Sue and Settle

Regulating Behind Closed Doors

U.S. CHAMBER OF COMMERCE

Reconsideration of 2008 Ozone NAAQS

$738 million

Boiler MACT Rule

Lead RRP Rule

$2.16 billion

Regional Haze Implementation Rules

Utility MACT Rule

$9.6 billion

Standards for Cooling Water Intake Structures

$90 billion

$18 billion

Florida Nutrient Standards for Estuaries and Flowing Waters

Revision to the Particulate Matter ($PM_{2.5}$) NAAQS

$3 billion

$350 million

TMDL for Chesapeake Bay

$500 million

Oil and Natural Gas MACT Rule

$384 million

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.

A Report on

SUE AND SETTLE

REGULATING BEHIND CLOSED DOORS

U.S. Chamber of Commerce

May 2013

Acknowledgments

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Introduction

What Is Sue and Settle?

Sue and settle occurs when an agency intentionally relinquishes its statutory discretion by accepting lawsuits from outside groups that effectively dictate the priorities and duties of the agency through legally binding, court-approved settlements negotiated behind closed doors—with no participation by other affected parties or the public.

As a result of the sue and settle process, the agency intentionally transforms itself from an independent actor that has discretion to perform its duties in a manner best serving the public interest into an actor subservient to the binding terms of settlement agreements, which includes using congressionally appropriated funds to achieve the demands of specific outside groups. 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 obligation is created.

What Is the Sue and Settle Process?

Executive Summary

William L. Kovacs
U.S. Chamber Senior Vice President for Environment, Technology & Regulatory Affairs

BACKGROUND

The U.S. Chamber of Commerce undertook an investigation of the sue and settle process because of the growing number of complaints by the business community that it was being entirely shut out of regulatory decisions by key federal agencies. While the U.S. Environmental Protection Agency (EPA) and the Fish and Wildlife Service have been leaders in settling—rather than defending—cases brought by advocacy groups, other agencies, including the U.S. Forest Service, the Bureau of Land Management, the National Park Service, the Army Corps of Engineers, the U.S. Department of Agriculture, and the U.S. Department of Commerce, have also agreed to this tactic.

As discussed in our report *Sue and Settle: Regulating Behind Closed Doors*, we found that under this sue and settle process, EPA chose at some point not to defend itself in lawsuits brought by special interest advocacy groups at least 60 times between 2009 and 2012.[1] In each case, it agreed to settlements on terms favorable to those groups. These settlements directly resulted in EPA agreeing to publish more than 100 new regulations,[2] many of which impose compliance costs in the tens of millions and even billions of dollars.[3]

LACK OF AGENCY TRANSPARENCY ON SUE AND SETTLE CASES

We also found that when EPA was asked by Congress to provide information about the notices of intent to sue received by the agency or the petitions for rulemaking served on EPA by private parties, the agency could not—or would not—provide the information. When such lawsuits were initiated, EPA does not disclose the notice of the lawsuit or its filing until a settlement agreement had been worked out with the private parties and filed with the court. As a result, court orders were entered, binding the agency to undertake a specific rulemaking within a specific and usually very short time period, notwithstanding whether the agency actually had sufficient time to perform the obligations imposed by the court order. In response to Congress, EPA made it clear that it is "unable to accommodate this [congressional] request to make all petitions, notices, and requests for agency action publicly accessible in one location on the

[1] A description of the methodology the Chamber used to identify sue and settle cases is discussed in Appendices A and B of this report.
[2] *See* pages 43–45 for the list of rules and agency actions resulting from sue and settle cases.
[3] For a description of the costs of selected rules, see discussion and notes on pages 14–22.

Internet."[4] Specifically, "the EPA does not have a centralized process to individually characterize and sort all the different types of notices of intent the agency receives."[5] Imagine what would happen if a state or local government, a school district, or a publicly traded company claimed to have no knowledge about lawsuits brought against it, the number of cases settled by its lawyers, or the number of agreements that obligated it to undertake extensive new action? It is unimaginable that such an entity would be able to claim ignorance of lawsuits that significantly impact it or to be unable to provide its citizens, customers, and regulatory agencies with required information. And yet, the position of EPA has been that it would not be bothered to track settlements that impose significant new rules and requirements on the country or to notify the public about them in any systematic fashion.[6]

SUE AND SETTLE SKIRTS PROCEDURAL SAFEGUARDS ON THE RULEMAKING PROCESS

The practice of agencies entering into voluntary agreements with private parties to issue specific rulemaking requirements also severely undercuts agency compliance with the Administrative Procedure Act. The Administrative Procedure Act is designed to promote transparency and public participation in the rulemaking process. Because the substance of a sue and settle agreement has been fully negotiated between the agency and the advocacy group before the public has any opportunity to see it—even in those situations where the agency allows public comment on the draft agreement—the outcome of the rulemaking is essentially set. Sue and settle allows EPA to avoid the normal protections built into the rulemaking process, such as review by OMB, reviews under several executive orders, and reviews by the public and the regulated community. Further, the principles of federalism are also flagrantly ignored when EPA uses the conditions in sue and settle agreements to set aside state-administered programs, such as the Regional Haze program. With no public input, EPA binds itself to the demands of a private entity with special interests that may be adverse to the public interest, especially in the areas of project development and job creation. Sue and settle activities deny the public its most basic of all rights in the regulatory process: the right to weigh in on a proposed regulatory decision before agency action occurs.

SUE AND SETTLE CREATES TENSION BETWEEN THE BRANCHES OF GOVERNMENT

At its heart, the sue and settle issue is a situation in which the executive branch expands the authority of agencies at the expense of congressional oversight. This occurs with at least the implicit cooperation of the courts, which typically rubber stamp proposed settlement agreements even though they enable private parties to dictate agency policy. Congress is harmed because its control over appropriations diminishes. Sue and settle deals (and not Congress) increasingly are what drive an agency's budget concerns. Additionally, the

[4] Letter from Arvin Ganesan, EPA Associate Administrator for the Office of Congressional and Intergovernmental Affairs, to Hon. Fred Upton, Chairman, House Committee on Energy and Commerce (June 12, 2012) at 2.
[5] *Id.*
[6] It is our understanding that EPA has very recently begun to disclose on its website the notices of intent to sue that it receives from outside parties. While this is a welcome development, this important disclosure needs to be required by statute and not just be a voluntary measure. Moreover, agencies such as EPA also need to provide public notice of the filing of a complaint and/or petitions for rulemaking.

implementation of congressionally directed policies is now reprioritized by court orders that the agency asks the court to issue. Once the court approves the consent decree or settlement agreement, EPA is free to tell Congress "we are acting under court order and we must publish a new regulation."

Sue and Settle Migrates To Other Statutes?

A major concern is that the sue and settle tactic, which has been so effective in removing control over the rulemaking process from Congress—and placing it instead with private parties under the supervision of federal courts—will spread to other complex statutes that have statutorily imposed dates for issuing regulations, such as Dodd-Frank or Obamacare. On April 22, 2013, the U.S. District Court for the Northern District of California, which has been very active in sue and settle cases, issued an order in a Food Safety Modernization Act case that sets in motion a new process to bring sue and settle actions under Section 706 of the Administrative Procedure Act. In *Center for Food Safety v. Hamburg*,[7] the court recognized a statutorily imposed deadline, but also recognized that food safety is not always served by rushing a regulation to finality. In this instance, the court ordered the parties to "arrive at a mutually acceptable schedule" because "it will behoove the parties to attempt to cooperate on this endeavor, as any decision by the court will necessarily be arbitrary. The parties are hereby ORDERED to meet and confer, and prepare a joint written statement setting forth proposed deadlines, in detail sufficient to form the basis of an injunction." With a new structure in place that uses the Administrative Procedure Act as a basis for citizen suits, private interest groups and agencies could—without use of any other citizen suit provision—negotiate private arrangements for how an agency will proceed with a new regulation.

The Importance of Fixing the Sue and Settle Problem

Why is it so important to fix the sue and settle process? Congress's ability to act on or undertake oversight of the executive branch is diminished and perhaps eliminated through the private agreements between agencies and private parties. Rulemaking in secret, a process that Congress abandoned 65 years ago when it passed the Administrative Procedure Act, is dangerous because it allows private parties and willing agencies to set national policy out of the light of public scrutiny and the procedural safeguards of the Administrative Procedure Act.

Perhaps the most significant impact of these sue and settle agreements is that by freely giving away its discretion in order to satisfy private parties, an agency uses congressionally appropriated funds to achieve the demands of private parties. This happens even though there are congressional appropriations specifying the use of such funds. In essence, the agency intentionally transforms itself from an independent actor that has discretion to perform duties in a manner best serving the public interest into an actor subservient to the binding terms of the settlement agreements. The magnitude and serious consequences of the sue and settle problem have recently been recognized by at least one court, when it set aside a sue and settle

[7] *Center for Food Safety v. Hamburg*, No. C 12-4529 PJH, slip op. at 10 (N.D. Cal. Apr. 22, 2013).

agreement that would "promulgate a substantial and permanent amendment" to an agency rule.[8]

THE MOST EFFECTIVE SOLUTION TO SUE AND SETTLE LIES WITH CONGRESS

In the final analysis, Congress is also to blame for letting the sue and settle process take on a life free of congressional review. Most of the sue and settle lawsuits were filed as citizen suits authorized under the various environmental statutes.[9] Because citizen suit provisions were included within the environmental titles of the U.S. Code, Congress placed jurisdiction and oversight of citizen suits with congressional authorizing committees rather than with the House and Senate Judiciary Committees. Despite the fact that the sole purpose of citizen suits is to grant access to the federal courts, which is the primary jurisdiction of the Judiciary committees, jurisdiction was instead placed in committees that had no expertise in the subject matter. Accordingly, no meaningful oversight has been conducted in more than four decades over the use and abuse of citizen suit activity, such as sue and settle.

Fortunately, however, in 2012, the House Judiciary Committee began looking at the abuses of the sue and settle process. It introduced the Sunshine for Regulatory Decrees and Settlements Act of 2012, which the House passed as part of a larger bill. Under the bill, before the agency and outside groups can file a proposed consent decree or settlement agreement with a court, the proposed consent decree or settlement has to be published in the *Federal Register* for 60 days to allow for public comment. Also, affected parties would be afforded an opportunity to intervene prior to the filing of the consent decree or settlement.

On April 11, 2013, the Sunshine for Regulatory Decrees and Settlements Act of 2013 was introduced in the Senate as S. 714, and in the House as H.R. 1493. It is a strong bill that would implement these and other important common-sense changes. Passage of this legislation will close the massive sue and settle loophole in our regulatory process.

[8] *Conservation Northwest v. Sherman*, No. 11-35729, slip op. at 15 (9th Cir. Apr. 25, 2013) ("Because the consent decree in this case allowed the Agencies effectively to promulgate a substantial and permanent amendment to [a regulation] without having followed statutorily required procedures, it was improper.").

[9] *See, e.g.,* Clean Air Act, 42 U.S.C. § 7604; Clean Water Act, 33 U.S.C. § 1365; Resource Conservation and Recovery Act, 42 U.S.C. § 6972.

SUE AND SETTLE

REGULATING BEHIND CLOSED DOORS

May 2013

INTRODUCTION

Over the past several years, the business community has expressed growing concern about interest groups using lawsuits against federal agencies and subsequent settlements as a technique to shape agencies' regulatory agendas. The overwhelming majority of instances of sue and settle actions from 2009 to 2012 have occurred in the environmental regulatory context. These actions were primarily brought under the citizen suit provisions of the Clean Air Act, the Clean Water Act, and the Endangered Species Act.[10] The citizen suit provisions in environmental statutes such as the Clean Air Act provide advocacy groups with the most direct and straightforward path to obtain judicial review of an agency's failure to meet a statutory deadline or perform such other duty a plaintiff group believes is necessary and desirable.[11] From a new wave of endangered species listings to the EPA's federalization of the Chesapeake Bay cleanup program, to the federal takeover of regional haze programs, recent sue and settle arrangements have fueled fears that the rulemaking process itself is being subverted to serve the ends of a few favored interest groups.

Beginning in 2011, the U.S. Chamber of Commerce began working to better understand the full scope and consequences of the sue and settle issue. We set out to determine how often sue and settle actually happens, to identify major sue and settle cases, and to track the types of agency actions involved. Compiling information on sue and settle agreements turned out to be labor intensive and time consuming. Many such agreements are not clearly disclosed to the

[10] Clean Air Act, 42 U.S.C. § 7604; Clean Water Act, 33 U.S.C. § 1365; Endangered Species Act, 16 U.S.C. §1540(g).

[11] Interest groups have traditionally also obtained judicial review of agency action (or inaction) through section 706 of the Administrative Procedure Act (APA), even where the underlying statute does not contain an explicit citizen suit provision. *See, e.g., Calvert Cliffs Coordinating Comm. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971)(Court of Appeals for the D.C. Circuit holds that an agency's compliance with NEPA is reviewable, and that the agency is not entitled to assert that it has wide discretion in performing the procedural duties required by NEPA). APA-based citizen suits to enforce or expand the requirements of regulatory programs developed under recent laws such as Dodd-Frank and the Affordable Care Act, and the potential for advocacy group-driven sue and settle agreements in areas like financial regulation, healthcare, transportation, and immigration are a growing likelihood. *See Center for Food Safety v. Hamburg*, No. C 12-4529 (PJH)(N.D. Cal. Apr. 22, 2013)(nonprofit group sued the Food and Drug Administration under section 706 of the APA to compel a rulemaking on a specific deadline. Despite agency's assertion that the "issuance of the required regulations on a rushed or hurried basis would not help protect human health and safety," the court ordered the parties to "meet and confer, and prepare a joint written statement setting forth proposed deadlines, in detail sufficient to form the basis of an injunction.").

public or other parties until after they have been signed by a judge and the agency has legally bound itself to follow the settlement terms. Even then, agencies do not maintain lists of their sue and settle cases that are publicly available.

Using a combination of approaches, the Chamber was able to compile a database of sue and settle cases and their subsequent rulemaking outcomes. This combined database, which is summarized at the end of this report, indicates the sue and settle cases for the current administration. The Chamber also developed data on the use of the tactic during earlier administrations.

WHAT IS SUE AND SETTLE?

Sue and settle occurs when an agency intentionally relinquishes its statutory discretion by accepting lawsuits from outside groups which effectively dictate the priorities and duties of the agency through legally binding, court-approved settlements negotiated behind closed doors—with no participation by other affected parties or the public.[12]

As a result of the sue and settle process, the agency intentionally transforms itself from an independent actor that has discretion to perform its duties in a manner best serving the public interest into an actor subservient to the binding terms of settlement agreements, which includes using congressionally appropriated funds to achieve the demands of specific outside groups. This process also allows agencies to avoid the normal protections built into the rulemaking process—review by the Office of Management and Budget (OMB) and other agencies, reviews under executive orders, and review by other stakeholders—at the critical moment when the agency's new obligations are created.

Because sue and settle lawsuits 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. These sue and settle agreements often go beyond simply enforcing statutory deadlines and the agreements themselves become the legal authority for expansive regulatory action with no meaningful participation by affected parties or the public. 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.

WHAT DID OUR RESEARCH REVEAL?

By using the methodologies described in Appendix A and Appendix B, the Chamber was able to compile a list of sue and settle cases that occurred between early 2009 and 2012. Because agencies are not required to notify the public when they receive notices from outside groups of

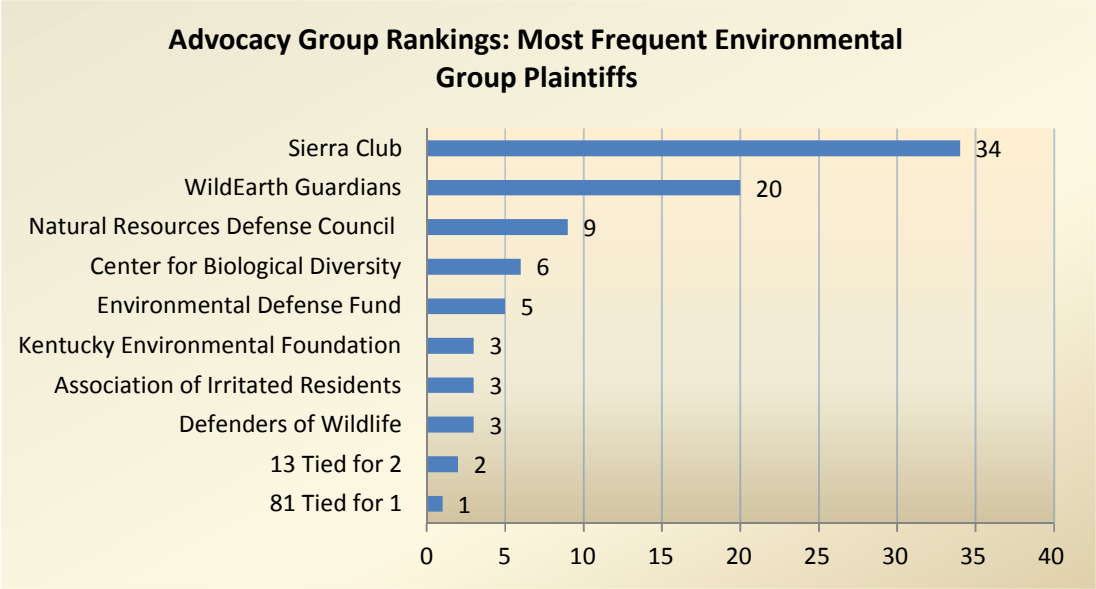
[12] The coordination between outside groups and agencies is aptly illustrated by a November 2010 sue and settle case where EPA and an outside advocacy group filed a consent decree and a joint motion to enter the consent decree with the court *on the same day* the advocacy group filed its complaint against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

their intent to sue, or, in many cases, when they reach tentative settlement agreements with the groups, it is often extremely difficult for an interested party (e.g., a state, a regulated business, the public) to know about a settlement until it is final and has legally binding effect on the agency. For this reason, we do not know if the list of cases we have developed is a truly complete list of recent sue and settle cases. Only the agencies themselves and the Department of Justice[13] really know this.

Number of Sue and Settle Cases

Our investigation shows that from 2009 to 2012, a total of 71 lawsuits (including one notice of intent to sue) were settled under circumstances such that they can be categorized as sue and settle cases under the Chamber's definition. These cases include EPA settlements under the Clean Air Act and the Clean Water Act, along with key Fish and Wildlife Service (FWS) settlements under the Endangered Species Act. Significantly, settlement of these cases directly resulted in more than 100 new federal rules, many of which are major rules with estimated compliance costs of more than $100 million annually.

Which Advocacy Groups Use the Sue and Settle Process the Most?

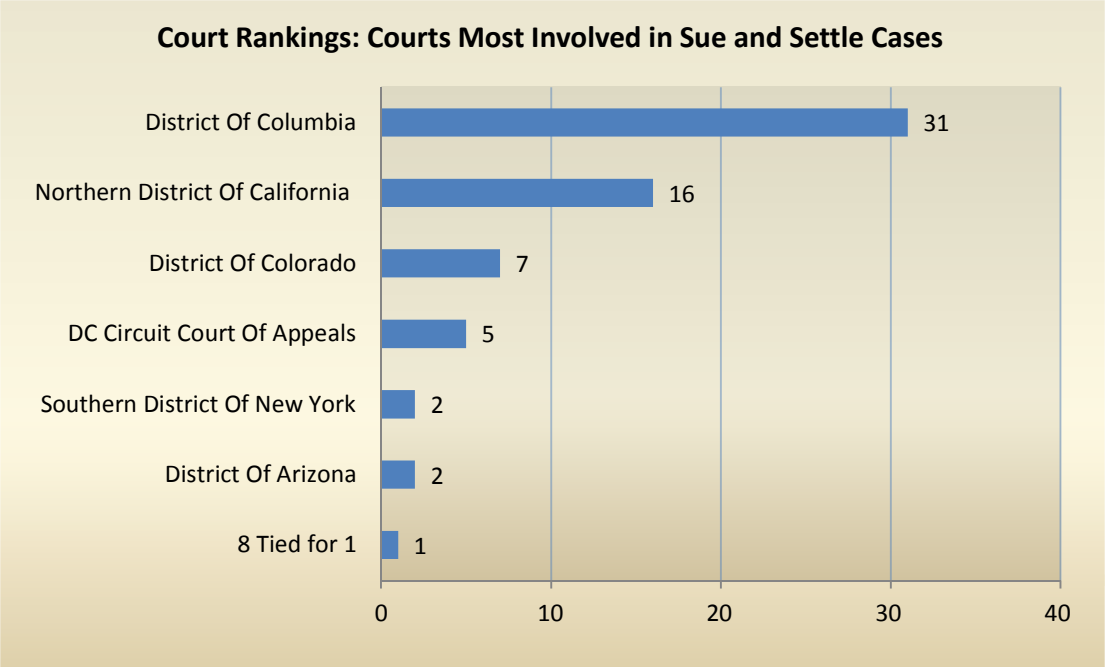


Several environmental advocacy groups have made the sue and settle process a significant part of their legal strategy. By filing lawsuits covering significant EPA rulemakings and regulatory initiatives, and then quickly settling, these groups have been able to circumvent the normal rulemaking process and effect immediate regulatory action with the consent of the agencies themselves.[14]

[13] Virtually all lawsuits against federal agencies are handled by U.S. Department of Justice attorneys. In all of the sue and settle cases the Chamber found, the Department of Justice represented the agency.

[14] Although the Chamber was not able to compile a complete database on the extent to which advocacy groups receive attorney's fees from the federal government, a review of a portion of the Chamber's database revealed that attorney's fees

Which Courts Handle the Most Sue and Settle Cases?

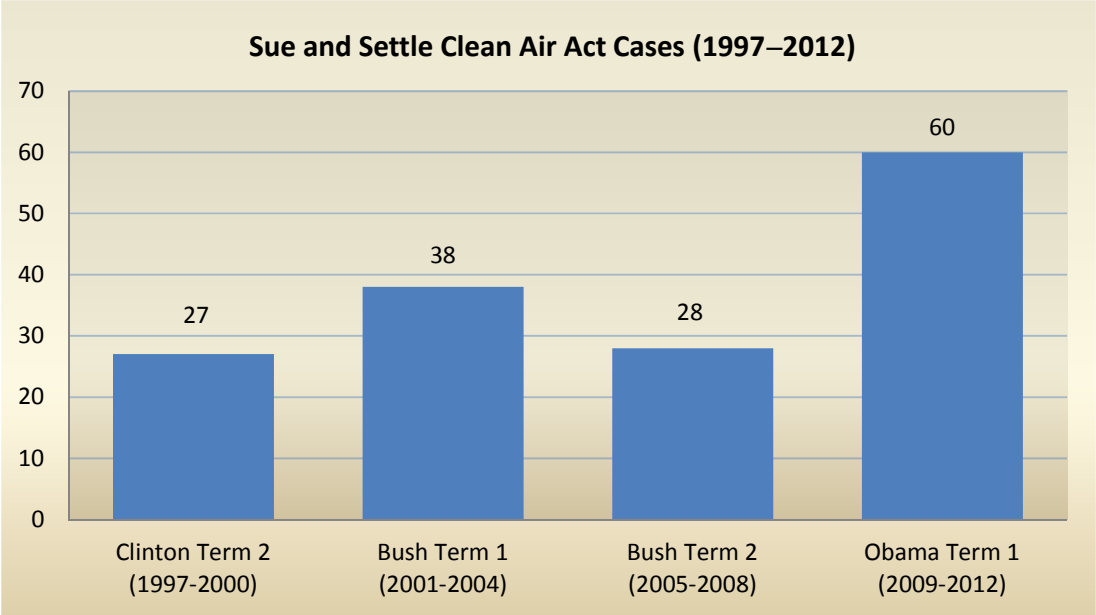


Comparing the Use of Sue and Settle Over the Past 15 Years

Unlike other environmental laws, the Clean Air Act specifically requires EPA to publish notices of draft consent decrees in the *Federal Register*.[15] These public notices gave the Chamber the opportunity to identify Clean Air Act settlement agreements/consent decrees going back to 1997. By excluding agreements resulting from enforcement actions, permitting cases, and other non-sue and settle cases (e.g., cases not involving the issuance of rules of general applicability), we have been able to compare the Clean Air Act sue and settle cases that occurred between 1997 and 2012. The following chart compares Clean Air Act sue and settle settlement agreements and consent decrees finalized during that period.

were awarded in at least 65% (49 of 71) of the cases. These fees are not paid by the agency itself, but are paid from the federal Judgment Fund. In effect, advocacy groups are incentivized by federal funding to bring sue and settle lawsuits and exert direct influence over agency agendas.

[15] Section 113(g) of the Clean Air Act, 42 U.S.C. § 7413(g), provides that "[a]t least 30 days before a consent decree or settlement agreement of any kind under [the Clean Air Act] to which the United States is a party (other than enforcement actions) . . . the Administrator shall provide a reasonable opportunity by notice in the *Federal Register* to persons who are not named as parties or intervenors to the action or matter to comment in writing." Of all the other major environmental statutes, only section 122(i) of the Superfund law, (42 U.S.C. § 9622(i)) requires an equivalent public notice of a settlement agreement.



The results show that sue and settle is by no means a recent phenomenon[16] and that the tactic has been used during both Democratic and Republican administrations. To the extent that the sue and settle tactic skirts the normal notice and comment rulemaking process, with its procedural checks and balances, agencies have been willing for decades to allow sue and settle to vitiate the rulemaking requirements of the Administrative Procedure Act.[17] Moreover, our research found that business groups have also taken advantage of the sue and settle approach to influence the outcome of EPA action. While advocacy groups have used sue and settle much more often in recent years, both interest groups and industry have taken advantage of the tactic.

WHAT ARE THE ECONOMIC IMPLICATIONS OF OUR FINDINGS?

Since 2009, regulatory requirements representing as much as $488 billion in new costs have been imposed by the federal government.[18] By itself, EPA is responsible for adding tens of billions of dollars in new regulatory costs.[19] Significantly, more than 100 of EPA's costly new rules were the product of sue and settle agreements. The chart below highlights just ten of the most significant rules that arose from sue and settle cases:

[16] The sue and settle problem dates back at least to the 1980s. In 1986, Attorney General Edward Meese III issued a Department of Justice policy memorandum, referred to as the "Meese Memo," addressing the problematic use of consent decrees and settlement agreements by the government, including the agency practice of turning discretionary rulemaking authority into mandatory duties. *See* Meese, Memorandum on Department Policy Regarding Consent Decrees and Settlement Agreements (March 13, 1986).
[17] 5 U.S.C. Subchapter II.
[18] Sam Batkins, American Action Forum, "President Obama's $488 Billion Regulatory Burden" (September 19, 2012).
[19] *Id.* Mr. Batkins estimates the regulatory burden added by EPA in 2012 alone to be $12.1 billion.

Ten Costly Regulations Resulting From Sue and Settle Agreements		
1.	Utility MACT Rule	Up to $9.6 billion annually
2.	Lead Renovation, Repair and Painting (LRRP) Rule	Up to $500 million in first-year
3.	Oil and Natural Gas MACT Rule	Up to $738 million annually
4.	Florida Nutrient Standards for Estuaries and Flowing Waters	Up to $632 million annually
5.	Regional Haze Implementation Rules	$2.16 billion cost to comply
6.	Chesapeake Bay Clean Water Act Rules	Up to $18 billion cost to comply
7.	Boiler MACT Rule	Up to $3 billion cost to comply
8.	Standards for Cooling Water Intake Structures	Up to $384 million annually
9.	Revision to the Particulate Matter ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS)	Up to $350 million annually
10.	Reconsideration of 2008 Ozone NAAQS	Up to $90 billion annually

1. Utility MACT Rule

In December 2008, environmental advocacy groups sued EPA, seeking to compel the agency to issue maximum achievable control technology (MACT) air quality standards for hazardous air pollutants from power plants.[20] In October 2009, EPA lodged a proposed consent decree.[21] The intervenor in the case, representing the utility industry, argued that MACT standards such as those proposed by EPA were not required by the Clean Air Act.[22]

Utility MACT (also known as the Mercury Air Toxics Standard, or MATS) is a prime example of EPA taking actions, in the wake of a sue and settle agreement, that were not mandated by the Clean Air Act. Ironically, even in this situation, where an affected party was able to intervene, EPA and the advocacy groups 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.[23] The extremely costly Utility MACT Rule, which EPA was not previously required to issue, is estimated by EPA to cost $9.6 billion annually by 2015.[24]

2. Lead Renovation, Repair and Painting Rule for Residential Buildings

In 2008, numerous environmental groups sued EPA to challenge EPA's April 22, 2008, Lead Renovation, Repair and Painting Program (LRRP) Rule, and these suits were consolidated in the

[20] *American Nurses Ass'n v. Jackson*, No. 1:08-cv-02198 (RMC) (D.D.C.), filed December 18, 2008.
[21] *American Nurses Ass'n*, Defendant's Notice of Lodging of Proposed Consent Decree (Oct. 22, 2009).
[22] *American Nurses Ass'n*, Motion of Defendant-Intervenor Utility Air Regulatory Group for Summary Judgment (June 24, 2009)(Defendant-Intervenors argued that the proposed consent decree improperly limited the government's discretion because it required EPA to find that MACT standards under section 112(d) of the Clean Air Act were required, rather than issuing less burdensome standards or no standards at all).
[23] *American Nurses Ass'n v. Jackson*, No. 1:08-cv-02198 (RMC), 2010 WL 1506913 (D.D.C. Apr. 15, 2010).
[24] 77 Fed. Reg. 9,304, 9306 (Feb. 16, 2012); s*ee 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."

D.C. Circuit Court of Appeals. EPA chose not to defend the suits and settled with the environmental groups on August 24, 2009. As part of the settlement agreement, EPA agreed to propose significant and specific changes to the rule, including the elimination of an "opt-out" provision that had been included in the 2008 rule. The opt-out authorized homeowners without children under six or pregnant women residing in the home to allow their contractor to forgo the use of lead-safe work practices during the renovation, repair, and/or painting activity. Removing the opt-out provision more than doubled the amount of homes subject to the LRRP rule—to an estimated 78 million—and increased the cost of the rule by $500 million per year.[25] To make matters worse, EPA underestimated the number of contractors who would have to be trained to comply with the new rule and failed to anticipate that there were too few trainers to prepare contractors by the rule's deadline.

3. Oil and Natural Gas MACT Rule

In January 2009, environmental groups sued EPA to update federal regulations limiting air emissions from oil- and gas-drilling operations. EPA settled the dispute with environmentalists on December 7, 2009. The settlement required EPA to review and update three sets of regulations: (1) new source performance standards (NSPS) for oil and gas drilling, (2) the Oil and Gas MACT standard, and (3) the air toxics "residual risk" standards. On August 23, 2011, EPA proposed a comprehensive set of updates to these rules, including new NSPS and MACT standards. Despite concerns by the business community that EPA had rushed its analysis of the oil and gas industry's emissions and relied on faulty data, EPA issued final rules on August 16, 2012. These rules are estimated by the agency to impose up to $738 million in additional regulatory costs each year.[26]

4. Florida Nutrient Standards for Estuaries and Flowing Waters

Environmental groups sued EPA in July 2008 to set water quality standards in Florida that would cut down on nitrogen and phosphorous in order to reduce contamination from sewage, animal waste, and fertilizer runoff. EPA entered into a consent decree with the plaintiffs in August 2009—a consent decree that was opposed by nine industry intervenors. As part of the settlement, EPA agreed to issue numeric nutrient limits in phases. Limits for Florida's estuaries and flowing waters were proposed on December 18, 2012. Final rules are required by September 30, 2013. EPA recently approved Florida's proposed nutrient standards as substantially complying with the federal proposal. The estimated cost of the federal standards is up to $632 million per year.[27]

[25] 75 Fed. Reg. 24,802, 24,812 (May 6, 2010).
[26] *See* Fall 2011 Regulatory Plan and Regulatory Agenda, "Oil and Natural Gas Sector – New Source Performance Standards and NESHAPS," RIN: 2060-AP76, at http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201110&RIN=2060-AP76.
[27] EPA, Proposed Nutrient Standards for Florida's Coastal, Estuarine & South Florida Flowing Waters, November 2012, at http://water.epa.gov/lawsregs/rulesregs/upload/floridafaq.pdf.

5. Regional Haze Implementation Rules

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, and not a health standard, Congress emphasized that states—and not EPA—should decide which measures are most appropriate to address haze within their borders.[28] Instead, 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 that 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. 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.[29] Next, on the eve of the deadlines it had agreed to, EPA determined that each of the state haze plans was in some way procedurally deficient. Because the deadlines did not give the states time to resubmit revised plans, EPA argued that it had no choice but to impose its preferred controls federally. EPA used sue and settle to reach into the state haze decision-making process and supplant the states as decision makers—despite the protections of state primacy built into the regional haze program by Congress.

As of 2012, the federal takeover of the states' regional haze programs is projected to cost eight states an estimated $2.16 billion over and above what they had been prepared to spend on visibility improvements.[30]

6. Chesapeake Bay Clean Water Act Rules

On January 5, 2009, individuals and environmental advocacy groups filed a lawsuit against EPA alleging that the agency was not taking necessary measures to protect the Chesapeake Bay.[31] On May 10, 2010, EPA and the groups entered into a settlement agreement that would require EPA to establish stringent total maximum daily load (TMDL) standards for the Bay. EPA also agreed to establish a new stormwater regime for the watershed. The U.S. District Court for the District of Columbia signed the settlement agreement on May 19, 2010.[32] The agency later cited the binding agreement as the legal basis for its expansive action on TMDLs and stormwater.[33]

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[28] *See* 42 U.S.C. § 7491 (b)(2)(A).

[29] 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).

[30] *See* William Yeatman, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs* (July 2012)(Oklahoma was ultimately forced to comply with federally mandated SO2 controls rather than implementing fuel switching; costs for the SO2 controls were estimated to at $1.8 billion). The report is available at http://www.uschamber.com/sites/default/files/reports/1207_ETRA_HazeReport_lr.pdf.

[31] *Fowler v. EPA*, case 1:09-00005-CKK, Complaint (Jan. 5, 2009).

[32] *Fowler v. EPA*, Settlement Agreement (May 19, 2010).

[33] *See Clouded Waters: A Senate Report Exposing the High Cost of EPA's Water Regulations and Their Impacts on State and Local Budgets*, U.S. Senate Committee on Environment and Public Works, Minority Staff, at pp. 2-3 (June 30, 2011), available at http://epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=fbcb69a1-802a-23ad-4767-8b1337aba45f.

Several lawmakers, in a 2012 letter, argued that EPA was taking this substantive action even though it was not authorized to do so under law.[34] Further, they also argued that EPA was improperly using settlements as the regulatory authority for other Clean Water Act actions:

> We are concerned that EPA has demonstrated a disturbing trend recently, whereby EPA has been entering into settlement agreements that purport to expand federal regulatory authority far beyond the reach of the Clean Water Act and has then been citing these settlement agreements as a source of regulatory authority in other matters of a similar nature.
>
> One example of this practice is EPA's out-of-court settlement agreement with the Chesapeake Bay Foundation in May 2010. EPA has referred to that settlement as a basis for its establishment of a federal total maximum daily load (TMDL) for the entire 64,000 square-mile Chesapeake Bay watershed and EPA's usurpation of state authority to implement TMDLs in that watershed. EPA also has referred to that settlement as a basis for its plan to regulate stormwater from developed and redeveloped sites, which exceeds the EPA's statutory authority.[35]

The sweeping new federal program for the Chesapeake Bay is major in its scope and economic impact. The program sets land use–type limits on businesses, farms, and communities on the Bay based upon their calculated daily pollutant discharges. EPA's displacement of state authority is estimated to cost Maryland and Virginia up to $18 billion[36] to implement.

The federal takeover of the Chesapeake Bay program is unprecedented in its scope; however, by relying on the settlement agreement as the source of its regulatory authority for the TMDLs and stormwater program, EPA did not have to seek public input, explain the statutory basis for its actions in the Clean Water Act, or give stakeholders an opportunity to evaluate the science upon which the agency relies. Because the rulemakings resulted from a settlement agreement that set tight timelines for action, the public never had access to the information, which would have been necessary in order to comment effectively on the modeling and the assumptions EPA used.

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[34] 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 Sessions, January 20, 2012. The date of the letter is based on the press release date, http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=fbcb69a1-802a-23ad-4767-8b1337aba45f and this project Vote Smart page, http://votesmart.org/public-statement/663407/letter-to-lisa-jackson-administrator-of-environmental-protection-agency-epa.

[35] "House, Senate Lawmakers Highlight Concerns with EPA Sue & Settle Tactic for Backdoor Regulation," United States Senate Committee on Environment & Public Works, Minority Office, January 20, 2012 at http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=fbcb69a1-802a-23ad-4767-8b1337aba45f.

[36] *See* Sage Policy Group, Inc., *The Impact of Phase I Watershed Implementation Plans on Key Maryland Industries* (Apr. 2011); *CHESAPEAKE BAY JOURNAL*, January 2011, available at www.bayjournal.com/article.cfm?article=4002.

7. Boiler MACT Rule

In 2003, EPA and Sierra Club entered into a consent agreement that required EPA to set a MACT standard for major- and area-source boilers. In 2006, the U.S. District Court for the District of Columbia issued an order detailing a schedule for the rulemaking. On September 10, 2009, April 3, 2010, and September 20, 2010, EPA and Sierra Club agreed to extend the deadline for the rule. Sierra Club subsequently opposed EPA's request to further extend the deadline from January 16, 2011, to April 13, 2012, despite declarations by EPA officials that the agency could not meet the January 2011 deadline because of the time necessary to consider and respond to all of the public comments on the proposed rule. The D.C. District Court ruled that EPA had had enough time and gave the agency only an additional month to finalize the rule. EPA knew the final rule it had been ordered to issue would not survive court challenge. Accordingly, EPA published a notice of reconsideration the same day it finalized the rule: March 21, 2011. Based on comments it received from the public as well as additional data, EPA issued final reconsidered rules on January 31, 2013, and February 1, 2013. The cost of the 2012 Boiler MACT Rule that EPA had to issue prematurely was estimated by the agency to be $3 billion.[37]

8. Standards for Cooling Water Intake Structures

On November 17, 2006, environmental advocacy groups sued EPA, claiming that the agency had failed to use "Best Technology Available" when it issued a final rule setting standards for small, existing cooling water intake structures under section 316(b) of the Clean Water Act.[38] EPA defended against this lawsuit. On July 23, 2010, EPA and the groups agreed to a voluntary remand of the 2006 cooling water intake rule. On November 22, 2010, EPA entered into a settlement agreement with the environmental groups to initiate a new rulemaking and to take public comment on the appropriateness of subjecting small, existing facilities to the national standards developed for larger facilities. EPA published the proposed rule on April 20, 2011. The proposal would increase dramatically the cost to smaller facilities—such as small utilities, pulp and paper plants, chemical plants, and metal plants—by more than $350 million each year.[39]

9. Revision to the Particulate Matter ($PM_{2.5}$) NAAQS

EPA entered into a consent decree with advocacy groups and agreed to issue a final rule by December 14, 2012, revising the NAAQS for fine particulate matter ($PM_{2.5}$). Even by EPA's own admission, this deadline was unrealistic. In a May 4, 2012, declaration filed with the U.S. District Court of the District of Columbia, Assistant Administrator for Air Regina McCarthy stated that EPA would need until August 14, 2013, to finalize the $PM_{2.5}$ NAAQS due to the many technical and complex issues included in the proposed rulemaking.[40] Despite this recognition of the time

[37] Letter from President Barack Obama to Speaker John Boehner (Aug. 30, 2011), Appendix "Proposed Regulations from Executive Agencies with Cost Estimates of $1 Billion or More."
[38] 71 Fed. Reg. 35,046 (Jun. 16, 2006).
[39] "2012 Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," rule web page for "Criteria and Standards for Cooling Water Intake Structures," RIN: 2040-AE95, available at http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=2040-AE95.
[40] *American Lung Ass'n v. EPA*, Nos. 1:12-cv-00243, 1:12-cv-00531, Declaration of Regina McCarthy (D.D.C. May 4, 2012) at ¶ 20.

constraints, EPA agreed in the original consent decree to a truncated deadline, promising to finish the rule in only half the time it believed it actually needed to do the rulemaking properly. The final rule is estimated to cost as much as $382 million each year.[41]

10. Reconsideration of the 2008 Ozone NAAQS

On May 23, 2008, environmental groups sued EPA to challenge the final revised ozone NAAQS, which the agency had published on March 27, 2008. The 2008 rule had lowered the eight-hour primary ground-level ozone standard from 84 parts per billion (ppb) to 75 ppb. On March 10, 2009, EPA filed a motion requesting that the court hold the cases in abeyance to allow time for officials from the new administration to review the 2008 standards and determine whether they should be reconsidered. On January 19, 2010, EPA announced that it had decided to reconsider the 2008 ozone NAAQS.[42] Although EPA did not enter into a settlement agreement or consent decree with the environmental group, it readily accepted the legal arguments put forth by the group despite available legal defenses.[43] The agency announced its intention to propose a reconsidered standard ranging between 70 ppb and 65 ppb.[44] Although the reconsidered ozone NAAQS was not published—and was withdrawn by the administration on September 2, 2011—EPA had estimated that the reconsidered standard would impose up to $90 billion of new costs per year on the U.S. economy.[45]

OTHER SUE AND SETTLE-BASED RULEMAKINGS OF PARTICULAR NOTE

Revisions to EPA's Rule on Protections for Subjects in Human Research Involving Pesticides

In 2006, EPA issued a final rule on protecting human subjects in research involving pesticides.[46] Various advocacy groups sued EPA, alleging that the rule did not go far enough.[47] In November 2010, EPA and the advocacy groups finalized a settlement agreement that required EPA to include specific language for a new proposed rule.

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[41] "Overview of EPA's Revisions to the Air Quality Standards for Particle Pollution (Particulate Matter)," Environmental Protection Agency (2012), *see* http://www.epa.gov/pm/2012/decfsoverview.pdf.
[42] 75 Fed. Reg. 2,938, 2,944 (Jan. 19, 2010).
[43] Most of the sue and settle cases identified in this report involve a consent decree or settlement agreement. However, there is a variation of this standard type of sue and settle case that contains many of the same problems that these cases contain, but do not involve a consent decree or settlement agreement. In these cases, advocacy groups sue agencies and then the agencies take the desired action sought by the advocacy groups without any consent decrees or settlement agreements.
[44] 75 Fed. Reg. 2,938, 2,944 (Jan. 19, 2010).
[45] Letter from President Barack Obama to Speaker John Boehner (Aug. 30, 2011), Appendix "Proposed Regulations from Executive Agencies with Cost Estimates of $1 Billion or More." EPA's intention to revise the 2008 Ozone NAAQS Rule less than two years after it had been finalized—which was unprecedented—and the standard's staggering projected compliance costs, caused tremendous public outcry, which lead to the planned rule being withdrawn at the order of the White House on September 2, 2011. EPA is expected to propose the revised ozone NAAQS in late 2013 or early 2014.
[46] 71 Fed. Reg. 6,138 (Feb. 6, 2006).
[47] *Natural Resources Defense Council v. EPA*, No. 06-0820-ag (2d Cir.). NRDC filed a petition for review on February 23, 2006. Other plaintiffs filed petitions shortly thereafter. The case was consolidated into this case before the Second Circuit.

The advocacy group's influence on the substance of the rules is reflected in the fact that their desired regulatory changes were directly incorporated into the proposed rule. In the preamble of the 2011 proposed rule,[48] EPA wrote:

> EPA also agreed to propose, at a minimum, amendments to the 2006 rule that are substantially consistent with language negotiated between the parties and attached to the settlement agreement.… Although the wording of the amendments proposed in this document [2011 proposed rule] differs in a few details of construction and wording, they are substantially consistent with the regulatory language negotiated with Petitioners, and EPA considers these amendments to address the Petitioners' major arguments.[49]

In fact, there are entire passages from the settlement agreement that are identical to the language included in the 2011 proposed rule.[50] EPA was not mandated by statute to take any action on the human-testing rule and certainly was not required to "cut and paste" the language sought by the advocacy groups. If EPA was concerned that the rule needed to be changed, it should have gone through a normal notice and comment rulemaking rather than writing the substance of the proposed rule behind closed doors.

U.S. Fish and Wildlife Service (FWS) Endangered Species Act Listings and Critical Habitat Designation

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 Endangered Species Act.

FWS used a settlement in 2009 to designate a large critical habitat area under the Endangered Species Act.[51] 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.[52] Initially, FWS 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.[53] FWS doubled the size of the critical habitat area from 13,000 acres to more than

[48] 76 Fed. Reg. 5,735, 5,740 (February 2, 2011).
[49] Settlement Agreement between EPA and plaintiffs connected to *Natural Resources Defense Council v. EPA*, 06-0820, (2nd Cir.), November 3, 2010. *See also* 76 Fed. Reg. 5,735, 5,740-5,741 (February 2, 2011).
[50] *See* Settlement Agreement between EPA and plaintiffs connected to *Natural Resources Defense Council v. EPA*, 06-0820 (2nd Cir.), November 3, 2010, and the proposed rule at 76 Fed. Reg. 5735, 5740. Much of the language in 26.1603(b) and (c) of the proposed rule is identical to the language set forth in the settlement agreement.
[51] *Northwoods Wilderness Recovery v. Kempthorne*, Civil Action No. 08-01407, (N.D. Ill.), Stipulated Settlement Agreement and Order of Dismissal (February 12, 2009).
[52] *Northwoods Wilderness Recovery v. Kempthorne*, Civil Action No. 08-01407, Complaint for Declaratory and Injunctive Relief, March 10, 2008 (N.D. Ill.).
[53] *Supra*, note 37.

26,000 acres, as sought by the advocacy groups.[54] Thus, FWS effectively removed a large amount of land from development without affected parties having any voice in the process. Even the federal government did not think FWS was clearly mandated to double the size of the critical habitat area, as evidenced by the previous administration's willingness to fight the lawsuit.

Moreover, 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 Endangered Species Act.[55] Agreeing to list this many species all at once imposes a huge new burden on the agency. According to the director of FWS, in FY 2011, FWS was allocated $20.9 million 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.[56] In other words, sue and settle cases and other lawsuits are effectively driving the regulatory agenda of the Endangered Species Act program at FWS.

THE PUBLIC POLICY IMPLICATIONS OF SUE AND SETTLE

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 agendas of an agency. Instead of agencies being able to use their discretion on how best to 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.

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 spent more than 75% of this allocation ($15.8) taking the substantive actions required by court orders or ***settlement agreements*** *resulting from litigation.*

Through sue and settle, advocacy groups also significantly affect the regulatory environment by getting agencies to issue substantive requirements that are not required by law. Even when a regulation is required, agencies can use the terms of a sue and settle agreement as a legal basis for allowing special interests to dictate the discretionary terms of the regulations. Third parties have a very difficult time challenging the agency's surrender of its discretionary power because they typically cannot intervene, and the courts often simply want the case to be settled quickly.

[54] *See, e.g.*, 75 Fed. Reg. 21,394 (August 30, 2010).
[55] Stipulated Settlement Agreements, *WildEarth Guardians v. Salazar* (D.D.C. May 10, 2011) and *Center for Biological Diversity v. Salazar* (D.D.C. July 12, 2011). The requirement to add more than 720 candidates for listing as endangered species would significantly add to the existing endangered species list that contains 1,118 plant and animal species, which could significantly expand the amount of critical habitat in the U.S. This would be a nearly two-thirds expansion in the number of listed species. Fish and Wildlife Species Reports, at http://ecos.fws.gov/tess_public/pub/Boxscore.do.
[56] Testimony of Hon. Dan Ashe, Director, U.S. Fish and Wildlife Service before the House Natural Resources Committee (December 6, 2011).

Likewise, when advocacy groups and agencies negotiate deadlines and schedules for new rules through the sue and settle process, the rulemaking process can suffer greatly. Dates for regulatory action are often specified in statutes, and agencies like EPA are typically unable to meet the majority of those deadlines. To a great extent, these agencies must use their discretion to set resource priorities in order to meet their many competing obligations. By agreeing to deadlines that are unrealistic and often unachievable, the agency lays the foundation for rushed, sloppy rulemaking that often delays or defeats the objective the agency is seeking to achieve. These hurried rulemakings typically require correction through technical corrections, subsequent reconsiderations, or court-ordered remands to the agency. Ironically, the process of issuing rushed, poorly developed rules and then having to spend months or years to correct them defeats the advocacy group's objective of forcing a rulemaking on a tight schedule. The time it takes to make these fixes, however, does not change a regulated entity's immediate obligation to comply with the poorly constructed and infeasible rule.

Instead of agencies being able to use their discretion on how best to 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.

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 to develop achievable standards?). Especially when it comes to implementation timetables, agencies are ill-suited to make such decisions without significant feedback from those who actually will have to comply with a regulation.

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. These requirements include the Regulatory Flexibility Act (RFA)[57] and the Unfunded Mandates Reform Act.[58] In addition to undermining the protections of these statutory requirements, rushed deadlines can limit the review of regulations under the OMB's regulatory review under executive orders,[59] among other laws. This short-circuited process deprives the public (and the agency itself) of critical information about the true impact of the rule.

Unreasonably accelerated deadlines, such as with $PM_{2.5}$ NAAQS, have adverse impacts that go well beyond the specific rule at issue. As Assistant Administrator McCarthy noted in her declaration before the court in the $PM_{2.5}$ NAAQS case discussed above, an unreasonable deadline for one rule will draw resources from other regulations that may also be under

[57] Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. §§ 601-612.
[58] Unfunded Mandates Reform Act of 1995, 2 U.S.C. § 1501 et seq.
[59] *See, e.g.,* Executive Order 12,866, "Regulatory Planning and Review" (September 30, 1993); Executive Order 13132, "Federalism" (August 4, 1999); Executive Order 13,211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (May 18, 2001); Executive Order 13,563 "Improving Regulation and Regulatory Review" (January 18, 2011).

deadlines.[60] When there are unrealistic deadlines, there will be collateral damage on these other rules, which will invite advocacy groups to reset EPA's priorities further when they sue to enforce those deadlines.

In fact, one of the primary reasons advocacy groups favor sue and settle agreements approved by a court is that the court retains jurisdiction over the settlement and the plaintiff group can readily enforce perceived noncompliance with the agreement by the agency. For its part, the agency cannot change any of the terms of the settlement (e.g., an agreed deadline for a rulemaking) without the consent of the advocacy group. Thus, even when an agency subsequently discovers problems in complying with a settlement agreement, the advocacy group typically can force the agency to fulfill its promise, regardless of the consequences for the agency or regulated parties.

Because a settlement agreement directs the structure (and sometimes even the actual substance) of the agency rulemaking that follows, interested parties have a very limited ability to alter the subsequent rulemaking through comments.

For all of these reasons, sue and settle violates the principle that if an agency is going to write a rule, then 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 conceived. They usually take a great deal of time and effort to correct, when the rule could have been done right in the first place if the rulemaking process had been conducted properly.

Notice and Comment Allowed After a Sue and Settle Agreement Does Not 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, is 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.[61]

[60] "This amount of time [requested as an extension by EPA] also takes into account the fact that during the same time period for this rulemaking, the Office of Air and Radiation will be working on many other major rulemakings involving air pollution requirements for a variety of stationary and mobile sources, many with court-ordered or *settlement agreement deadlines*." *American Lung Ass'n v. EPA*, Nos. 1:12-cv-00243, 1:12-cv-00531, Declaration of Regina McCarthy (D.D.C. May 4, 2012) at ¶ 15 (emphasis added).

[61] In the $PM_{2.5}$ NAAQS deadline settlement agreement discussed above, for example, the timetable for final rulemaking action remained unchanged despite industry comments insisting that the agency needed more time to properly complete the rulemaking. Even though EPA itself agreed that more time was needed, the rulemaking deadline in the settlement agreement was not modified.

Moreover, because the settlement agreement directs the timetable and the structure (and sometimes even the actual substance[62]) of the agency rulemaking that follows, interested parties usually have a very limited ability to alter the design of the subsequent rulemaking through their comments.[63] In effect, the "cement" of the agency action is set and has already hardened by the time the rule is proposed, and it is very difficult to change it. Once an agency proposes a regulation, the agency is restricted in how much it can change the rule before it becomes final.[64] Proposed regulations are not like proposed legislation, which can be very fluid and go through several revisions before being enacted. When an agency proposes a regulation, they are not saying, "let's have a conversation about this issue," they are saying, "this is what we intend to put into effect unless there is some very good reason we have overlooked why we cannot." By giving an agency feedback during the early development stage about how a regulation will affect those covered by it, the agency learns from all stakeholders about problems before they get locked into the regulation.

Rather than hearing from a range of interested parties and designing the rule with a panoply of 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.

Sue and settle agreements cut this critical step entirely out of the process. Rather than hearing from a range of interested parties and designing the rule with a panoply of 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.

SUE AND SETTLE IS AN ABUSE OF THE ENVIRONMENTAL CITIZEN SUIT PROVISIONS

Congress expressed concern long ago that allowing unlimited citizen suits under environmental statutes to compel agency action has the potential to severely disrupt agencies' ability to meet their most pressing statutory responsibilities.[65] Matters are only made worse when an agency

[62] *See* discussion of the Human Testing Rule, *supra* on page 21.

[63] 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. As EPA Assistant Administrator for Air McCarthy recently noted, "[m]y staff has made me aware of some instances in which EPA changed the substance of Clean Air Act settlement agreements in response to public comments. For example, after receiving adverse comments on a proposed settlement agreement [concerning hazardous air standards for 25 individual industries] EPA modified deadlines for taking proposed or final actions and clarified the scope of such actions for a number of source categories before finalizing the agreement. However, I am not aware of every instance in which EPA has made such a change." McCarthy Response to Questions for the Record submitted by Senator David Vitter to Assistant Administrator Gina McCarthy, Senate Environment and Public Works Committee April 8, 2013, Confirmation Hearing at 24. The Chamber is not aware of any other instances where EPA has made such a change in response to public comments.

[64] *See South Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1st Cir. 1974) ("logical outgrowth doctrine" requires additional notice and comment if final rule differs too greatly from proposal).

[65] The Court of Appeals for the District of Columbia noted in 1974 that "While Congress sought to encourage citizen suits, citizen suits were specifically intended to provide only 'supplemental … assurance that the Act would be implemented and

does not defend itself against sue and settle lawsuits, and when it willingly allows outside groups to reprioritize its agenda and deadlines for action.

Most of the legislative history that gives an understanding of the environmental citizen suit provision comes from the congressional debate on the 1970 Clean Air Act. There is little legislative history beyond the Clean Air Act.[66] The addition of the citizen suit provision in later statutes was perfunctory, and the statutory language used was generally identical to the Clean Air Act language.[67]

The inclusion of a citizen suit provision was far from a given when it was being considered in the Clean Air Act. The House version of the bill did not include a citizen suit provision.[68] The Senate bill did include such a provision,[69] but serious concern was expressed during the Senate floor debate. Senator Roman Hruska (R-NE), who was ranking member of the Senate Judiciary Committee, expressed two major concerns about the citizen suit provision: the limited opportunity for Senators to review the provision 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.[70]

Senator Hruska entered into the record a memo written by one of his staff members. It reiterated the problem of ignoring the Judiciary Committee:

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enforced.' *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1974). Congress made 'particular efforts to draft a provision that would not reduce the effectiveness of administrative enforcement, … nor cause abuse of the courts while at the same time still preserving the right of citizens to such enforcement of the act.' Senate Debate on S. 3375, March 10, 1970, *reprinted in* Environmental Policy Division of the Congressional Research Service, A Legislative History of the Clean Air Act Amendments of 1970, Vol. I. at 387 (1974) (remarks of Senator Cooper)." *Friends of the Earth, et al. v. Potomac Electric Power Co.*, 546 F. Supp. 1357 (D.D.C. 1982); "[T]he agency might not be at fault if it does not act promptly or does not enforce the act as comprehensively and as thoroughly as it would like to do. Some of its capabilities depend on the wisdom of the appropriation process of this Congress. It would not be the first time that a regulatory act would not have been provided with sufficient funds and manpower to get the job done…. Notwithstanding the lack of capability to enforce this act, suit after suit after suit could be brought. The functioning of the department could be interfered with, and its time and resources frittered away by responding to these lawsuits. The limited resources we can afford will be needed for the actual implementation of the act." (Sen. Hruska arguing against the citizen suit provision of the Clean Air Act during Senate debate on S.4358 on Sept. 21, 1970).

[66] *See, e.g.,* Robert D. Snook, *Environmental Citizen Suits and Judicial Interpretation: First Time Tragedy, Second Time Farce*, 20 W. New Eng. L. Rev. 311 (1998) at 318.

[67] *Id.* at 313–314, 318.

[68] *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.

[69] *Id.*

[70] Senate debate on S. 4358 at 277.

> The Senate Committee on the Judiciary has jurisdiction over, among other things, "(1) Judicial proceedings, civil and criminal, generally…. (3) Federal court and judges…." The Senate should suspend consideration of Section 304 [the citizen suit provision] pending a study by the Judiciary Committee of the section's probable impact on the integrity of the judicial system and the advisability of now opening the doors of the courts to innumerable Citizens Suits against officials charged with the duty of carrying out the Clean Air Act.[71]

Senator Griffin (R-MI), also a member of the Senate Judiciary Committee, noted the lack of critical feedback that was received regarding the provision:

> [I]t is disturbing to me that this far-reaching provision was included in the bill without any testimony from the Judicial Conference, the Department of Justice, or the Office of Budget and Management concerning the possible impact this might have on the Federal judiciary.[72]

The citizen suit provision in the Clean Air Act was never considered by either the House or Senate Judiciary Committees. The same is true for the citizen suit provision in the Clean Water Act, which was enacted just two years later. There was no House or Senate Judiciary Committee hearing focused specifically on citizen suits for 41 years, dating back to the creation of the first citizen suit provision in 1970.

The citizen suit provision in the Clean Air Act was never considered by either the House or Senate Judiciary Committees.[73] The same is true for the citizen suit provision in the Clean Water Act, which was enacted just two years later.[74] There was no House or Senate Judiciary Committee hearing focused specifically on citizen suits for 41 years, dating back to the creation of the first citizen suit provision in 1970.[75]

Fortunately however, in 2012, during the 112th Congress, the House Judiciary Committee began looking at the abuses of the sue and settle process. Representative Ben Quayle (R-AZ) introduced H.R. 3862, the Sunshine for Regulatory Decrees and Settlements Act of 2012. This bill became Title III of H.R. 4078, the Red Tape Reduction and Small Business Job Creation Act, which passed the House of Representatives on July 24, 2012, by a vote of 245 to 172. As part of the development of the Sunshine for Regulatory Decrees

[71] *Id.* at 279.
[72] *Id.* at 350.
[73] "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.
[74] "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.
[75] In 1985, the Senate Judiciary Committee held a hearing on the Superfund Improvement Act of 1985 that among other things discussed 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.

and Settlements Act, the House Judiciary Committee held extensive hearings on sue and settle and issued a committee report on July 11, 2012. Under the bill, which passed the House as Title III of H.R. 4078, before a court could sign a proposed consent decree between a federal agency and an outside group, the proposed consent decree or settlement must be published in the *Federal Register* for 60 days for public comment. Also, affected parties would be afforded an opportunity to intervene prior to the filing of the consent decree or settlement. The agency would also have to inform the court of its other mandatory duties and explain how the consent decree would benefit the public interest. Unfortunately, the Senate never took action on its version of the sue and settle bill, also called the Sunshine for Regulatory Decrees and Settlements Act of 2012, which was introduced by Senator Chuck Grassley on July 12, 2012.

On April 11, 2013, the Sunshine for Regulatory Decrees and Settlements Act of 2013 was introduced in the Senate as S. 714, and in the House as H.R. 1493. The 2013 Act is a strong bill that would implement these and other important common-sense changes. Passage of this legislation will close the massive sue and settle loophole in our regulatory process.

RECOMMENDATIONS

The regulatory process should not be radically altered simply because of a consent decree or settlement agreement. There should not be a two-track system that allows the public to meaningfully participate in rulemakings, but excludes the public from sue and settle negotiations which result in rulemakings designed to benefit a specific interest group. There should not be one system where agencies can use their discretion to develop rules and another system where advocacy groups use lawsuits to legally bind agencies and improperly hand over their discretion.

- **Notice**

Federal agencies should inform the public immediately upon receiving notice of an advocacy group's intent to file a lawsuit.[76] This public notice should be provided in a prominent location, such as the agency's website or through a notice in the *Federal Register*.[77] By having this advanced notice, affected parties will have a better opportunity to intervene in cases and also prepare more thoughtful comments.

- **Comments and Intervening**

Federal agencies should be required to submit a notice of a proposed consent decree or settlement agreement before it is filed with the court. This notice should be published in the *Federal Register* and allow a reasonable period for public comment (e.g., 45 days).

[76] The Department of Justice also should provide public notice of the filing of lawsuits against agencies, as well as settlements the agencies agree to.

[77] It is our understanding that EPA recently began to disclose on this website the notices of intent to sue that it receives from outside parties. While this is a welcome development, this important disclosure needs to be statutorily required, not just a voluntary measure.

Currently, because it is so difficult for third parties to intervene in sue and settle cases, courts should presume that it is appropriate to include a third party as an intervenor. The intervenors should only be excluded if this strong presumption could be rebutted by showing that the party's interests are adequately represented by the existing parties in the action. Given that intervenors presently can be excluded from settlement negotiations, *sometimes without even being notified of the negotiations*, there should be clarification that all parties in the action, including the intervenors, should have a seat at the negotiation table.

- **Substance of Rules**

Agencies should not be able to cede their discretionary powers to private interests, especially the power to issue regulations and to develop the content of rules. This problem does not exist in the normal rulemaking process. Yet, since courts readily approve consent decrees that legally bind agencies in the sue and settle context, the decree itself becomes a vehicle for agencies to give up their discretionary rulemaking power—and even to develop rules with questionable statutory authority.

Courts should review the statutory basis for agency actions in consent decrees and settlement agreements in the same manner as if they were adjudicating a case. For example, they should ensure that an agency is required to perform a mandatory act or duty, and, if so, that the agency is implementing the act or duty in a way that is authorized by statute.

- **Deadlines**

Federal agencies should ensure that they (and their partners, including states and other agencies) have enough time to comply with regulatory timelines. The public also should be given enough time to meaningfully comment on proposed regulations, and agencies should themselves take enough time to adequately conduct proper analysis. This would include agency compliance with the RFA, executive orders, and other requirements designed to promote better regulations. This is particularly important because recent rulemakings are often more challenging to evaluate in terms of scope, complexity, and cost than earlier rules were.

- **The Sunshine for Regulatory Decrees and Settlements Act of 2013**

Fortunately, there is a simple, noncontroversial way to address the sue and settle problem that currently undermines the fundamental protections that exist within our regulatory system. Passage of the Sunshine for Regulatory Decrees and Settlements Act of 2013 would solve the sue and settle problem and restore the protections of the Administrative Procedure Act to all citizens and stakeholders.

Catalog of Sue and Settle Cases

Sue and Settle Cases Resulting in New Rules and Agency Actions[78] (2009–2012)

Case	Agency	Issue and Result
***American Petroleum Institute v. EPA* (petroleum refineries NSPS)** 08-1277 (D.C. Cir.) Settled: 12/23/2010 (date is from EPA website)	EPA	**Issue**: Greenhouse gas (GHG) New Source Performance Standards (NSPS) for petroleum refineries **Result**: EPA agreed to issue the first-ever NSPS for GHG emissions from petroleum refineries.
***American Lung Association v. EPA* (consolidated with *New York v. Jackson*)** 12-00243 (consolidated with 12-00531) (D.D.C.) Settled: 6/15/2012	EPA	**Issue**: National ambient air quality standards (NAAQS) for particulate matter **Result**: EPA agreed to sign a final rule addressing the NAAQS for particulate matter. In January 2013, EPA published a final rule making the standard more stringent.
American Nurses Association v. Jackson 08-02198 (D.D.C.) Settled: 10/22/2009	EPA	**Issue**: Maximum achievable control technology (MACT) emissions standards for hazardous air pollutants (HAP) from coal- and oil-fired electric utility steam generating units (EGUs) **Result**: EPA entered into a consent decree requiring the agency to issue MACT standards under Section 112 of the Clean Air Act for coal- and oil-fired electric utility steam generating units (known as the "Utility MACT" rule). The rule was finalized in February 2012.
***Association of Irritated Residents v. EPA et al.* (2008 $PM_{2.5}$ SIP)** 10-03051 (N.D. Cal.) Settled: 11/12/2010	EPA	**Issue**: CA state implementation plan (SIP) submission regarding 1997 $PM_{2.5}$ NAAQS **Result**: EPA agreed to take final action on the 2008 $PM_{2.5}$ San Joaquin Valley Unified Air Control District Plan for compliance with 1997 $PM_{2.5}$ NAAQS. The final action was taken in November 2011.
***Association of Irritated Residents v. EPA et al.* (SIP revisions)** 09-01890 (N.D. Cal.) Settled: 10/21/2009	EPA	**Issue**: CA SIP revision regarding two rules amended by the San Joaquin Valley Unified Air Pollution Control District **Result**: EPA agreed to take final action on the SIP revision and specifically the two rules amended by the San Joaquin Valley Unified Air Pollution Control District (Rule 2020 "Exemptions" and Rule 2020 "New and Modified Stationary Source Review Rule"). The final action was taken in May 2010.
***Center for Biological Diversity et al. v. EPA* (kraft pulp NSPS)**	EPA	**Issue**: Kraft pulp NSPS

[78] For a description of the methodology the Chamber used to identify sue and settle cases is discussed in Appendices A and B of this report.

Case	Agency	Issue and Result
11-06059 (N.D. Cal.) Settled: 8/27/2012		**Result**: EPA agreed to review and, if applicable, revise the kraft pulp NSPS air quality standards.
Center for Biological Diversity v. EPA 09-00670 (W.D. Wash.) Settled: Settlement agreement (parties entered into it on 3/10/10). Notice of voluntary dismissal, 3/11/10. Notice discusses settlement agreement.	EPA	**Issue**: GHGs and ocean acidification under the Clean Water Act **Result**: In a settlement agreement, EPA agreed to take public comment and begin drafting guidance on how to approach ocean acidification under the Clean Water Act. On November 15, 2010, in guidance, EPA urged states to identify waters impaired by ocean acidification under the Clean Water Act and urged states to gather data on ocean acidification, develop methods for identifying waters affected by ocean acidification, and create criteria for measuring the impact of acidification on marine ecosystems.
Center for Biological Diversity v. U.S. Department of Agriculture 08-03884 (N.D. Cal.) Settled: 12/15/2010	Dept. of Agriculture, U.S. Forest Service	**Issue**: Southern California Forest Service Management Plans **Result**: Conservation groups sued U.S. Forest Service over a forest management plan for four California national forests. The challenged plans designated more than 900,000 roadless acres for possible road building or other development. In 2009, a federal district court agreed with the groups, ruling that the plans violated the National Environmental Policy Act (NEPA). The parties entered into a settlement agreement that withholds more than 1 million acres of roadless areas from development. Further, the agency allowed the advocacy groups to participate in a collaborative process to, among other things, identify a list of priority roads and trails for decommissioning and/or restoration projects.
Center for Biological Diversity v. U.S. Dept. of the Interior (DOI) 10-00952 (D.D.C.) Settled: 1/14/2011	DOI, Dept. of Agriculture, BLM, U.S. Forest Service	**Issue**: Grazing fees on federal lands; environmental groups wanted the fees raised **Result**: In a settlement agreement, agencies agreed to respond to the plaintiffs' petition by January 18, 2011, and determine whether a NEPA environmental impact statement was required to issue new rules for the fee grazing program. The agencies ultimately declined to revise the rules for the fee grazing program, citing other high-priority efforts that took precedence.
Coal River Mountain Watch. et al. v. Salazar et al. 08-02212; A related case is National Parks Conservation Association v. Kempthorne: 09-001 15; Settlement agreement: 09-00115 (D.D.C) (D.D.C.) Settled: 3/19/2010	EPA and DOI	**Issue**: Stream Buffer Zone Rule **Result**: The 1983 stream buffer rule restricted mining activities from impacting resources within 100 feet of waterways. The Bush administration revised the rule to allow activity inside the buffer if it was deemed impractical for mine operators to comply. Environmental groups want the Obama administration to undo that change and declare that the stream buffer zone rule prohibits "valley fills." Environmental groups sued DOI in 2008 over the changes. Secretary Salazar tried to revoke the rule in April 2009, but a court held that OSM must go through a full rulemaking process. OSM agreed to amend or replace the stream buffer rule.
Colorado Citizens Against Toxic Waste, Inc. et al. v. Johnson 08-01787 (D. Colo.) Settled: 9/3/2009	EPA	**Issue**: National emission standards for radon emissions from operating mill tailings **Result**: EPA agreed to review and, if appropriate, revise national emission standards for radon emissions from operating mill tailings. EPA also agreed to certain public participation stipulations.

Case	Agency	Issue and Result
Colorado Environmental Coalition v. Salazar 09-00085 (D. Colo.) Settled: 2/15/2011	DOI	**Issue**: Bureau of Land Management (BLM) decision to amend resource management plans (RMPs), which opened 2 million acres of federal lands for potential oil shale leasing; plaintiffs alleged failure to comply with NEPA and other statutes **Result**: BLM agreed to consider amending each of the 2008 RMP decisions. As part of the amendment process, BLM agreed to consider several proposed alternatives, including alternatives that would exclude lands with wilderness characteristics and core or priority habitat for the imperiled sage grouse from commercial oil shale leasing. BLM also agreed to delay any calls for commercial leasing, but retained the right to continue nominating parcels for Research, Development, and Demonstration (RD&D) leases and to convert existing RD&D leases to commercial leases.
***Comite Civico del Valle, Inc. v. Jackson et al.* (CA SIP)** 10-00946 (N.D. Cal.) Settled: 6/11/2010	EPA	**Issue**: CA SIP regarding measures to control particulate matter emissions from beef feedlot operations within the Imperial Valley **Result**: EPA agreed to take final action on the SIP revision regarding particulate matter emissions from beef feedlot operations within the Imperial Valley. The final rule was published on November 10, 2010.
***Comite Civico del Valle, Inc. v. Jackson et al.* (Imperial County 1)** 09-04095 (N.D. Cal.) Settled: 11/10/2009	EPA	**Issue**: CA SIP revision regarding Imperial County Air Pollution Control District Rules 800-806 (addressing PM_{10}) **Result**: EPA agreed to take final action on the Imperial County Air Pollution Control District's Rules 800-806 (addressing PM_{10}) that revise the CA SIP. A proposed rule was published on January 7, 2013.
***Comite Civico del Valle, Inc. v. Jackson et al.* (Imperial County 2)** 10-02859 (N.D. Cal.) Settled: 10/12/2010	EPA	**Issue**: CA SIP revision regarding Imperial County Air Pollution Control District Rules 201, 202, and 217 **Result**: EPA agreed to take final action on Imperial County Air Pollution Control District Rules 201, 202, and 217 that revise the CA SIP.
Defenders of Wildlife v. Jackson 10-01915 (D.D.C.) Settled: 11/5/2010, 11/8/10 moved for entry same day the complaint was filed (see page 3 of the 3/18/12 memorandum opinion), 3/18/12 (ordered)	EPA	**Issue**: Effluent Limitation Guidelines for Steam Electric Power Generating Point Source **Result**: EPA agreed to sign a notice of proposed rulemaking regarding revisions to the effluent guidelines for steam electric power plants, followed by a final rule. In this case, the advocacy group's complaint was filed on the same day that the parties moved to enter the consent decree.
El Comite Para El Bienestar De Earlimart et al. v. EPA et al. 11-03779 (N.D. Cal.) Settled: 11/14/2011	EPA	**Issue**: CA SIP submission regarding fumigant rules in San Joaquin Valley **Result**: EPA agreed to take final actions on the Pesticide Element SIP Submittal and the Fumigant Rules Submittal. A final rule was published on October 26, 2012.
Environmental Defense Fund v. Jackson 11-04492 (S.D.N.Y.) Settled: 7/6/2012	EPA	**Issue**: NSPS for municipal solid waste landfills **Result**: EPA agreed to review and, if applicable, revise the NSPS for municipal solid waste landfills.

Case	Agency	Issue and Result
Florida Wildlife Federation v. Jackson 08-00324 (N.D. Fla.) Settled: 8/25/2009	EPA	**Issue**: Numeric nutrient criteria for waters in FL **Result**: Environmental groups sued EPA in July 2008 to develop numeric nutrient criteria for FL. EPA entered into a consent decree with the plaintiffs in 2009. As part of the consent decree, EPA agreed to issue limits in phases. Limits for FL's inland water bodies outside South FL were finalized on December 6, 2010; the limits for estuaries and coastal waters, and South FL's inland flowing waters were proposed on December 18, 2012. Final rules, by consent decree, are required by September 30, 2013.
Fowler v. EPA 09-00005 (D.D.C.) Settled: 5/10/2010	EPA	**Issue**: Clean Water Act regulatory regime for Chesapeake Bay **Result**: EPA agreed to establish a Total Maximum Daily Load for the Chesapeake Bay. The settlement requires EPA to develop changes to its storm water program affecting the Bay.
Friends of Animals v. Salazar 10-00357 (D.D.C.) Settled: 7/21/2010	DOI	**Issue**: DOI non-action on plaintiff's petitions to list 12 species of parrots, macaws, and cockatoos as endangered or threatened under the Endangered Species Act **Result**: DOI agreed to issue 12-month findings on the 12 species contained in the petition.
In re Endangered Species Act Section 4 Deadline Litigation **(This case relates to Center for *Biological Diversity v. Salazar*, 10-0230, and 12 different WildEarth Guardians complaints)** 10-00377 (D.D.C.) Settled: Wildlife Guardians: 5/10/2011 CBD: July 12, 2011	DOI	**Issue**: WildEarth Guardians cases: 12 lawsuits seeking to designate 251 species as threatened or endangered under the Endangered Species Act. CBD case: Seeking 90-day findings for 32 species of Pacific Northwest mollusks, 42 species of Great Basin springsnails, and 403 southeast aquatic species. **Result**: WildEarth: U.S. Forest Service agreed to make a final determination on Endangered Species Act status for 251 candidate species on or before September 2016. CBD: FWS agreed to make requested findings no later than the end of 2011 (this covers 32 species of Pacific Northwest mollusks, 42 species of Great Basin springsnails, and the 403 southeast aquatic species). Note: There are additional actions required for both settlements.
Kentucky Environmental Foundation v. Jackson **(Huntington-Ashland SIP)** 10-01814 (D.D.C.) Settled: 8/4/2011	EPA	**Issue**: KY SIP revision addressing 1997 $PM_{2.5}$ NAAQS **Result**: EPA agreed to take final action on the Kentucky SIP addressing 1997 $PM_{2.5}$ NAAQS for the Huntington-Ashland area. The final rule was published in April 2012.
Kentucky Environmental Foundation v. Jackson **(Louisville SIP)** 11-01253 (D.D.C.) Settled: 2/27/2012	EPA	**Issue**: KY SIP regarding 1997 $PM_{2.5}$ NAAQS **Result**: EPA had already taken actions by the time the agreement was made. EPA did agree to take final action on the $PM_{2.5}$ emissions inventory for the Louisville SIP.
Louisiana Environmental Action Network v. Jackson 09-01333 (D.D.C.) Settled: 11/23/2010	EPA	**Issue**: LA SIP for 1997 ozone NAAQS **Result**: LEAN brought the case to compel EPA to take action on ozone standards in the Baton Rouge area. As part of the settlement, LEAN agreed to ask the court to hold the litigation in abeyance and EPA agreed to take action if the Baton Rouge area does not come into attainment.
Mossville Environmental	EPA	**Issue**: New MACT standards for polyvinyl chloride (PVC) manufacturers

Case	Agency	Issue and Result
Action NOW v. Jackson 08-01803 (D.D.C.) Settled: 10/30/2009		**Result**: Environmental groups previously litigated and won a decision overturning EPA's 2002 decision not to make the MACT standards for PVC makers more stringent. Environmental groups brought this case in 2008 to compel EPA to set new MACT standards. In 2009, there was a settlement agreement between EPA and the plaintiffs. The agreement called upon EPA to finalize the new MACT standards. EPA issued a final rule in April 2012.
***National Parks Convservation Association v. Jackson* (Regional haze FIPS and SIPs)** 11-01548 (D.D.C.) Settled: 11/9/2011	EPA	**Issue**: Regional haze FIPs and SIPs **Result**: EPA agreed to deadlines to promulgate proposed and final regional haze FIPs and/or SIPs (or partial FIPs and SIPs).
Natural Resources Defense Council et al. v EPA 09-60510 (5th Cir.) Settled: 5/25/2010	EPA	**Issue**: Reporting requirements for concentrated animal feeding operations (CAFOs) **Result**: EPA agreed to create publicly available guidance to assist in the implementation of NPDES permit regulations and Effluent Limitation Guidelines and Standards for CAFOs. The agency also agreed to publish a proposed rule regarding reporting requirements for CAFOs. A proposed rule was published in October 2011 and later withdrawn in July 2012.
Natural Resources Defense Council v. EPA 06-0820 (2d Cir.) Settled: 6/17/2010 (see EarthJustice press release), Finalized on 11/3/10 (see proposed rule)	EPA	**Issue**: Pesticide human testing consent rule **Result**: A 2006 human-testing rule required subjects of paid pesticide experiments to provide "legally effective informed consent." Environmental groups challenged the rule. A June 2010 settlement required EPA to propose amendments to the rule to make it stricter. The settlement required EPA to incorporate specific language in the rule. The new rules were proposed on February 2, 2011. The final rule was published on February 14, 2013 and includes the negotiated language.
***Natural Resources Defense Council v. EPA* (California SIP)** 10-06029 (C.D. Cal.) Settled: 12/13/2010	EPA	**Issue**: CA SIP submission for 1997 ozone and $PM_{2.5}$ NAAQS **Result**: EPA agreed to take action on SIPs as they apply to $PM_{2.5}$ and ozone for California's South Coast Air Basin.
Natural Resources Defense Council v. Salazar 10-00299 (D.D.C.) Settled: 6/18/2010	Fish and Wildlife Service (FWS); DOI	**Issue**: Listing of whitebark pine tree as an endangered species under the Endangered Species Act as a result of climate change **Result**: On July 19, 2011, FWS found that the whitebark pine tree should be listed as threatened or endangered under the Endangered Species Act as a result of climate change. It was the first time the federal government has declared a widespread tree species in danger of extinction because of climate change.
New York v. EPA 06-1322 (D.C. Cir.) Settled: 12/23/2010 (see EPA settlement page)	EPA	**Issue**: GHG NSPS for power plants **Result**: On April 13, 2012, EPA proposed the first-ever NSPS for GHG emissions from new coal- and oil-fired power plants. This came about as a result of a settlement of a 2006 lawsuit challenging power plant NSPS.
Northwoods Wilderness Recovery v. Kempthorne 08-01407 (N.D. Ill.)	FWS; DOI	**Issue**: FWS's exclusion of 13,000 acres of national forest land in Michigan and Missouri from the final "critical habitat" designation for the Hine's emerald dragonfly under the Endangered Species Act

Case	Agency	Issue and Result
Settled: 1/13/2009		**Result**: FWS agreed 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. FWS doubled the size of the critical habitat from 13,000 acres to more than 26,000. The final rule was published in April 2010.
Portland Cement Assn. v. EPA 07-1046 (D.C. Cir.) Settled: 1/6/2009 (This date is based on when DOJ signed the settlement agreement)	EPA	**Issue**: MACT standards for cement kilns **Result**: EPA settled a lawsuit seeking to force the agency to control mercury emissions from cement kilns. The settlement was between EPA and numerous petitioners that challenged the 2006 cement MACT rule. The petitioners included environmental groups, states, and the cement industry. The final cement MACT rule was published in the Federal Register on September 9, 2010; environmental groups and cement industry petitioned for reconsideration of the 2010 rule. EPA denied in part and amended in part the petitions to reconsider. EPA published a new final rule on February 12, 2013. The reconsidered rule relaxed some aspects of the 2010 rule, and allowed cement companies more time to comply.
Riverkeeper v. EPA 06-12987 (S.D.N.Y.) Settled: 11/22/2010	EPA	**Issue**: Clean Water Act 316(b) standards on cooling water intake structures **Result**: The EPA agreed to propose and finalize a rule regulating cooling water intake structures under 316(b), and to consider the feasibility of more stringent technical controls.
Sierra Club et al. v. Jackson **(ozone NC, NV, ND, HI, OK, AK, ID, OR, WA, MD, VA, TN, AR, AZ, FL, and GA)** 10-04060 (N.D. Cal.) Settled: 8/12/2011 (Date that court ordered Joint Motion to Stay All Deadlines. This motion was filed with the Notice of Proposed Settlement)	EPA	**Issue**: Action on 1997 ozone NAAQS revisions for NC, NV, ND, HI, OK, AK, ID, OR, WA, MD, VA, TN, AR, AZ, FL, and GA **Result**: EPA agreed to take final action on 1997 Ozone NAAQS revision for NC, NV, ND, HI, OK, AK, ID, OR, WA, MD, VA, TN, AR, AZ, FL, and GA.
Sierra Club et al. v. Jackson et al. **(CA RACT SIP)** 11-03106 (N.D. Cal.) Settled: 1/6/2012	EPA	**Issue**: CA SIP submissions regarding reasonably available control technology demonstration **Result**: EPA agreed to take final action on the CA RACT SIP.
Sierra Club et al. v. Jackson et al. **(San Joaquin Valley)** 10-01954 (N.D. Cal.) Settled: 11/8/2010	EPA	**Issue**: CA SIP submission for 1997 ozone NAAQS **Result**: EPA agreed to take final action on the 8-hour ozone plan submitted by the San Joaquin Valley Air Pollution Control District, the purpose of which is to achieve progress toward attainment of 1997 ozone NAAQS. A final rule was published on March 1, 2012.
Sierra Club et al. v EPA **(lead case)** 08-1258 (D.C. Cir.) Settled: 8/24/2009 (see also the amended settlement	EPA	**Issue**: Lead Renovation, Repair and Painting Program **Result**: In 2008, numerous environmental groups commenced lawsuits against EPA to challenge the Lead Renovation, Repair, and Painting Program Rule, and these suits were consolidated in the DC Circuit Court of Appeals.

Case	Agency	Issue and Result
agreement referring to this date)		As part of this settlement agreement, EPA agreed to propose significant and specific changes to the rule that were outlined in the settlement agreement. Significantly, EPA agreed to drop an "opt-out" provision that would allow millions of homes without children or pregnant women to waive the lead restrictions.
Sierra Club filed a notice of intent to file a lawsuit NOTICE OF INTENT Settled: 12/19/2011	EPA	**Issue**: Attainment determinations for 1997 ozone NAAQS for areas in NY, NJ, CT, MA, IL, MO and other areas **Result**: EPA agreed to make attainment determinations for 1997 ozone NAAQS for areas in NY, NJ, CT, MA, IL, and MO. The "other areas" were not included because EPA and plaintiffs agreed that EPA had already addressed the issues for those areas.
***Sierra Club v. EPA* (Nitric Acid)** 09-00218 (D.D.C.) Settled: 11/3/2009	EPA	**Issue**: Nitric acid plants NSPS **Result**: EPA agreed to review NSPS for nitric acid plants. As a result of this review, EPA proposed NSPS for nitric acid plants in October 2011. The final rule was published in August 2012.
***Sierra Club v. EPA et al.* (clay ceramics)** 08-00424 (D.D.C.) Settled: 11/20/2012	EPA	**Issue**: Brick MACT **Result**: EPA agreed to issue final rules setting MACT standards for brick and structural clay products manufacturing facilities located at major sources and clay ceramics manufacturing facilities located at major sources.
***Sierra Club v. EPA et al.* (TX ozone PM SIP)** 10-01541 (D.D.C.) Settled: 9/13/2011	EPA	**Issue**: TX SIP submission regarding 1997 ozone and $PM_{2.5}$ NAAQS **Result**: EPA agreed to take final action on certain infrastructure components of TX SIP submissions for 1997 ozone and $PM_{2.5}$ NAAQS.
***Sierra Club v. Jackson* (21 states)** 10-00133 (D.D.C.) Settled: 4/29/2010 (EPA lodged consent decree with court on this date)	EPA	**Issue**: 21 states' SIPs submissions for 1997 ozone NAAQS **Result**: EPA agreed to approve or disapprove the 1997 8-hour ozone NAAQS Infrastructure SIPs for ME, RI, CT, NH, AL, KY, MS, SC, WI, IN, MI, OH, LA, KS, NE, MO, CO, MT, SD, UT, and WY.
***Sierra Club v. Jackson* (28 different MACT)** 09-00152 (N.D. Cal.) Settled: 7/6/2010	EPA	**Issue**: MACT standards for 28 industry source categories **Result**: Sierra Club sued EPA on January 13, 2009—seven days prior to the change in administration—to review and revise Clean Air Act MACT standards for 28 different categories of industrial facilities, including wood furniture manufacturing, Portland Cement, pesticides, lead smelting, secondary aluminum, pharmaceuticals, shipbuilding, and aerospace manufacturing. On July 6, 2010, EPA lodged a consent decree that required EPA to revise MACT standards for all 28 categories.
***Sierra Club v. Jackson* (AL and GA SIPs)** 11-02000 (D.D.C.) Settled: 7/20/2012	EPA	**Issue**: AL SIP submission for 1997 $PM_{2.5}$ NAAQS and GA SP submission for 1997 ozone NAAQS **Result**: EPA agreed to take final action on "numerous SIP submittals" by AL for the 1997 $PM_{2.5}$ NAAQS and GA for the 1997 8-hour ozone NAAQS.
***Sierra Club v. Jackson* (AR Regional Haze)**	EPA	**Issue**: AR Regional Haze SIP

Case	Agency	Issue and Result
10-02112 (D.D.C.) Settled: 8/3/2011		**Result**: EPA agreed to sign a notice of final rulemaking to approve or disapprove the AR Regional Haze SIP.
Sierra Club v. Jackson **(Boiler MACT and RICE rule)** 01-01537 (D.D.C.) Settled: RICE and Boiler MACT: 5/22/03 (consent decree). For RICE: 11/15/07 amendment to change deadlines; 11/9/09 amendment to change deadlines; 2/10/10 was a third modification to the deadline.	EPA	**Issue**: MACT standards for boilers and stationary reciprocating internal combustion engines (RICE) **Result**: In 2003, EPA and Sierra Club entered into a consent decree that required MACT standards for boilers and RICE. There were other MACT standards requirements as well. For Boiler MACT: The rule history is extremely complicated. In 2006, the DC District court issued an order detailing a schedule. EPA and Sierra Club both agreed multiple times to extend the deadline to finalize rules. However, Sierra Club opposed EPA's motion to extend a January 16, 2011 deadline that was established in a September 20, 2010, order, from January 16, 2011 to April 13, 2012. EPA realized that it needed much more time for the final rules. Judge Paul Friedman of the DC District Court decided that enough was enough and gave EPA only one month to issue the rules. EPA did in fact issue the rule on March 21, 2011, and that same day published a notice of reconsideration. The final rules based on the reconsideration were published on January 31, 2013, and February 1, 2013. For the RICE rule: In 2007, 2009, and 2010, EPA and Sierra Club modified the deadline dates for final action as required in the decree. EPA agreed to take additional comment on the RICE rule in June and October 2012, and published the final RICE rule in January 2013.
Sierra Club v. Jackson **(DSW Rule)** 09-1041 Consol. with 09-1038 (D.C. Cir.) Settled: 9/7/2010 (see also proposed rule that says this date, pp. 44, 102)	EPA	**Issue**: Revisions to the Definition of Solid Waste under RCRA **Result**: Sierra Club challenged the 2008 "Definition of Solid Waste" rule, which established requirements for recycling hazardous secondary materials. To settle the lawsuit, EPA agreed it would review and reconsider the rule. In July 2011, EPA published a proposed rule, significantly tightening the types of materials that can be recycled under RCRA.
Sierra Club v. Jackson **(Houston-Galveston-Brazoria)** 12-00012 (D.D.C.) Settled: 6/21/2012	EPA	**Issue**: TX SIP submission for 1997 ozone NAAQS **Result**: EPA agreed to take final action on the SIP for the Houston-Galveston-Brazoria 1997 8-hour ozone nonattainment areas.
Sierra Club v. Jackson **(Kentucky Regional Haze)** 10-00889 (D.D.C.) Settled: 10/29/2010	EPA	**Issue**: KY SIP submissions for 1997 ozone NAAQS and Regional Haze **Result**: EPA agreed to the following: By April 15, 2011, EPA would take final action on ozone SIP submittals for various Kentucky ozone maintenance areas; by March 15, 2012, EPA would take final action on KY's Regional Haze SIP.
Sierra Club v. Jackson **(MA, CT, NJ, NY, PA. MD, and DE SIPs)** 11-02180 (D.D.C.) Settled: 7/23/2012	EPA	**Issue**: SIP submissions for certain NAAQS by MA, CT, NJ, NY, PA, MD, and DE **Result**: EPA agreed to take final actions on SIPs for certain NAAQS for MA, CT, NJ, NY, PA, MD, and DE.
Sierra Club v. Jackson **(ME, MO, IL, and WI SIPs)** 11-00035 (D.D.C.) Settled: 11/30/2011	EPA	**Issue**: SIP submissions for 1997 ozone NAAQS by ME, MO, IL, and WI **Result**: EPA agreed to take final action on the SIPs for certain areas of IL, ME, and MO. Wisconsin was not included because the issue was already

Case	Agency	Issue and Result
		resolved.
***Sierra Club v. Jackson* (NC and SC SIPs)** 12-00013 (D.D.C.) Settled: 6/28/2012	EPA	**Issue**: NC and SC SIP submissions regarding 1997 ozone NAAQS **Result**: EPA agreed to take final actions on North Carolina and South Carolina SIPs for Charlotte-Gastonia-Rock Hill.
***Sierra Club v. Jackson* (OK SIP)** 12-00705 (D.D.C.) Settled: 10/15/2012	EPA	**Issue**: OK SIP revision regarding excess emissions **Result**: EPA agreed to ake final action on a revision to the OK SIP regarding excess emissions.
***Sierra Club v. Jackson* (ozone TX, CT, MD, NY, NJ, MA, and NH)** 11-00100 (D.D.C.) Settled: 9/12/2011	EPA	**Issue**: Attainment determinations for 1-hour ozone for areas in TX, CT, MD, NY, NJ, MA, and NH **Result**: EPA agreed to make attainment determinations for 1 hour ozone for areas in TX, CT, MD, NY, NJ, MA, and NH.
***WildEarth Guardians et al. v. Jackson* (ozone AZ, NV, PA, and TN)** 10-04603 (N.D. Cal.) Settled: 3/23/2011 (Date found in the notice of proposed settlement)	EPA	**Issue**: Nonattainment of 1997 ozone NAAQS for areas in AZ, NV, PA, and TN **Result**: EPA agreed to set a deadline for issuing findings of failure to submit SIPs for the 1997 ozone NAAQS for areas in NV and PA. Other actions addressed concerns in two other states.
***WildEarth Guardians v. Jackson* (2008 ozone NAAQS)** 11-01661 (D. Ariz.) Settled: 12/12/2011	EPA	**Issue**: Area designations for 2008 ground level ozone NAAQS **Result**: EPA agreed to sign for publication in the Federal Register a notice of the Agency's promulgation of area designations for the 2008 ground-level ozone NAAQS.
***WildEarth Guardians v. Jackson* (2nd suit for Phoenix)** 11-02205 (N.D. Cal.) Settled: 6/7/2011	EPA	**Issue**: AZ SIP submission for 1997 ozone NAAQS **Result**: EPA agreed to take action on AZ SIP submission pertaining to Phoenix-Mesa's plan to achieve progress toward attainment of 1997 ozone NAAQS. EPA issued a final rule on June 13, 2012.
***WildEarth Guardians v. Jackson* (CO, UT, MT, and NM SIPs)** 09-02148 (D. Colo.) Settled: 2/1/2010	EPA	**Issue**: Final action on 22 SIP submissions from CO, UT, and MT **Result**: EPA agreed to take final action on 22 SIP submissions from CO, UT, and MT, and then added 19 SIP submissions from NM, for a total of 41 SIP submissions.
***WildEarth Guardians v. Jackson* (oil and gas)** 09-00089 (D.D.C.) Settled: 12/3/2009	EPA	**Issue**: Clean Air Act Regulations on Oil and Gas Drilling Operations **Result**: In January 2009, environmental groups sued EPA to update federal regulations limiting air pollution from oil and gas drilling operations. EPA settled with environmentalists on December 3, 2009. The settlement required EPA to review and update three sets of regulations: (1) NSPS for oil and gas drilling; (2) MACT standards for hazardous air pollutant emissions; (3) and "residual risk" standards. On August 23, 2011, EPA proposed a comprehensive set of updates to these rules, including new NSPS and MACT standards. On August 16, 2012, EPA issued final rules covering NSPS, MACT, and residual risk for the oil and gas sector.

Case	Agency	Issue and Result
***WildEarth Guardians v. Jackson* (ozone)** 09-02453 (N.D. Cal.) Settled: 2/18/2010	EPA	**Issue**: SIP submissions for 1997 8-hour ozone and $PM_{2.5}$ NAAQS by CA, CO, ID, NM, ND, OK, and OR **Result**: EPA agreed to decide, for each state, whether to approve or deny SIPs for the 1997 8-hour ozone and $PM_{2.5}$ NAAQS, or whether to instead force the states to comply with a federal implementation plan.
***WildEarth Guardians v. Jackson* ($PM_{2.5}$)** 11-00190 (N.D. Cal.) Settled: 8/25/2011	EPA	**Issue**: SIP submissions for 2006 $PM_{2.5}$ MAAQS infrastructure by 20 states **Result**: EPA agreed to sign a final action to approve or disapprove the 2006 $PM_{2.5}$ NAAQS infrastructure SIPs for AL, CT, FL, MS, NC, TN, IN, ME, OH, NM, DE, KY,NV, AR, NH, SC, MA, AZ, GA, and WV.
***WildEarth Guardians v. Jackson* (CO, WY, MT, and ND SIPs)** 11-00001 (Consolidated with 11-00743) (D. Colo.) Settled: 6/6/2011	EPA	**Issue**: CO, WY, MT, and ND SIP submissions for Regional Haze and excess emissions standards **Result**: EPA agreed to decide for each state whether to approve or deny the SIP submissions.
***WildEarth Guardians v. Jackson* (Utah breakdown provision)** 09-02109 (D. Colo.) Settled: 11/23/2009	EPA	**Issue**: Utah SIP revision regarding breakdown provision **Result**: EPA agreed to take a final action regarding the "Utah breakdown provision," which allows sources to exceed their permitted air pollution limits during periods of "unavoidable breakdown." In April 2011, EPA found the breakdown provision inadequate and called on the state to revise its SIP.
***WildEarth Guardians v. Jackson* (Utah SIP)** 10-01218 (D. Colo.) Settled: 10/28/2010	EPA	**Issue**: Utah SIP submissions for Regional Haze and PM_{10} NAAQS **Result**: EPA agreed to sign a final action approving or disapproving, in whole or in part, Utah's request to redesignate Salt Lake City's attainment status for PM_{10} NAAQS. EPA also agreed to take final action on Utah's Regional Haze submission.
***WildEarth Guardians v. Jackson, et al.* (Utah Salt Lake and Davis Counties SIP)** 12-00754 (D. Colo.) Settled: 7/11/2012	EPA	**Issue**: Deadline for action on Utah SIP for 1997 NAAQS for ozone regarding Salt Lake and Davis Counties **Result**: EPA agreed to sign a notice of final action regarding Utah's proposed SIP revision for maintenance of the 1997 8-hour NAAQS for ozone in Salt Lake and Davis Counties.
WildEarth Guardians v. Kempthorne 08-00689 (D. Ariz.) Settled: 4/29/2009	DOI	**Issue**: Critical habitat designation for the Chiricahua leopard frog **Result**: DOI under the Bush administration listed the leopard frog as threatened under the Endangered Species Act but declined to designate a critical habitat because doing so would not be "prudent," as is permitted by the Endangered Species Act. WildEarth Guardians sued to challenge this decision, and the Obama administration's DOI settled the case. The terms of the settlement provided that DOI would reconsider its prudency determination. On March 20, 2012, DOI finalized a rule that reversed its prudency decision and designated approximately 10,346 acres as critical habitat for the Chiracahua leopard frog.
WildEarth Guardians v. Locke 10-00283 (D.D.C.)	Dept. of Commerce	**Issue**: Alleged failure by National Marine Fisheries Service (NMFS) to set Endangered Species Act protections for sperm whales, fin whales, and sei

Case	Agency	Issue and Result
Settled: 6/25/2010		whales **Result**: NMFS agreed to issue recovery plans for sperm whales, fin whales, and sei whales by the end of 2011.
***WildEarth Guardians v. Salazar* (674 species)** 08-00472 (D.D.C.) Settled: 3/13/2009	DOI	**Issue**: DOI non-action on plaintiff's petitions to list 674 plant and animal species as threatened under the Endangered Species Act **Result**: DOI agreed to issue decisions on hundreds of species for which no finding had already been made.
***WildEarth Guardians v. Salazar* (Wright's marsh thistle)** 10-01051 (D.N.M.) Settled: 6/2/2010	DOI	**Issue**: DOI non-action on petition to list the Wright's marsh thistle as endangered or threatened under the Endangered Species Act **Result**: DOI agreed to issue a decision on whether to list the the Wright's marsh thistle. FWS listed the Wright's marsh thistle as endangered or threatened on November 4, 2010 (it was a 12-month petition finding).

Most sue and settle cases are resolved through a consent decree or settlement agreement. However, there is a comparable type of case in which the case is resolved by agency action in response to the legal challenge, as opposed to resolving the case with a consent decree or settlement agreement. Like with the "standard" sue and settle cases, special interests bring legal actions to compel agencies to take their desired actions. A common thread between the cases is the special interests are able to change policy affecting the general public without the public having sufficient notice or opportunity to change agency actions.

Case	Agency	Issue and Result
California v. EPA 08-1178 (D.C. Cir.) Settled: 6/30/2009 (EPA granted the waiver; see also EPA waiver web page)	EPA	**Issue**: Grant of California GHG Waiver **Result**: EPA, California, environmental groups and the automobile industry negotiated a settlement of a multi-party lawsuit requesting that EPA set Clean Air Act Title II emissions limitations on GHG emissions from automobiles, and granting California a waiver to set its own automobile GHG standards. EPA had previously denied the waiver in 2008; a lawsuit followed. In January, 2009, California asked for reconsideration of the waiver request. EPA granted the waiver in June 2009 (the notice was published in the Federal Register on July 8, 2009).
Center for Biological Diversity v. Kempthorne 08-05546 (lead case--a consolidated case is NRDC v. DOI, 08-05605) (N.D. Cal.) Settled: 5/14/2009	DOI, NMFS, Dept. of Commerce	**Issue**: December 2008 amendments to the Section 7 consultation rules under the Endangered Species Act and the decision to exempt greenhouse gas emitters from regulation under the Endangered Species Act **Result**: While the lawsuit was pending, the Department of Interior unilaterally revoked the Section 7 rule at issue, reverting to the Section 7 consultation process as it existed prior to the December 2008 amendments. The parties to this lawsuit then jointly agreed to dismiss the case. A formal settlement agreement was not issued.
Greater Yellowstone Coalition v. Kempthorne 08-02138 (D.D.C.) Settled: 11/2/2009	National Park Service, DOI	**Issue**: December 2008 rule allowing limited recreational snowmobile use (720 snowmobiles per day) inside Yellowstone National Park **Result**: While the lawsuit was pending, the National Park Service

Case	Agency	Issue and Result
		announced, on October 15, 2009, a new winter rule superseding the December 2008 rule of which the plaintiffs complained. The plan reduced snowmobile usage to 318 snowmobiles per day, which is less than half the allowed number under the prior rule.
League of Wilderness Defenders-Blue Mountains Biodiversity Project v. Kevin Martin 09-01023 (D. Or.) Settled: Stipulation of Dismissal, 12/30/2009	U.S. Forest Service	**Issue**: Whether authorization of the Wildcat Fuels Reduction and Vegetation Management Project in the Umatilla National Forest violates NEPA and Administrative Procedure Act **Result**: U.S. Forest Service agreed to withdraw its decision notice for the project, which would have allowed timber to be harvested from the National Forest. The parties then agreed to dismiss the case.
***Mississippi v. EPA* (ozone case)** 08-1200 (D.C. Cir.) Settled: 1/19/2010 (This is the publication date of the proposed ozone standards)	EPA	**Issue**: Ozone NAAQS Reconsideration **Result**: Earthjustice sued EPA in 2008 challenging the NAAQS for ground-level ozone, which were lowered at the time from 84 parts per billion (ppb) to 75 ppb. In 2009, EPA announced it would reconsider the rule, and Earthjustice agreed to place its lawsuit on hold as long as EPA imposed stricter ozone NAAQS. EPA proposed new NAAQS somewhere in the range of 60 and 70 ppb. The Obama Administration put the planned rule on hold. However, the rule is expected to be proposed in late 2013.
Natural Resources Defense Council v. Federal Maritime Commission 08-07436 (C.D. Cal.) Settled: 9/11/2009	Federal Maritime Comm'n	**Issue**: Federal Maritime Commission (FMC) decision to terminate portions of the Port of Los Angeles' and Long Beach's Clean Trucks Programs **Result**: While the lawsuit was pending, FMC ended its administrative investigation against the Ports of Los Angeles and Long Beach related to their clean trucks programs, and in a related case, FMC's attempt to block implementation of the ports' clean trucks program was dismissed.
Natural Resources Defense Council v. DOI 08-05605 (N.D. Cal.) Settled: 5/15/2009	DOI, NMFS, Dept. of Commerce	**Issue**: December 2008 amendments to the Section 7 consultation rules under the Endangered Species Act and the decision to exempt greenhouse gas emitters from regulation under the Endangered Species Act **Result**: While the lawsuit was pending, the Department of Interior unilaterally revoked the Section 7 rule at issue, reverting to the Section 7 consultation process as it existed prior to the December 2008 amendments. The parties to this lawsuit then jointly agreed to dismiss the case. A formal settlement agreement was not issued.
Ohio Valley Environmental Coalition v. Army Corps of Engineers 09–247 (R46–024) (U.S.) Settled: 7/30/2010 (Memo that effectively settled the case)	EPA	**Issue**: Clean Water Act Guidance for Mountaintop Removal Mining Permits **Result**: Environmental groups challenged Clean Water Act permitting for mountaintop removal mining, saying EPA did not account for the impact on stream function. EPA issued this "guidance" while suit was pending in the U.S. Supreme Court, which effectively settled the case.
***Sierra Club v. EPA* (emission case)** 09-1063 (D.C. Cir.) Settled: 6/15/2010 EPA revoked the rule	EPA	**Issue**: Emission-Comparable Fuels (ECF) conditional exclusion reconsideration **Result**: EPA issued a December 2008 rule creating a category of Emission-Comparable Fuels (ECF) wastes that could be burned in industrial boilers without triggering RCRA combustion requirements, as long as the resulting

Case	Agency	Issue and Result
		emissions were comparable to those produced by burning fuel oil. Environmental groups sued, and EPA proposed a rule that would withdraw this conditional exclusion for ECF. In June, 2010, EPA published a final rule that revoked this conditional exclusion.
Southern Appalachian Mountain Stewards v. Anninos	Army Corps	**Issue**: Decision to issue a streamlined nationwide Clean Water Act permit for surface coal mining **Result**: Army Corps suspended the use of Nationwide Permit 21, which authorized discharges of dredged or fill material into waters of the United States for surface coal mining activities. As a result, coal mining companies must obtain costly, time-consuming individual dredge and fill permits from the Corps.
09-00200 (Complaint, Army Corps Joint Status Report (stating decision to suspend NWP 21 permit), Stipulation of Dismissal)		
Settled: 6/18/2010 (This date is based on a 6/30/10 status report explaining the suspension of permits as of 6/18/10)		
Taylor v. Locke	National Marine Fisheries Service (NMFS)	**Issue**: Atlantic Herring Fishery Revocation of Exemption **Result**: Settlement removes exemption that allowed herring industrial trawlers to release small amounts of fish that remain after pumping without federal inspection. The new final rule by NMFS, published in 2010, requires federal accounting and inspection for all fish brought on board.
09-02289 (D.D.C.)		
Settled: 7/19/2010		

List of Rules and Agency Actions

Rules and Agency Actions Resulting From Sue and Settle Cases (Pending or Final) 2009–2012

Air

- The Environmental Protection Agency (EPA) agreed to propose the first-ever greenhouse gas (GHG) regulations for power plants.
- EPA agreed to propose the first-ever GHG regulations for petroleum refineries.
- EPA issued Maximum Achievable Control Technology (MACT) standards for cement kilns.
- EPA revoked rule that made it easier to burn Emission Comparable Fuel wastes.
- EPA proposed stricter ozone standards (withdrawn, but could be published at any time).
- EPA issued a rule that made the National Ambient Air Quality Standards (NAAQS) for particulate matter more stringent.
- EPA issued MACT standards for hazard air pollutants for coal- and oil-fired electric utility steam generating units (Utility MACT).
- EPA granted waiver to CA to set its own limitations on GHG emissions from automobiles.
- EPA to increase regulations on oil- and gas-drilling operations regulations, including:
  - New Source Performance Standards (NSPS) for oil and gas drilling
  - MACT standards for hazardous air pollutant emissions
  - Residual Risk Standards
- EPA finalized new MACT standards for polyvinyl chloride manufacturers.
- EPA agreed to set MACT standards for brick and structural clay products manufacturing facilities located at major sources and clay ceramics manufacturing facilities located at major sources.
- EPA imposed a Federal Implementation Plan (FIP) on OK impacting three coal-fired power plants.
- EPA imposed an FIP on ND impacting seven coal-fired power plants.
- EPA imposed an FIP on NM impacting one coal-fired power plant.
- EPA imposed an FIP on NE impacting one coal-fired power plant.
- EPA agreed to review kraft pulp NSPS.
- EPA revised NSPS for nitric acid plants.
- EPA agreed to review national emissions standards for radon emissions from operating mill tailings.
- EPA agreed to review NSPS for municipal solid waste landfills.
- EPA issued MACT standards for boilers (Boiler MACT).
- EPA issued MACT standards for stationary reciprocating internal combustion engines (RICE rule).

EPA issuing MACT standards for:

- Marine tank vessel loading operations
- Pharmaceuticals production
- Printing and publishing industry
- Hard and decorative chromium electroplating and chromium anodizing tanks
- Steel pickling—HCL process facilities and hydrochloric acid regeneration plants
- Group I polymers and resins
- Shipbuilding and ship repair
- Ferroalloys production—ferromanganese and silicomanganese
- Wool fiberglass manufacturing
- Secondary aluminum production
- Pesticide active ingredient production
- Polyether polyols production
- Group IV polymers and resins
- Flexible polyurethane foam production
- Generic MACT—acrylic and modacrylic fibers

- Wood furniture manufacturing operations
- Primary lead smelting
- Secondary lead smelting
- Pulp and paper production industry
- Aerospace manufacturing and rework facilities
- Mineral wool production
- Primary aluminum reduction plants
- Portland cement manufacturing industry
- production
- Generic MACT—polycarbonate production
- Off-site waste and recovery operations
- Phosphoric acid manufacturing
- Phosphate fertilizers production plants
- Group III polymers and resins—manufacture of amino/phenolic resins

EPA agreed to take action on the following proposals related to State Implementation Plans (SIPs):

- CA SIP revision regarding San Joaquin Valley (SJV) 1997 $PM_{2.5}$ attainment plan
- CA SIP revision regarding rule changes for SJV Unified Air Pollution Control District
- CA SIP revision regarding particulate matter from beef feedlot operations
- CA SIP revision regarding PM_{10} emissions in Imperial County
- CA SIP revision regarding air quality rules in Imperial County
- Pesticide Element SIP submittal and the Fumigant Rules submittal
- KY SIP submission regarding 1997 $PM_{2.5}$ NAAQS for the Huntington-Ashland area
- KY SIP submission regarding 1997 $PM_{2.5}$ NAAQS emissions inventory for Louisville
- EPA agreed to issue a federal plan if Louisiana regulators do not attain 1997 ozone standards in Baton Rouge
- CA SIP revisions addressing 1997 $PM_{2.5}$ and ozone NAAQS for South Coast Air Basin
- 1997 ozone NAAQS revision for NC, NV, ND, HI, OK, AK, ID, OR, WA, MD, VA, TN, AR, AZ, FL, and GA
- CA SIP submission demonstrating RACT for SJV
- CA SIP submission for 1997 ozone NAAQS plan for SJV
- 1997 ozone NAAQS submission by NY, NJ, CT, MA, IL, and MO
- TX SIP submission addressing 1997 ozone and $PM_{2.5}$ NAAQS
- EPA required to approve or disapprove ozone NAAQS SIPs for 21 states
- AL SIP for 1997 $PM_{2.5}$ NAAQS and GA SIP for 1997 8-hour ozone NAAQS
- AR regional haze SIP
- TX SIP submission for Houston-Galveston-Brazoria 1997 8-hour ozone nonattainment areas
- KY SIP submission addressing 1997 ozone NAAQS in 3 counties
- SIP submission for certain NAAQS for MA, CT, NJ, NY, PA, MD, and DE
- SIPS for certain areas of IL, ME, and MO
- NC and SC SIP submissions for 1997 ozone NAAQS
- OK SIP submission regarding excess emissions
- Determination of 1-hour ozone attainment designations for areas in TX, CT, MD, NY, NJ, MA, and NH
- 1997 ozone NAAQS for areas in NV and PA
- Determination of area designations for the 2008 ground-level ozone NAAQS
- AZ SIP submission regarding plan for 1997 NAAQS attainment in Phoenix-Mesa
- 41 SIP submissions by CO, UT, MT, and NM
- SIP submissions for 1997 8-hour ozone and $PM_{2.5}$ NAAQS by CA, CO, ID, NM, ND, OK, and OR
- 2006 $PM_{2.5}$ NAAQS Infrastructure SIP submissions by AL, CT, FL, MS, NC, TN, IN, ME, OH, NM, DE, KY, NV, AR, NH, SC, MA, AZ, GA, and WV
- SIP submissions regarding regional haze and excess emissions standards in CO, WY, MT, and ND
- UT SIP revision regarding the "breakdown provision"
- Two UT SIP submissions, including one on regional haze
- 1997 8-hour NAAQS for ozone in Salt Lake and Davis Counties (UT)
- UT SIP submission addressing PM_{10} NAAQS designations for Salt Lake County, Utah County, and Ogden City

Land

- U.S. Forest Service (USFS) considering blocking 1 million acres in CA federal parks from development.
- EPA considering revisions to "definition of solid waste."
- Office of Surface Mining agreed to consider restricting mining activities near waterways (Stream Buffer Zone Rule).
- The Bureau of Land Management agreed to consider amending 12 resource management plans that opened 2

million acres of federal lands for potential oil shale leasing.
- National Park Service reduced snowmobile usage inside Yellowstone National Park.
- USFS agreed to withdraw its decision notice regarding the "Wildcat" project on the Umatilla National Forest.

Plants and Animals

- National Marine Fisheries Service (NMFS) imposed inspection requirements for Atlantic Herring Fishery.
- Fish and Wildlife Service (FWS) doubled size of critical habitat of Hine's emerald dragonfly to more than 26,000 acres in MI and MO.
- The Department of the Interior (DOI) designated about 10,386 acres of critical habitat for Chiracahua leopard frog.
- DOI agreed to issue decisions that had not already been made on hundreds of plant and animal species from list of 674 species.
- FWS listed the whitebark pine tree as an endangered species as a result of climate change.
- NMFS agreed to issue recovery plans for sperm plans, fin whales, and sei whales.
- DOI agreed to issue 12-month findings under the Endangered Species Act on 12 species of parrots, macaws, and cockatoos.
- USFS agreed to make final determinations under the Endangered Species Act for 251 species.
- FWS agreed to make findings under the Endangered Species Act for at least 477 species.
- DOI agreed to issue a decision whether to list Wright's marsh thistle.

Water

- New water quality standards for FL (inland).
- New water quality standards for FL (coastal).
- Guidance for mountaintop removal mining permits.
- EPA issued guidance on how states should address ocean acidification under the Clean Water Act.
- Army Corps of Engineers suspended nationwide surface coal mining permit.
- EPA finalizing rule regulating cooling water intake structures.
- EPA agreed to issues rules that revise steam electric effluent guidelines.
- EPA agreed to establish a total maximum daily load for the Chesapeake Bay.
- EPA agreed to develop changes to its stormwater regulations nationally.

Other

- EPA issued stricter pesticide human-testing consent rule.
- EPA agreed to issue specific changes to the Lead Renovation, Repair and Painting Program Rule.
- Federal Maritime Commission ended its administrative investigation of the ports of Los Angeles and Long Beach related to their clean trucks program.

Appendix A

Methodology I for Identifying Cases in the Sue and Settle Database

To identify the cases included in the current version of the sue and settle database, the following approaches were used:

The database was *only* designed to capture examples of major sue and settle cases. To accomplish this, a multijurisdictional federal court search was conducted in 2011 using Lexis-Nexis looking at cases 2.5 years before the start of the Obama administration and 2.5 years after (through June 2011). The names of numerous environmental groups were used and dockets of cases were identified.

For those cases identified that were still open, they were not pursued any further because an open case is by its nature not a sue and settle case. If the case was closed, then the case was searched on PACER (www.pacer.gov). If there was a settlement, relevant cases were included in a larger database that included challenges to projects. In the current version of the database, challenges to projects were excluded.

To add major cases or cross-check the existing database:

- A search was conducted in the Fall Unified Agendas for 2009–2012.[79] Economically significant active, completed, and long-term actions were searched. If a consent decree or settlement agreement was listed as being connected to a specific rule, a case search was conducted to verify this information.
- House Report 112-593, which is the House Report for the Sunshine for Regulatory Decrees and Settlements Act of 2012 (H.R. 3862), included information on sue and settle cases. These cases were either added or cross-checked with the database, as was information from the following House testimony: *Addressing Off Ramp Settlements: How Legislation Can Ensure Transparency, Public Participation, and Judicial Review in Rulemaking Activity*, Testimony of Roger R. Martella, Jr. before the House Committee on the Judiciary, Feb. 2, 2012; and *The Use and Abuse of Consent Decrees in Federal Rulemaking*, Testimony of Andrew M. Grossman before the House Committee on the Judiciary, Feb. 2, 2012.
- The following GAO report was used: GAO, *Environmental Litigation: Cases Against EPA and Associated Costs Over Time* GAO-11-650 (Washington, D.C.: August, 2011). The U.S. Chamber's report on regional haze and sue and settle was also used: *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs, Chamber of Commerce of the United States*, William Yeatman (August 2012). In addition,

[79] Since only one Unified Agenda was published in 2012, which was in December, this agenda was used for 2012.

environmental groups announce settlements and lawsuits on their websites—this information served as a resource.

The database includes environmental-related cases, regardless of federal agency or federal statute; however, actions that were not of general applicability (except for some FOIA cases) were excluded, such as enforcement actions and Title V permit cases.

Appendix B

Methodology II for Identifying Cases in the Sue and Settle Database

Clean Air Act

Clean Air Act settlement agreements and were compiled using a database search of the *Federal Register*. Pursuant to Clean Air Act section 113(g), all settlement agreements and consent decrees must be announced in the *Federal Register*. The search terms were:

- Agency: "Environmental Protection Agency"
  Title: "Settlement Agreement" or "Consent Decree"
  Dates: Between "1/20/2009" and "1/20/2013"

All settlement agreements and consent decrees pursuant to a Title V challenge or an enforcement action were removed in order to ensure that the settlement agreement or consent decree had a general applicability.

It was possible to determine whether EPA and the petitioners either litigated or went straight to negotiations by checking the case docket using www.pacer.gov.

Clean Water Act

Clean Water Act settlement agreements pursuant to citizen deadline suits are not announced in the *Federal Register*. Two techniques were used to find them.

The first was a database search of "Inside EPA," and used two sets of search terms:

- "Clean Water Act" and "Settlement Agreement"
  "Clean Water Act" and "Consent Decree"

The second was a database search of the *Federal Register*. Instead of searching for announcements of settlement agreements (as had been done for the Clean Air Act), regulations pursuant to Clean Water Act settlement agreements or consent decrees were searched. The search terms were as follows:

- Agency: "Environmental Protection Agency"
  Title: "Clean Water Act"
  Full Text or Metadata: "Settlement Agreement" or "Consent Decree"
  Dates: Between "1/20/2009" and "1/20/2013"

As with the Clean Air Act methodology, all settlement agreements and consent decrees pursuant to an enforcement action were removed to ensure that the settlement agreement or consent decree had general applicability. It was possible to determine whether EPA and the petitioners either litigated or went straight to negotiations by checking the case docket using www.pacer.gov.

Reconsideration of 2008 Ozone NAAQS

Boiler MACT Rule

Lead RRP Rule

$2.16 billion

Regional Haze Implementation Rules

$9.6 billion

Utility MACT Rule

Standards for Cooling Water Intake Structures

$18 billion

$90 billion

Florida Nutrient Standards for Estuaries and Flowing Waters

$3 billion

Revision to the Particulate Matter ($PM_{2.5}$) NAAQS

$350 million

$500 million

TMDL for Chesapeake Bay

Oil and Natural Gas MACT Rule

$384 million

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