



## Statement of the U.S. Chamber of Commerce

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**ON: Hearing on “Examining Policy Impacts of Excessive Litigation Against the Department of the Interior”**

**TO: U.S. House Committee on Natural Resources,  
Subcommittee on Oversight and Investigations**

**DATE: June 28, 2017**

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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.

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

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.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

**BEFORE THE COMMITTEE ON NATURAL RESOURCES, SUBCOMMITTEE ON  
OVERSIGHT AND INVESTIGATIONS**

**Hearing on Examining Policy Impacts of Excessive Litigation Against the Department of  
the Interior**

**Statement of William L. Kovacs  
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U.S. Chamber of Commerce**

**June 28, 2017**

**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.<sup>1</sup>

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.”<sup>2</sup> While Administrator Pruitt’s new policy is a much-welcomed and needed step in the right direction, it is important to ensure that the practice does not occur again at the EPA and other agencies like the Fish & Wildlife Service (“FWS”) and National Marine Fisheries Service (“NMFS”).

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.

The Chamber’s July 2012 report, *EPA’s New Regulatory Front: Regional Haze and the Takeover of State Programs*,<sup>3</sup> 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.

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<sup>1</sup> 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).

<sup>2</sup> 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>.

<sup>3</sup> 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](https://www.uschamber.com/sites/default/files/documents/files/1207_ETRA_HazeReport_lr_0.pdf).

Subsequently, the Chamber’s May 2013 report, *Sue and Settle: Regulating Behind Closed Doors*,<sup>4</sup> 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 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.<sup>5</sup> 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* 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.<sup>6</sup> 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. FWS and NMFS’ Failure to Meet Statutory Deadlines Drives Sue and Settle Cases**

Under several of the major environmental laws, such as the Endangered Species Act (“ESA”), FWS and the NMFS are required to take actions within specific statutory deadlines regarding the listing and delisting of endangered and threatened species and their critical habitats.<sup>7</sup> According to a 2017 study by the Government Accountability Office (“GAO”),<sup>8</sup>

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<sup>4</sup> 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>.

<sup>5</sup> *Id.* at 15-20.

<sup>6</sup> 5 U.S.C. §§ 500 *et seq.*

<sup>7</sup> See 16 U.S.C. § 1533 (Section 4 of the Endangered Species Act)

<sup>8</sup> Government Accountability Office, “Environmental Litigation: Information on Endangered Species Act Deadline Suits” at 11 (Feb. 2017) available at <http://www.gao.gov/assets/690/683058.pdf>.

[f]or decades, FWS has faced challenges in implementing its Section 4 program, in part because of a high volume of litigation and petitions seeking to add a large number of species to the threatened and endangered species lists. For example in 2007, FWS received two “mega-petitions,” collectively requesting the listing of 674 species in the Southwest and Mountain-Prairie regions. In 2010, another “mega-petition” was submitted requesting the listing of 404 southeast aquatic species. During fiscal years 2005 through 2015, FWS received 170 petitions to list 1,446 species.

FWS and NMFS are not alone in failing to meet environmental statutory deadlines. The EPA overwhelmingly fails to meet those deadlines. 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.<sup>9</sup>

Under the ESA, anyone, including activist groups, can submit petitions to the FWS and NMFS to list or delist species as endangered or threatened. Ninety days after receiving the petition, the Services must make a finding as to whether the petition presents substantial information that the action may be warranted. One year after the petition is filed, the Services are required to determine whether the petitioned action is warranted, not warranted, or warranted by some other higher priority listing action. Upon determining the action is warranted, the agency is required to publish a proposed rule promptly in the *Federal Register*. All the while, the agency has deadlines regarding critical habitat designations and five-year status reviews of whether to list or delist a species.<sup>10</sup>

When FWS and NMFS miss deadlines, advocacy groups can sue the agencies via the citizen suit provision in the ESA<sup>11</sup> for failure to promulgate the subject regulation or to review the standard at issue. Because FWS and NMFS are out of compliance many times with the ESA’s statutory deadlines, 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 FWS and NMFS priorities and budgetary agendas, particularly when the agencies are 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.

### **C. “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

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<sup>9</sup> 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](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.

<sup>10</sup> *Supra* note 28 at 10.

<sup>11</sup> 16 U.S.C. § 1540(g).

settlements are only about **when** the agency must fulfill its nondiscretionary duty.<sup>12</sup> However, this argument ignores several critical facts. 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 to 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 FWS and NMFS’s budgetary and resource priorities through appropriations, and Congress should not allow advocacy groups to use sue and settle agreements to circumvent the appropriations process.

According to the Director of the FWS in 2011 FWS was allocated \$20.9 million by Congress for endangered species listing and critical habitat designation; the agency spent more than 75% of this allocation (\$15.8 million) taking the substantive actions required by court orders or settlement agreements resulting from litigation.<sup>13</sup> Given these budgetary constraints, according to GAO, “[a]s of September 2016, FWS’s backlog of overdue Section 4 actions included nearly 600 12-month findings on listing petitions and other listing-related actions that FWS has been unable to address while it focused on completing its litigation-related workload.”<sup>14</sup>

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 technical corrections, subsequent reconsiderations or court-ordered remands to the agency. It can take months or years for courts to correct these defective rules.<sup>15</sup>

Third, by setting accelerated deadlines, agencies very often give themselves insufficient time to comply with the important analytical 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.

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<sup>12</sup> 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.

<sup>13</sup> Testimony of Hon. Dan Ashe, Director, U.S. Fish and Wildlife Service before the House Natural Resources Committee (Dec. 6, 2011).

<sup>14</sup> *Supra* note 28 at 25.

<sup>15</sup> One such example is the EPA’s Mercury Air Toxics (“MATS” or “Utility MACT”) Rule which was rooted in a settlement agreement agreed to during the Obama Administration by the EPA. 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. 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. 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. 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.

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.

#### **D. 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 an agency takes comment on a draft settlement agreement or takes notice and comments on the subsequent rulemaking, may not be sufficient to compensate for the lack of transparency and participation in the settlement process itself.<sup>16</sup>

Moreover, because the settlement agreement directs the timetable and the structure 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.<sup>17</sup> 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.

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.

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<sup>16</sup> In cases where an agency like the EPA allows public comment on draft consent decrees, EPA only rarely alters the consent agreement, even after it receives adverse comments. In proposed settlement agreements the Chamber has commented on, such as for the revised PM<sub>2.5</sub> 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.

<sup>17</sup> 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.

**E. Inadequate Congressional Oversight of Citizen Suits**

*a. The Lack of Congressional Oversight Hearings*

In 1970, Congress enacted the first environmental citizen suit provision,<sup>18</sup> which was contained within the Clean Air Act.<sup>19</sup> 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.<sup>20</sup> Citizen suits are also often used to challenge other matters such as the issuance of a permit. The ESA provides a citizen suit mechanism for groups to sue the Department of the Interior and other violators of the law.<sup>21</sup>

Citizen suits are not supposed to enrich the plaintiffs, but theoretically are designed to serve the interests of the public.<sup>22</sup> 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.<sup>23</sup> The awarding of costs to plaintiffs may incentivize activists groups to file lawsuits that may otherwise not have been brought due to cost considerations.

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 1 below demonstrates the lack of congressional oversight of these citizen suit provisions.

**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"/>

<sup>18</sup> 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).

<sup>19</sup> Clean Air Amendments of 1970, Pub. L. No. 91-604 (1970).

<sup>20</sup> 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.

<sup>21</sup> 16 U.S.C. § 1540(g).

<sup>22</sup> See *supra* note 12 at 198; See also *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983).

<sup>23</sup> See e.g. 42 U.S.C. § 7604.

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.<sup>24</sup>

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.

*b. The Lack of Public Information on ESA Citizen Suits*

Unfortunately, there is no easily accessible way for the public to obtain information on ESA citizen suits. According to the GAO, ‘there is no other comprehensive public source of information on deadline suits involving Section 4 of the ESA’ other than data in the possession of the Department of Justice which is not available online.<sup>25</sup> Through its Environmental Conservation Online System (“ECOS”), FWS maintains a database of actions taken on particular

<sup>24</sup> 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.

<sup>25</sup> *Supra* note 28 at 3.

species like petitions and 90-day and 12-month findings but does not list NOIs or complaints regarding deadlines.<sup>26</sup>

The Chamber filed a Freedom of Information (“FOIA”) request to FWS in November 2016 requesting all Notices of Intent to Sue (“NOI”)<sup>27</sup> and complaints served on the agency under the Endangered Species Act in 2014 and 2015. FWS provided the Chamber with PDF copies of the NOIs and complaints. During 2014 and 2015, FWS was served with 34 complaints and 208 NOIs. Although the number of suits is not particularly large, it is important to note a small number of suits can require FWS to undertake a massive workload. For instance, according to GAO, FWS and NMFS were required to undertake **1,673 ESA actions** such as missed 90-day and 12-month findings, critical habitat designations and 5-year status reviews arising from only 141 cases.<sup>28</sup>

Not only is there a lack of easily obtainable information on ESA suits, there is also inadequate transparency with regard to the Judgment Fund and monetary awards paid to litigants in these suits. The Judgment Fund is a permanent, indefinite appropriation used to pay monetary awards against the United States, as well as for money owed in compromise settlements.<sup>29</sup> The Judgment Fund is administered by the Department of the Treasury’s Bureau of the Fiscal Service which provides a database online of money paid out from the fund.<sup>30</sup> The database contains fields for attorney fees, costs, and total amounts paid in a case on behalf of individual agencies as well as the statute a case is brought under and which court presided over the case. Unfortunately, many of these fields are left blank, making it incredibly difficult to determine from a public search how much money was awarded under the ESA. Additionally, the database does not provide the names of litigants and their attorneys.

## **F. 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 House and Senate Judiciary Committees should assume a more formalized role in overseeing deadline suits.** The provisions in various environmental statutes that allow

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<sup>26</sup> See e.g. ECOS Fenders Blue Butterfly <https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=I0IS>.

<sup>27</sup> Some environmental statutes like the ESA require that a citizen filing a lawsuit send a notice of intent to sue to the Secretary of the Interior sixty days before submitting a complaint in federal court.

<sup>28</sup> *Supra* note 28 at 17.

<sup>29</sup> 31 U.S.C. § 1304.

<sup>30</sup> Department of the Treasury Judgment Fund Payment Search *available at* <https://jfund.fms.treas.gov/jfradSearchWeb/JFPymtSearchAction.do>.

for deadline suits to be filed against the Department of the Interior as well as 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 over such lawsuits and allow Congress to properly oversee the effect these suits are having on the judiciary system.

- **Congress should extend the deadlines in the Endangered Species Act.** As discussed above, FWS and NFMS have chronically missed statutory deadlines. 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 to give FWS and NMFS a reasonable chance to comply. Congress should also provide FWS and NFMS with an affirmative defense to deadline suits, under which a plaintiff must show the agency acted in bad faith in missing a deadline.
- **Congress should enact the Judgment Fund Transparency Act (H.R. 2096/S. 565.)** As mentioned earlier, The Treasury Department's Judgment Fund payment database inadequately provides the public and Congress enough meaningful information to determine why and to whom monetary awards are being paid under the Judgment Fund. The Judgment Fund Transparency Act requires the Department of the Treasury to make available on the internet the agency or entity whose actions gave rise to the claim or judgment, the plaintiff or claimant, the counsel for the plaintiff or claimant, the amount paid, a description of the facts that gave rise to the claim, and the agency that submitted the claim.
- **FWS, NFMS, and EPA should create a public dashboard of NOIs, complaints, and settlement agreements.** As discussed earlier, no public database exists that is readily accessible to view complaints and NOIs brought under the ESA. EPA has a website that lists NOIs filed in environmental cases<sup>31</sup> but no such public dashboard exists for the ESA cases for FWS and NFMS. The Department of the Interior should post a dashboard online that tracks and provides copies of ESA petitions, NOIs, complaints and settlement agreements. An ESA dashboard would provide Congress and the public meaningful information on the hundreds of potential lawsuits filed against agencies within the Interior Department.

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<sup>31</sup> Notices of Intent to Sue the U.S. Environmental Protection Agency Documents 2016-2017 available at <https://www.epa.gov/noi/notices-intent-sue-us-environmental-protection-agency-documents-2016-2017>.