012. The date of the letter is based on <http://votesmart.org/public-statement/663407/letter-to-lisa-jacksonadministrator-of-environmental-protection-agency-epa#.WRsQZPnyUk>.

⁴² In proposed settlement agreements the Chamber has commented on, such as for the revised PM_{2.5} NAAQS standard, the timetable for final rulemaking action remained unchanged despite our comments insisting that the agency needed more time to properly complete the rulemaking. Even though EPA itself asserted that more time was needed, the rulemaking deadline in the settlement agreement was not modified.

⁴³ EPA overwhelmingly rejected the comments and recommendations submitted by the business community on the major rules that resulted from sue and settle agreements. These rules were ultimately promulgated largely as they had been proposed. *See, e.g.*, the Chamber’s 2012 comments on the proposed PM NAAQS rule and the proposed GHG NSPS rule for new electric utilities.

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

G. Citizen Lawsuits Remain a Threat to Growth in a Post-“Sue and Settle” World

Although Administrator Pruitt has declared that EPA will no longer engage in the practice of “sue and settle,” citizen lawsuits remain a threat to economic growth. Realizing that they have less influence in the current administration than the previous one, some activist organizations have called on the activist community to sue private parties under citizen suit provisions of environmental statutes.⁴⁴

In 1970, Congress enacted the first citizen suit provision,⁴⁵ which was contained within the Clean Air Act.⁴⁶ A citizen suit allows a private citizen to sue any person (including the government) for violating a mandatory requirement of a statute. Further, the private citizen can sue the federal government for failure to take nondiscretionary acts or duties that are required by a statute.⁴⁷ Citizen suits are also often used to challenge other matters such as the issuance of a permit.

Citizen suits are not supposed to enrich the plaintiffs, but to serve the interests of the public.⁴⁸ Therefore, as “private attorneys general,” plaintiffs are not awarded damages, but they may receive injunctive relief to secure the desired action and may be entitled to litigation costs, including attorney and expert witness fees, when a court deems it is appropriate.⁴⁹ The awarding of costs to plaintiffs may incentive activists groups to file lawsuits that may otherwise not have been brought due to cost considerations.

Some environmental statutes like the Clean Water Act require that a citizen filing a lawsuit send a notice of intent to sue to the Administrator of the EPA sixty days before submitting a complaint in federal court.⁵⁰ The Chamber submitted Freedom of Information Act (“FOIA”) requests to the EPA seeking data on notices of intent to sue and found that between 2005 and 2015, **3,096** notices of intent to sue were submitted to the EPA against private parties under the Clean Water Act. Figure 3 below shows the year-by-year breakdown of notices of intent to sue.

⁴⁴ Pete Harrison, “When Government Won’t Stop Illegal Pollution, We the People Can (For Now),” Waterkeeper Alliance (Mar 10, 2017) available at <http://waterkeeper.org/when-government-wont-stop-illegal-pollution-we-the-people-can-for-now/>.

⁴⁵ 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).

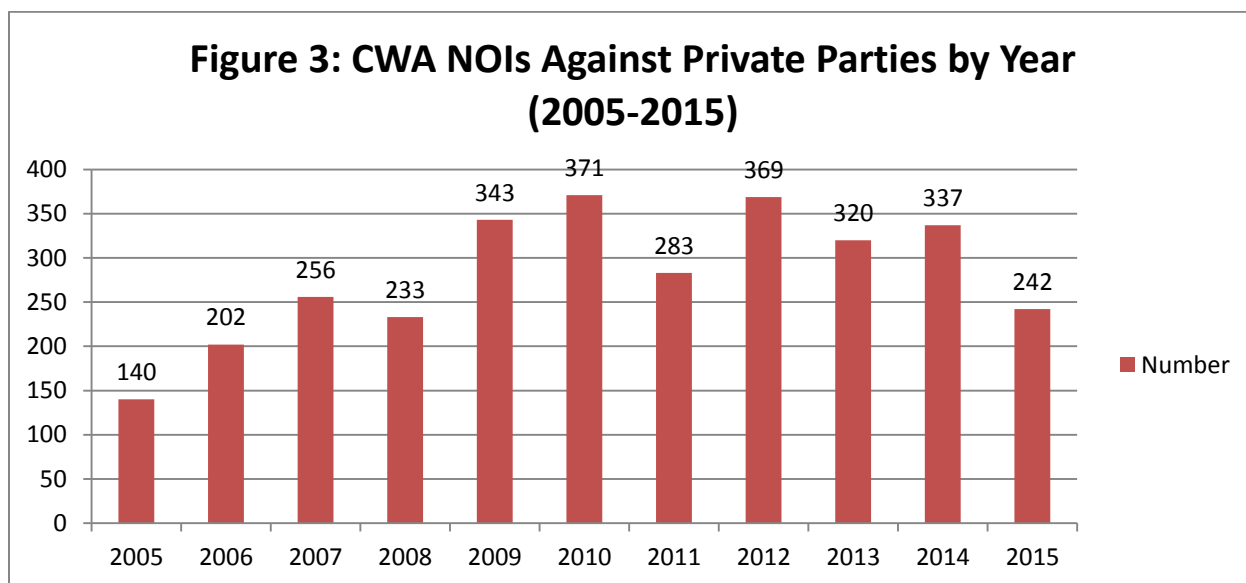
⁴⁶ Clean Air Amendments of 1970, Pub. L. No. 91-604 (1970).

⁴⁷ 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.

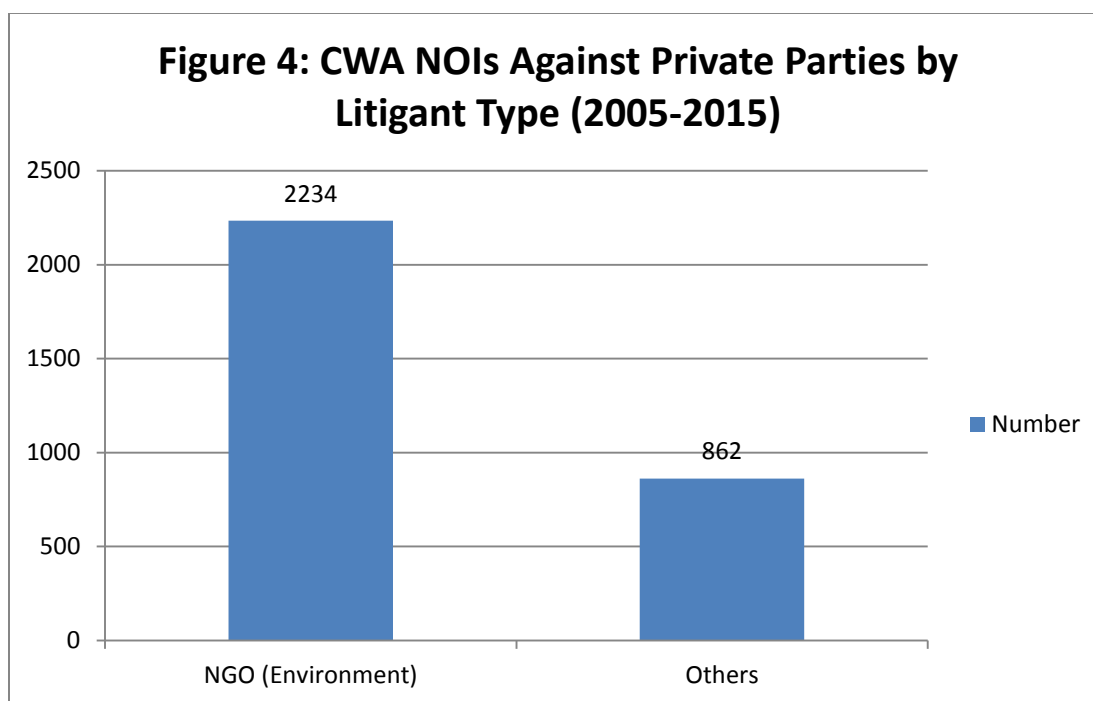
⁴⁸ See *supra* note 12 at 198; See also *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983).

⁴⁹ See e.g. 42 U.S.C. § 7604.

⁵⁰ 33 U.S.C. § 1365(b).



Most importantly, environmentalist groups submitted **2,234 or 72.2 percent** of all notice of intent to sue filings as seen in Figure 4.



Even if the activists who submitted notices of intent to sue do not actually take a case to federal court, the vast number of threatened lawsuits can have a chilling effect on businesses seeking to expand operations or deploy additional infrastructure.

The Lack of Congressional Oversight of Citizen Suits

The prevalence of citizen suits in our regulatory system raises several critical issues that need to be regularly considered by the Congress, including questions of judicial resources and workloads. In the 1970's, Congress enacted citizen suit provisions in twenty environmental statutes. These provisions allow any citizen the right to mandate that agencies implement and enforce the environmental statutes and to challenge private actions alleged to be in violation of statutes. It also authorized the payment of attorneys' fees to citizens that prevail or partially prevail in the litigation. These provisions are found in titles 15, 16, 30, 33, and 42 of the U. S. Code. Figure 5 below demonstrates the lack of congressional oversight of these citizen suit provisions.

Figure 5

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"/>

The Judiciary Committees of Congress nevertheless have never conducted any specific oversight over the numerous citizen suit provisions in environmental statutes. This is significant because the inclusion of a citizen suit provision in the Clean Air Act was far from certain when the bill was being considered in 1970. The House version of the bill did not include a citizen suit provision.⁵¹

Because citizen suits are inherently a legal matter and some of the most important legal questions are brought up as a result of these suits, the expertise of the Judiciary Committees is needed to adequately oversee them.

H. Recommendations

- ***Congress Should Enact the Sunshine for Regulatory Decrees and Settlements Act (H.R. 469/S. 119).***

This legislation would (1) require agencies to give notice when they receive notices of intent to sue from private parties, (2) afford affected parties an opportunity to intervene *prior to the filing* of the consent decree or settlement with a court, (3) publish notice of a proposed decree or settlement in the *Federal Register*, and take (and respond to) public comments at least 60 days prior to the filing of the decree or settlement, and (4) provide the court with a copy of the public comments at least 30 days prior to the filing of the decree or settlement. The legislation would also require agencies to do a better job of showing that a proposed agreement is consistent with the law and in the public interest.

- ***The Judiciary Committees should assume a more formalized role in overseeing deadline suits.*** The provisions in various environmental statutes that allow for deadline suits to be filed against EPA and other agencies should be recodified into Title 28 of the U.S. Code. This simple step would provide the House and Senate Judiciary Committees direct jurisdiction and thus would better enable Congress to properly oversee the effect these suits are having on the judiciary system.

- ***Congress should extend/stagger the deadlines contained in the CAA and the Clean Water Act.*** As discussed above, EPA has chronically missed statutory deadlines since Congress wrote the major environmental laws in the 1970s. The modern-day impact of nondiscretionary deadlines established in major environmental statutes written decades ago is critically important, because it is the fuel that drives the sue and settle approach to policymaking. Accordingly, Congress should either extend or stagger the numerous action deadlines it wrote into statutes in the 1970s so as to give EPA a reasonable chance to comply. Congress should also provide EPA with an affirmative defense to deadline suits, under which a plaintiff must show the agency acted in bad faith in missing a deadline.

⁵¹ 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.