CLEARING UP PERCEIVED PROBLEMS WITH THE SUE-AND-SETTLE ISSUE IN ENVIRONMENTAL LITIGATION

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I. INTRODUCTION

Advocacy groups and associations representing industries, regulated entities, and environmental causes have a long history of using citizen suits in environmental litigation. Citizen suit provisions of certain environmental laws[1] allow private citizen plaintiffs

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access to federal courts to force agencies to perform non-discretionary duties[2], including the area of analysis highlighted within this paper, informal rulemaking. Recently, there has been focused attention on the citizen suit practice of "sue-and-settle" in environmental litigation. Sue-and-settle is a process whereby an advocacy group sues a regulatory agency, charging the agency with violation of a non-discretionary statutory duty.[3] The agency, rather than defend itself at trial, settles with the advocacy group. The resulting settlement agreement or consent decree[4] binds the agency to take action to resolve the plaintiffs' claims.[5]

While the impact of sue-and-settle on the regulatory process is under continued study and evolution, the issue of its role in the rulemaking process is the center of a reignited discussion, taking on national significance. Legislation to reform the process has been introduced in the U.S. House and Senate over the past two sessions and political debate on the issue has made national headlines.[6] The debate regarding the current use and proliferation of the sue-and-settle practice suggests a potential misunderstanding of the legality and mechanism of the practice. This misunderstanding and critique may be resolved by an analysis of the legislative intent and an explanation of changes to the rulemaking process, which could improve the directness of the mechanism and its potential elements. Additionally, sue-and-settle within environmental litigation has, in recent years, undergone much scrutiny for perceived misuse of rulemaking authority. However, the sue-and-

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1. Provisions of these suits are included in the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9659 (2012), Clean Air Act, 42 U.S.C. § 7604(a)(2) (2012), the Clean Water Act, 33 U.S.C. § 1365(a)(2) (2012), and the Endangered Species Act, 16 U.S.C. § 1540(g)(1)(C) (2012), Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (2012) [hereinafter Environmental Citizen Suit Provisions].

2. *See* Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 119 (2002) (discussing the role of citizen suits in regulatory enforcement).

3. Ben Tyson, *An Empirical Analysis of Sue-and-Settle in Environmental Litigation*, 100 VA. L. REV. 1545 (2014).

4. Hereinafter both types of resolution (settlement agreement or consent decree) are referred to as "consent decrees" and are functionally the same, unless otherwise noted. The principal difference between consent decrees and settlement agreements is the court reviews consent decrees for validity before entry and can force compliance by the parties, while settlement agreements take their force from the law of contracts and require no ex-ante court approval. *See* Peter M. Shane, *Federal Policy Making by Consent Decree: An Analysis of Agency and Judicial Discretion*, 1987 U. CHI. LEGAL F. 241, 266 n.98 (2015) (describing the primary practical difference between settlement agreements and consent decrees).

5. William Kovacs, Keith Holman, & Jonathan Jackson, U.S. Chamber of Commerce, *Sue-to-Settle: Regulating Behind Closed Doors* 3-4 (2013) [hereinafter Chamber Report].

6. *See, e.g.*, Sunshine for Regulatory Decrees and Settlements Act of 2015, H.R. 712, 114th Cong. (2015) (proposed legislation to change the sue-and-settle process); *see also* Stephen Moore, Editorial, *Cross Country: Using 'Sue and Settle' to Thwart Oil and Gas Drillers*, WALL ST. J., Oct. 5–6, 2013, at A11 (example of national news coverage).

settle mechanism is actually a useful part of the democratic process due to the issues surrounding environmental regulation and the lack of resources allocated to implement the available programs for successful environmental protection.

This paper intends to better inform the ongoing discussion over the sue-and-settle process and provide further insight into the potential courses of action that can be taken in the future to refine and reshape the process. One specific recommendation is potential legislative actions to increase public involvement and transparency of the process, result, and agency actions. Part I will provide an overview of the citizen suit and sue-and-settle history and process, noting the current trends in litigation present today, causing much of the debate about the practice. A description of arguments against the practice will explain some of the negative reaction creating the political hot topic regarding the perceived undermining of executive rulemakings or legislative policymaking. Part II will provide an analysis of the legislative history of citizen suit provisions within environmental statutes and their use within the scope of agency authority. Part III will include a specific analysis of the mechanisms of the sue-and-settle process within rulemaking, including comment and agency decisions. Part IV provides proposed targeted remedies to residual concerns identified as significant factors in the process and other issues, which have not been settled, including process remedies to promote transparency, consistency, and review.

II. SUE-AND-SETTLE IN ENVIRONMENTAL LITIGATION

A. Sue-and-Settle Defined

Sue-and-settle is not a legal term, but rather a descriptive term commentators employ to describe a particular administrative law litigation practice.[7] To initiate the process, an outside group sues a federal agency through a citizen suit arguing the agency neglected its statutory obligation to issue a regulation or otherwise perform a non-discretionary act.[8] To avoid further litigation, the outside group and the regulatory agency agree on a settlement and take the settlement to the court where the suit is pending.[9] The court subsequently makes a judgment on the consent decree, approving or disapproving it, on the basis of whether it is "fair, reasonable,

7. Tyson, *supra* note 33, at 1548.
8. Chamber Report, *supra* note 5, at 4.
9. *Id.*

adequate, and consistent with applicable law."[10] Specifically, "the underlying purpose of this review is to determine whether the decree adequately protects and is consistent with the public interest."[11] To agree to entry of a consent decree, the presiding judge must determine the consent decree is not "illegal, a product of collusion, inequitable, or contrary to the public good."[12] The sue-and-settle process is common under three environmental statutes: the Clean Air Act ("CAA"), the Clean Water Act ("CWA"), and the Endangered Species Act ("ESA").[13]

The citizen suit provisions in environmental statutes, such as the CAA, 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 to be necessary and desirable.[14] The CAA incorporated the first modern civil suit provision in 1970.[15] Since then, almost all major environmental statutes have included citizen suit provisions, which closely model those in the CAA.[16] Congress thereby created a cause of action for private citizens to argue the agency neglected its statutory obligation to issue a regulation or otherwise perform a non-discretionary act. Citizen suits have contributed to the U.S. Environmental Protection Agency's ("EPA") ultimate goal of increasing compliance in the regulated community and, in many ways, have acted as sustenance to a starving agency.[17] The EPA historically has, to some extent, welcomed citizen suits to alleviate the tension created by demand, which outstrips the agency's supply in arenas such as enforcement.[18]

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10. *Id.*; United States v. BP Exploration & Oil Co., 167 F. Supp. 2d 1045, 1049 (N.D. Ind. 2001) (citing, *inter alia*, United States v. Union Elec. Co., 132 F.3d 422, 430 (8th Cir. 1997)).

11. *Id.* (citing United States v. Seymour Recycling Corp., 554 F. Supp. 1334, 1337 (S.D. Ind. 1982)).

12. Tyson, *supra* note 3, at 1548 (citing, *inter alia*, United States v. City of Jackson, 519 F.2d 1147, 1151 (5th Cir. 1975)).

13. Clean Air Act, 42 U.S.C. §§ 7401-7671q (2012); Clean Water Act, 33 U.S.C. §§ 1251-1387 (2012); Endangered Species Act, 16 U.S.C. §§ 1531-44 (2012).

14. Chamber Report, *supra* note 5, at 10.

15. *See* Clean Air Act, 42 U.S.C. § 7604(a)(1) (2012) (any person may commence a civil action on his own behalf against any person who is alleged to have violated an emission standard or limitation).

16. Envtl. Citizen Suit Provisions, *supra* note 1.

17. Mark Seidenfeld & Janna Satz Nugent, *The Friendship of the People: Citizen Participation in Environmental Enforcement*, 73 GEO. WASH. L. REV. 269, 283 (2005).

18. *See* ENVTL. LAW INST., CITIZEN SUITS: AN ANALYSIS OF CITIZEN ENFORCEMENT ACTIONS UNDER EPA-ADMINISTERED STATUTES ix (1984) (citizen suits were meant by Congress to operate independently of EPA activities and to allow citizens to set their own priorities); *see* Michael S. Greve, *Private Enforcement, Private Rewards: How Environmental Citizen Suits Became an Entitlement Program*, *in* ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS 105, 114-17 (Greve & Smith, Jr. eds., 1992) (arguing that Congress never planned on universal enforcement and that citizen suits augment the enforcement program beyond Congress's intent).

Citizen suit provisions contain notice requirements designed to protect the government's position as regulator.[19] At least sixty days prior to initiating a citizen suit, a person must notify the EPA, the violator, and under some statutes, the state where the violation occurred.[20] This "built-in grace period" gives the EPA time to analyze the complaint and decide whether action is necessary.[21] If the government can show it is already "diligently prosecuting" the allegation, the citizen suit is barred, but EPA cannot stop a citizen suit merely by commencing an administrative enforcement proceeding.[22] However, EPA can bar such a suit by commencing an administrative proceeding prior to notice of the citizen suit or if a citizen group fails to file suit within 120 days of the notice.[23] Additionally, once the citizen suit has commenced, a consent order may not be entered until the U.S. Department of Justice ("DOJ")[24] and EPA receive a forty-five day notice.[25]

B. Growth of Sue-and-Settle

In 1982, a substantial change in the dynamic of citizen suits was initiated, specifically under the CWA.[26] This change was primarily due to the emergence of well funded and staffed national and regional environmental groups.[27] Currently, environmental advocacy groups such as the Sierra Club, Natural Resources Defense Council, and the Atlantic States Legal Foundation are responsible for filing a substantial number of citizen suits.[28] The groups seek settlement agreements as plaintiffs that could provide compliance orders, monetary penalties, and attorneys' fees.[29] It is argued "even if the monetary rewards are aimed at self-

19. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7604(b)(1)(A) (2012).

20. *See, e.g.*, *id.* (not allowing action prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order).

21. Seidenfeld & Nugent, *supra* note 17, at 284; *see also* Clean Water Act, 33 U.S.C. § 1365(b)(1)(B) (2012) (if the government can show it is already "diligently prosecuting" the allegation, the citizen suit is barred, but EPA cannot stop a citizen suit merely by commencing an administrative enforcement proceeding); Clean Water Act, 33 U.S.C. § 1319(g)(6) (2012) (EPA can bar such a suit by commencing an administrative proceeding prior to notice of the citizen suit or if a citizen group fails to file suit within 120 days of the notice).

22. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1365(b)(1)(B) (2012).

23. *Id.* § 1319(g)(6).

24. The DOJ is the agency responsible for filing civil judicial action cases on behalf of the EPA. U.S. ENVTL. PROTECTION AGENCY, ENFORCEMENT BASIC INFORMATION, https://www.epa.gov/enforcement/enforcement-basic-information (last visited May 31, 2016).

25. 33 U.S.C. § 1365(c)(3) (2012).

26. Envtl. Law Inst., *supra* note 18, at viii.

27. *Id.*

28. *See* Greve, *supra* note 18, at 107-08.

29. *Id.* at 109-10 (arguing that substantial portions of citizen suit settlements constitute direct transfer payments to environmental groups).

preservation of the interest groups' business of private enforcement, long-term funding for these groups may greatly benefit the environment."[30] While environmental advocacy groups have used sue-and-settle more frequently in recent years, business groups have also historically taken advantage of the approach to influence the outcome of agency action.[31]

As to the extent to which this process has increased under President Barack Obama's administration, in its report *Sue and Settle: Regulating Behind Closed Doors*, the U.S. Chamber of Commerce identified more than 100 new major rules arising from this tactic, with estimated compliance costs over $100 million annually.[32] In comparison with previous administrations, the process is currently more prevalent than at any point under the two previous presidencies.[33] An example frequently used is from the 2011 fiscal year, when the U.S. Fish and Wildlife Service ("FWS") was allocated $20.9 million for endangered species listing and critical habitat designation.[34] The agency spent more than 75% of this allocation ($15.8 million) on substantive actions required by court orders or settlement agreements resulting from litigation.[35] The Chamber Report interpreted this as sue-and-settle cases and other lawsuits "effectively driving the regulatory agenda of the ESA program at FWS."[36]

C. Arguments Against the Practice and Negative Reaction

The use of sue-and-settle can dictate the policy and budgetary agendas of an agency by influencing action to be taken on specific regulatory programs.[37] The Chamber Report argues that instead of agencies being able to use their discretion in utilizing their limited resources, these resources are being shifted away from critical duties in order to satisfy the narrow demands of outside groups.[38] Additionally, with unrealistic deadlines, there will be collateral

30. Seidenfeld & Nugent, *supra* note 17, at 287.

31. Chamber Report, *supra* note 5, at 14.

32. *Id.* at 12 (citing Moore, *supra* note 6).

33. *Id.* (data from figure: President Bill Clinton (second term only) – 27 CAA rules; President George W. Bush (hereinafter Bush) – 66 CAA rules; President Obama (through May 2013) – 60 CAA rules)

34. *Id.* at 22 (citing Testimony of Hon. Dan Ashe, Director, U.S. Fish and Wildlife Service before the House Natural Resources Committee, Dec. 6, 2011).

35. *Id.*

36. *Id.* Further (unbiased) analysis would need to be taken to determine if this allocation is understandable and/or the claims are right within the frame of the entire obligations by the agency.

37. *Id.*

38. *Id.*

damage on other rules, inviting the same advocacy groups to reset EPA's priorities further by suing to enforce those deadlines.[39]

Typical arguments against sue-and-settle have a basis in the broader public interest of the right of the public to notice-and-comment[40] proceedings before the promulgation of regulations. The main thrust of the assault on sue-and-settle is that the process "avoids the normal protections built into the rulemaking process."[41] This leads to "rulemaking in secret,"[42] because settlements provide "no opportunity"[43] for "state and industry officials directly affected by the settlements"[44] to weigh in before "the outcome of the rulemaking is essentially set."[45] The following key assertion is made in a typical argument against the process:

> Environmental groups use the sue-and-settle process to engage in secret, backroom rulemaking away from the protections of public notice-and-comment processes to bind regulated entities in ways favorable to the environmental agenda — an end-run around public notice-and-comment. Through sue-and-settle, advocacy groups also significantly affect the regulatory environment by getting agencies to issue substantive requirements 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.[46]

1. Skirting Procedural Safeguards in the Rulemaking Process

The Administrative Procedure Act ("APA") is designed to promote transparency and public participation in the rulemaking process. Claims of the sue-and-settle process skirting procedural safeguards in the rulemaking process derive from when the substance of an agreement is fully negotiated between the agency

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39. *Id.* at 24.

40. "Notice-and-comment" refers to rulemaking following the procedures dictated in 5 U.S.C. § 553, also known as "informal rulemaking." *See* United States v. Mead Corp., 533 U.S. 218, 243-44 (2001) (Scalia, J., dissenting) (describing the informal rulemaking process).

41. Chamber Report, *supra* note 5, at 3.

42. *Id.* at 7.

43. Moore, *supra* note 6.

44. *Id.*

45. Chamber Report, *supra* note 5, at 6.

46. Moore, *supra* note 6; Chamber Report, *supra* note 5, at 22.

and the advocacy group, resulting in the rulemaking outcome essentially being set before the public has any opportunity to see it.[47] Furthermore, there are claims sue-and-settle allows agencies to avoid the normal protections built into the rulemaking process, such as reviews under several executive orders, reviews by the public, and reviews by the regulated community.[48] The example of the EPA Regional Haze program is further used to show that principles of federalism are also flagrantly ignored when EPA uses the conditions in sue-and-settle agreements to set aside state-administered programs.[49] Another example of this practice is the out-of-court settlement agreement with the Chesapeake Bay Foundation regarding the Chesapeake Bay, which the EPA has relied on as a basis for its establishment of a federal total maximum daily load ("TMDL") program for the entire 64,000 square-mile Chesapeake Bay watershed and EPA's usurpation of state authority to implement TMDLs in the watershed.[50]

Dates for regulatory action are often specified in statutes, requiring agencies to use their discretion to set resource priorities in order to meet their many competing obligations and sometimes resulting in the inability to meet deadlines.[51] By negotiating unrealistic and often unachievable deadlines and schedules, agencies lay the foundation for rushed, sloppy rulemaking, resulting in further time and resources required to be spent on technical corrections, subsequent reconsiderations, or court-ordered remands to the agency, defeating the advocacy group's objective of forcing a rulemaking on a tight schedule.[52] A regulated entity's immediate obligation to comply with the rule is not changed with the potential of additional necessary fixes. By setting accelerated deadlines, agencies very often give themselves insufficient time to comply with the important analytic requirements Congress enacted to ensure sound policymaking.[53] In addition to undermining the protections of these statutory requirements, rushed deadlines can limit review of regulations under the OMB's regulatory review under

47. Chamber Report, supra *note* 5, at 6.

48. *Id.*

49. *Id.*

50. *Id.* at 18; This federal takeover of the Chesapeake Bay program is an example how the process can deny the public rights in regulatory process to weigh in on a proposed regulatory decision before agency action occurs. The EPA did not have to seek public input, explain the statutory basis for its actions in the CWA, or give stakeholders an opportunity to evaluate the science upon which the agency relies.

51. *Id.* at 23.

52. *Id.*

53. *Id.* at 6; Requirements include the Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. §§ 601-12; Unfunded Mandates Reform Act of 1995, 2 U.S.C. § 1501 et seq.

executive orders,[54] depriving the public, and the agency itself, of critical information about the true impact of the rule.[55]

2. State and Congressional Reaction

With an increasingly ambitious and contentious environmental agenda, the Obama Administration invited blame for the current perceived trend of sue-and-settle in environmental litigation.[56] In 2012, at least twelve state attorneys general ("AG") presented a Freedom of Information Act ("FOIA") request to investigate the communications between the Obama Administration agencies and environmental litigants, based on a suspicion of influence within the process of regulating industries.[57] Many of the AGs believe sue-and-settle "is an end run around the Administrative Procedures Act," and cite newly announced EPA regional haze rules — which came into being because of sue-and-settle, and which could raise electricity costs in their states by as much as 20% — as an example of the lack of transparency and a reliance on science to justify new rules within the administration.[58]

Despite the fact that the sole purpose of citizen suits is to grant access to the federal courts, Congress placed jurisdiction and oversight of citizen suits with congressional authorizing committees rather than with the House and Senate Judiciary Committees.[59] Jurisdiction is within committees with limited expertise in the subject matter, and therefore, many argue no meaningful oversight has been conducted in more than four decades over the use and abuse of citizen suit activity.[60] Several lawmakers, in a 2012 letter, argued EPA was taking this substantive action even though

54. *See, e.g.*, Exec. Order 12,866, "Regulatory Planning and Review" (Sept. 30, 1993), Exec. Order 13,132, "Federalism" (Aug. 4, 1999), Exec. Order 13,211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (May 18, 2001), Exec. Order 13,563, "Improving Regulation and Regulatory Review" (Jan. 18, 2011), among other laws.

55. Chamber Report, *supra* note 5, at 23.

56. *See* Moore, *supra* note 6 ("The Obama administration didn't invent sue-and-settle, but the pace has increased dramatically since 2009 — an era that Oklahoma Attorney General Scott Pruitt calls "sue-and-settle on steroids.").

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

it was not authorized to do so under law,[61] and was improperly using settlements as the regulatory authority for other CWA actions stating:

> 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.[62]

Proposed reform legislation has become the next step for those who believe the Obama Administration has opened the door to pro-regulation environmental interest groups through the use of sue-and-settle agreements to impose rules behind closed doors with little or no public input.[63] Senator Chuck Grassley (R-IA) and Representative Doug Collins (R-GA) introduced the Sunshine for Regulatory Decrees and Settlements Act of 2015,[64] requiring all proposed consent decrees to be posted for sixty days for public comment before being filed with a court, allowing affected parties to challenge them and intervene prior to the filing of the consent decree or settlement.[65] Under the proposed legislation, 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.[66] This legislation stems from a 2012 House Judiciary Committee study into the abuses of the sue-and-settle process, and the passage of this legislation is considered by many of those against sue-and-settle to be the key to close the massive loophole in our regulatory process.[67]

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61. *See* Letter from House Transportation & Infrastructure Committee Chairman, John L. Mica, House Water Resources & Environment Subcommittee Chairman, Bob Gibbs, Senate Environment & Public Works Committee Ranking Member, James Inhofe, and Senate Water & Wildlife Subcommittee Ranking Member, Jeff Sessions, to EPA Administrator Lisa Jackson (Jan. 20, 2012), http://archives.republicans.transportation.house.gov/Media/file/112th/Water/2012-01-19--Letter_to_EPA_re_Buzzards_Bay-CLF_Litigation.pdf.

62. U. S. SENATE COMMITTEE ON ENVIRONMENT & PUBLIC WORKS, MINORITY OFFICE: HOUSE, SENATE LAWMAKERS HIGHLIGHT CONCERNS WITH EPA SUE & SETTLE TACTIC FOR BACKDOOR REGULATION (2012).

63. Ben Quayle, *Legislation to Fight Excessive Regulations*, W. FREE PRESS (Mar. 28, 2012), http://www.westernfreepress.com/2012/03/28/ben-quayle-legislation-to-fight-excessive-regulations/ (quoting a press release issued by former Congressman Ben Quayle).

64. Sunshine for Regulations and Regulatory Decrees and Settlements Act of 2016, H.R. 712, 114th Cong. (2015); Sunshine for Regulatory Decrees and Settlements Act of 2015, S. 378, 114th Cong. (2015) [hereinafter H.R. 712 and S. 378].

65. Chamber Report, *supra* note 5, at 8.

66. *Id.*

67. *Id.*

III. ACTING WITHIN THE SCOPE OF AGENCY AUTHORITY

The sue-and-settle actions are within the scope of agency allowance when analyzing the citizen suit provisions and why they were implemented. Citizen suits all trace their origin to Section 304 of the CAA. Congress exhibited a tendency to lift Section 304 of the CAA and included it in all new federal environmental statutes and major statutory amendments.[68] Subsequently, several courts have used the case law between statutes interchangeably.[69]

A. Legislative History Analysis

In regards to citizen suit provisions generally, the legislative history of the CAA supports the theory that Congress's intent was to push government regulators to greater enforcement action and to supplement their thinly stretched resources.[70] Comments by legislators involved in the passage of the various citizen suit provisions suggest Congress viewed citizen suits as an inexpensive alternative to government enforcement. Therefore, the provisions were included in an effort to encourage agencies, or relevant state agencies, to act when appropriate. Citizen suits were designed to "expand the scope of enforcement without burdening public funds and encourage public authorities to enforce environmental laws."[71] It appears clear Congress, at least in part, believed the provisions would allow citizens to act as private attorneys general and enforce the laws directly.[72] Implicit in this approach is the view that individual citizens, because they would be directly affected by the pollution, would be especially motivated and be effective advocates, while the EPA was understaffed and its resources inadequate.[73]

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68. Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws Part I*, 13 ENVTL. L. REP. 10309, 10311 (1983) [hereinafter Miller, Part I].

69. Hallstrom v. Tillamook Cnty., 844 F.2d 600 (9th Cir. 1987) (at least eight environmental statutes contain identical or similar provisions, which courts have construed identically despite slight differences in wording); Roe v. Wert, 706 F. Supp. 788, 792 (W.D. Okla. 1989) (no circuit has addressed the sixty days' notice provision of § 9659, however, it is informative that some circuits have addressed the notice requirements of various other environmental statutes).

70. Robert D. Snook, *Environmental Citizen Suits and Judicial Interpretation: First Time Tragedy, Second Time Farce*, 20 W. NEW ENG. L. REV. 311, 317 (1998).

71. L. Ward Wagstaff, *Citizen Suits and the Clean Water Act: The Supreme Court Decision in* Gwaltney of Smithfield v. Chesapeake Bay Foundation, 1988 UTAH L. REV. 891, 894 (1988).

72. *See* Baughman v. Bradford Coal Co., 592 F.2d 215, 218 (3d Cir. 1979) (citing S. REP. No. 91-1196, at 35-36 (1970)).

73. *See* 116 Cong. Rec. 32,925 (1970) (remarks of Senator Hruska).

During the legislative debates surrounding passage of the CAA, some in Congress said suits were permitted in order "to both goad the responsible agencies to more vigorous enforcement of anti-pollution standards and, if the agencies remained inert, to provide an alternative enforcement mechanism."[74] Senator Muskie stated, "[s]tate and local governments have not responded adequately to the need for enforcement. It is clear enforcement must be toughened . . . . More tools are needed, and the Federal presence and backup authority must be increased."[75] There was a belief that government initiative in seeking enforcement under the CAA had been restrained, and authorizing citizens to bring suits for violations should motivate governmental enforcement and abatement proceedings.[76] Therefore, allowing recovery of the costs of litigation, including attorneys and expert witness fees, and extending intervention as of right in related cases were methods used as encouragement to promote citizen initiative to enforce pollution laws.[77]

1. Questioning Support of Citizen Suits

An entirely different view of the role of private parties is seen with regard to the inclusion of the notice and diligent prosecution provisions.[78] The very existence of these sections implies Congress was hesitant to allow unfettered citizen access to the courts.[79] For example, Senator Hruska remarked "the functioning of the department could be interfered with, and its time and resources frittered away by responding to these suits."[80] Consequently, these two restrictions were placed on citizen suits to assure they would complement and not interfere with federal regulatory and enforcement programs.[81] This is confirmed by the preclusion of citizen suits if a compliance action is being diligently prosecuted.[82] As one court noted, these two sections combined suggest "Congress intended to provide for citizens' suits in a manner that would be

74. Baughman, *supra* note 72.
75. A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970 226 (1974).
76. S. Rep. No. 91-1196, at 36-37; *see also* Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws Part II*, 14 ENVTL. L. REP. 10063, 10064 (1984) [hereinafter Miller, Part II].
77. WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 63 (1986).
78. Snook, *supra* note 70, at 318.
79. *See* Walls v. Waste Res. Corp., 761 F.2d 311, 317 (6th Cir. 1985).
80. Hruska, *supra* note 73.
81. Snook, *supra* note 70, at 318.
82. Rodgers, *supra* note 77, at 63.

least likely to clog already burdened federal courts and most likely to trigger governmental action which would alleviate any need for judicial relief."[83]

2. Legislative History Implications

During passage of the CWA, what little is found in the legislative history with respect to citizen suits reiterates the point that "if the agency had not initiated abatement proceedings following notice or if the citizen believed efforts initiated by the agency to be inadequate," a citizen had the ability to file a citizen suit.[84] Courts would then examine the agency's actions to determine if they were adequate and would then permit, consolidate, or dismiss the citizen action as required.[85] Citizen actions were clearly deemed supplementary to agency proceedings, and further, the courts were to act as arbiters of whether such private efforts could continue in the face of some form of government enforcement.[86] Not to say citizen participation was to be discouraged, but in two adjacent paragraphs, the legislative history refers to its "concern" about "frivolous and harassing citizen actions," and on the other hand, to "legitimate citizen actions" as "a public service."[87] Even in the brief references to citizen suits in the CWA, there is evidence Congress viewed such actions as both a valuable public service and a potential threat to environmental enforcement at the same time.[88]

B. Remaining Notice Problem

Congress's efforts to hammer out a compromise to allow citizens to sue, while preserving the overall authority of government regulators, resulted in badly fractured legislative history, providing judges abundant opportunity to justify expanding or restricting the citizen suit provisions as they see fit.[89] The primary case of interest with respect to the notice requirement is *Hallstrom v. Tillamook County*,[90] which concluded, consistent with the Supreme

83. Baughman, *supra* note 72 (quoting City of Highland Park v. Train, 519 F.2d 681, 690-91 (7th Cir. 1975)).

84. S. Rep. No. 92-414, at 80 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3746.

85. *See id*., reprinted in 1972 U.S.C.C.A.N. at 3746.

86. *Id*.

87. *Id*. at 81, reprinted in 1972 U.S.C.C.A.N. at 3747.

88. Snook, *supra* note 70, at 319.

89. *Id*. at 320.

90. Hallstrom v. Tillamook Cnty., 493 U.S. 20 (1989) (e.g., RCRA's requirement for citizens to notify EPA, the state in which alleged violation of Act occurred, and the alleged violator of intent to sue at least sixty days before commencing suit is a mandatory condition precedent to commencing suit under the citizen suit provision).

Court's generally strict view of citizen suits, notice is a mandatory jurisdictional prerequisite, the absence of which unequivocally bars a suit.

Several post-*Hallstrom* courts have found ways to avoid a literal interpretation of the Supreme Court's holding. For example, in *Friends of the Earth, Inc. v. Chevron Chemical Co*., the district court judge held a "strict application of the notice requirement can be procedurally unwieldy for litigants and courts."[91] "A strict application would require a plaintiff to send an additional notice to the EPA, state administrator, and permittee for every subsequent permit violation occurring after the suit was filed."[92] The court went further and relaxed the element of the notice requirement mandating listing the character of the violation, thus informing plaintiffs they need only "illuminate the parameters that have been exceeded."[93]

However, this generous treatment by some courts should not be heavily relied on, and "under no circumstances, should citizen plaintiffs believe they can count on generous treatment for technical notice deficiencies."[94] Many, such as Snook, believe there is nothing ambiguous about the Supreme Court's holding in *Hallstrom* and that "notice is a jurisdictional prerequisite to suit and not a procedural nicety."[95] Snook further details the interpretation of the Supreme Court's holding, stating:

> Although some courts have been willing to stretch matters somewhat, others have been willing to bar citizen suits for failings of the notice requirement that appear minor.[96] Ultimately, the best advice that can be given to citizen plaintiffs with regard to the notice requirement is to abide by the terms of the statute precisely and to provide the agency and the putative defendant with timely notice of the fact a suit is contemplated, who the defendants are, the violations complained of, and the statutes under which suit will be brought. Even if a court might be willing to overlook deficiencies in notice, it may be a waste of resources fighting the issue, and the *Hallstrom* decision gives defendants a powerful weapon to delay or derail citizen suits at their onset.[97]

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91. Friends of the Earth, Inc. v. Chevron Chem. Co., 900 F. Supp. 67, 77 (E.D. Tex. 1995).
92. *Id.*
93. *Id.*
94. Snook, *supra* note 70, at 323.
95. *Id.*; *see* Hallstrom, *supra* note 90, at 33.
96. Snook, *supra* note 70, at 323.
97. *Id.*

However, the issue of preclusion of citizen suits if a compliance action is being diligently prosecuted "has not benefitted from efforts at clarification by the Supreme Court."[98] The lack of statutory definition and the hazy legislative history have created contradictory opinions. This has served to confuse practitioners and offer judges with any set of partialities an array of precedent to support any conclusion they so choose. The First Circuit made the following statement:

> The focus of the statutory bar to citizen's suits is not on state statutory construction, but on whether corrective action already taken and diligently pursued by the government seeks to remedy the same violations as duplicative civilian action. . . . . Duplicative enforcement actions add little or nothing to compliance actions already underway, but do divert State resources away from remedying violations in order to focus on the duplicative effort. [99]

Under the CWA, the Tenth Circuit concluded that the "issue of whether a state was diligently prosecuting a manufacturer for its alleged environmental abuses was not appropriate for interlocutory review," since the issue had not been directly adjudicated.[100] Citizen plaintiffs have had numerous successes after *Baughman*[101] to demonstrate that government administrative actions are not sufficiently diligent to forestall private actions. Typically, citizen plaintiffs prevail when there has been (i) a history of noncompliance,[102] (ii) the imposition of trivial penalties,[103] and (iii) no citizen participation.[104]

C. Logical Outcome

The sue-and-settle process could simply be a logical outcome of passing legislation, and the legislative intent of the citizen suit

98. *Id.* at 324.

99. N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate, 949 F.2d 552, 556 (1st Cir. 1991).

100. Paper, Allied-Indus., Chem. & Energy Workers Int'l Union v. Cont'l Carbon Co., 428 F.3d 1285 (10th Cir. 2005).

101. Baughman v. Bradford Coal Co., 592 F.2d 215 (3d Cir. 1979).

102. *See* New York Coastal Fishermen's Ass'n v. New York City Dep't of Sanitation, 772 F. Supp. 162, 169 (S.D.N.Y. 1991).

103. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 890 F. Supp. 470, 491 (D.S.C. 1995).

104. *See* Frilling v. Vill. of Anna, 924 F. Supp. 821, 841 (S.D. Ohio 1996); Friends of the Earth, *supra* note 103.

provisions were meant to expedite the process in order to prevent the types of potential environmental harms that are the subject of the litigation. However, a main contention to this view directs its focus on the consequences of allowing unlimited citizen suits compelling agency action under environmental statutes. Congress has expressed concern of "the potential to severely disrupt agencies' ability to meet their most pressing statutory responsibilities."[105]

Supporters note that evidence of this statutory responsibility argument was present when the Court of Appeals for the District of Columbia detailed the legislative history of the Clean Air Act Amendments, revealing "the citizen suits provision reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced."[106] Congress made "particular efforts to draft a provision that would not reduce the effectiveness of administrative enforcement" or "cause abuse of the courts, while at the same time preserving the right of citizens" to enforcement.[107]

IV. SUE-AND-SETTLE PROCESS ROLE WITHIN RULEMAKING

A. Comment and Agency Decision

Some critics argue that the "opportunity to comment on the product of sue-and-settle agreements, either when the agency takes comment on a draft settlement agreement or through notice and comment on the subsequent rulemaking," is not "sufficient to compensate for the lack of transparency and participation in the settlement process itself."[108] The U.S. Chamber Report contends that in cases where the agency allows public comment on draft consent decrees, rarely is the consent agreement altered, even after adverse comments are received.[109] Since the settlement agreement directs the timetable, following structure, and sometimes even the actual substance of the agency rulemaking, "interested parties usually have a very limited ability to alter the design of the subsequent rulemaking through their comments."[110] This per-

105. Chamber Report, *supra* note 5, at 25.

106. Nat. Res. Def. Council, Inc. v. Train, 510 F.2d 692, 700 (D.C. Cir. 1974).

107. A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970, VOL. I. at 387 (1974) (remarks of Senator Cooper); *see* Friends of the Earth v. Potomac Elec. Power Co., 546 F. Supp. 1357 (D.D.C. 1982).

108. Chamber Report, *supra* note 5, at 24.

109. *Id.*

110. *Id.* (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).

ceived limitation to alter the design of the rulemaking has been analogized to the "cement of the agency action" being "considered to be set" and "already hardened," making it difficult for groups not involved in the process to change the substance of the rule.[111] Claims of restrictions on how much an agencies can change the rule before it becomes final[112] and differences in the fluidity of proposed regulation, compared to proposed legislation,[113] all help support this concept that change to proposed regulations is not likely or almost impossible. The U.S. Chamber Report summarized the view of this limitation by stating: 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."[114] Those making this argument contend that providing an agency with feedback "during the early development stage about how a regulation will affect those covered by it," creates an opportunity for the agency to learn "from all stakeholders about problems before they get locked into the regulation."[115]

However, this action of taking comments, but not altering the subsequent rulemaking, is within the scope of the powers of the agency. While anyone may comment, the ultimate decision has to be reasonable pursuant to the APA, and the agency has to provide a basis for their decision and show how the rule would achieve its purpose. Under hard look review,[116] a court determines whether an agency considered all relevant factors and whether an agency developed a rational connection between the evidence in the administrative record and a decision to settle.[117] Hard look review requires the agency to explain why it acted as it did and to explain why it chose to settle the case in the face of arguments by intervenors.[118]

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111. *Id*. at 25.

112. *Id*. *See* South Terminal Corp. v. EPA, 504 F.2d 646, 658-59 (1st Cir. 1974) ("logical outgrowth doctrine" requires additional notice and comment if final rule differs too greatly from proposal).

113. Chamber Report, *supra* note 5, at 25.

114. *Id*.

115. *Id*.

116. *See* Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970) (Judge Leventhal's explanation of the doctrine of hard look review of ensuring the agency is engaged in reasoned decision-making); *see also* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983) (adopting the "reasoned decision-making" approach to judicial review).

117. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) ("Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one.").

118. For discussion of what the hard look doctrine requires, see Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 774 (1994); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decision-Making in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 128-29 (1994) (hereinafter Seidenfeld, *A Syncopated Chevron*);

In similar situations concerning environmental enforcement proceedings, federal courts applying this standard of review evaluate "the entire settlement process to ensure the agency has kept itself and intervenors informed about factual matters, as well as the likelihood the settlement will cure the violation and deter future violations."[119] Finding the proposed consent decree is arbitrary and capricious will result in the court refraining from imposing its own solution on the conflict and send the parties off to either try the case or return to negotiations.[120] By refraining from ruling, the judge avoids transferring the primary decision-making responsibility to the courts.[121]

The "logical outgrowth test" is used through all rulemaking proceedings as a standard in which the court holds the agency to, not just in sue-and-settle cases.[122] On many of these rules, the agency already has feedback from potential stakeholders, and in cases where they do not have sufficient information or resources to complete the process in a timely manner, the agencies have frequently requested more time to develop the rule.

B. Time Sensitive Rulemaking

A remaining problem exists when courts do not allow the agency substantial time to properly develop the rule. Those against the outcomes of the sue-and-settle process argue dates for regulatory action are often specified in statutes, and agencies 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 unrealistic, and often unachievable deadlines, the agency lays the foundation for rushed and potentially sloppy rulemaking, which often delays or defeats the objective the agency is seeking to achieve.[123] These hurried rulemakings typically require adjustment through technical corrections, subsequent reconsiderations, or court-ordered remands to the agency.[124] Ironically, the process of issuing rushed, poorly developed rules, and then having to

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Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 518 n.163 (2002).

119. Seidenfeld & Nugent, *supra* note 17, at 312.

120. *See id*.

121. *See e.g.*, Seidenfeld, *A Syncopated Chevron*, *supra* note 118, at 126-27 (discussing potential of the administrative state to implement the "deliberative democratic ideal" of government decision-making); *see also* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 Harv. L. Rev. 1511, 1571 (1992) (discussing the role of judicial review in the administrative state).

122. *See South Terminal Corp*., 504 F.2d at 659.

123. Chamber Report, *supra* note 5, at 23.

124. *Id*.

spend months or years to correct them, could defeat the advocacy group's objective of forcing a rulemaking on a tight schedule.[125] However, the time it takes to make these fixes does not change a regulated entity's immediate obligation to comply with the constructed rule.[126]

A counter argument presents the position that immediate obligation to comply is the key objective of the practice, and while it may cause some harm to the regulated entity, the immediate action is needed due to the potential environmental harm taking place. Having to weigh time with rushed, possible sloppy rulemaking is a substantial risk the agency takes on with consent decrees. These agreements are generally quick and efficient mechanisms for resolving an issue. "The courts have long recognized that public policy favors settlements as a cost-efficient means of resolving disputes and conserving judicial resources."[127] This is especially true in environmental actions, because consent agreements "relieve the government of considerable burdens on its limited resources."[128] Even if successful, a lawsuit takes years, particularly if appeals are involved. Consent agreements can be finalized in a few months and allow the remedial action to initiate before the damage or problem spreads further.[129] This results in time being a "critical factor in remediation efforts,"[130] which are an essential element in overall environmental litigation. The court is making a calculated decision, weighing the time versus the rulemaking process, and deciding in cases of limited time frames that the environmental issue is too significant, ultimately denying the full time allocation requested by the regulated entities.

However, a thorough weighing of the issues would provide the agency with a realistic sense of the implications placed on the regulated entities. If regulated parties have not been represented when deadlines are set, an agency will not have a realistic sense of the entirety of the issues involved in the rulemaking and the agency could be considered ill-suited to make such decisions without significant feedback from those who actually will have to comply with a regulation.[131]

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125. *Id.*

126. *Id.*

127. United States v. Bliss, 133 F.R.D. 559, 567 (E.D. Mo. 1990) (citing Kiefer Oil & Gas Co. v. McDougal, 229 F. 933 (8th Cir. 1915)).

128. *Id.*

129. Snook, *supra* note 70, at 325.

130. *Id.*

131. *Id.*

V. TARGETED REMEDIES OF SIGNIFICANT CONCERNS

A main goal for the judiciary in this process should be achieving consistency and efficiency among the courts in applying the law. Years after the initial enactment of the relevant environmental statutes, the federal courts have failed to fashion a consistent and coherent body of law to guide public and private parties with respect to when and how citizen suits may be applied to protect human health, safety, and the environment. The primary areas of concern have involved the notice issue, ability to comment, and overall transparency in the process.

A. Increased Agency Discretion

1. Negotiated Schedule for Regulation Issuing

The concern that the practice is spreading to include other complex statutes that have statutorily imposed dates for issuing regulations is another major concern. 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 and set in motion a new process to bring sue-and-settle actions under Section 706 of the APA.[132] The court recognized a statutorily imposed deadline, but also made an important note that "the FDA is correct that the purpose of ensuring food safety will not be served by the issuance of regulations that are insufficiently considered, based on a timetable that is unconnected to the magnitude of the task set by Congress."[133] The court ordered the agreement of a mutually acceptable schedule setting forth proposed deadlines, in detail sufficient to form the basis of an injunction, in order to force the parties to attempt to cooperate, while also avoiding an arbitrary decision by the court.[134] However, the Ninth Circuit ruled ESA consultation duty is triggered "only when the agency has authority to take action and discretion to decide what action to take."[135] While there is no point in consulting if the agency has no choices, "with a new possible structure in place using the APA as a basis for citizen suits, private interest groups and agencies, without use of any other citizen suit provision, could negotiate private arrangements for how an agency will proceed with

132. Ctr. for Food Safety v. Hamburg, 954 F. Supp. 2d 965 (N.D. Cal. 2013).
133. *Id*. at 972.
134. *Id*
135. Ctr. for Food Safety v. Vilsack, 718 F.3d 829, 842 (9th Cir. 2013).

a new regulation."[136] If this negotiated schedule could take place within the sue-and-settle process, there would be more agency discretion in the determination of implementation dates and consideration for agency resources.

2. Agency Discretion after Settlement

There may be numerous reasons why advocacy groups favor these type of sue-and-settle agreements, for instance, the fact that the approval by the court allows the court to retain jurisdiction over the settlement.[137] Those opposed to these sue-and-settle agreements contend this allows the plaintiff group the ability to "readily enforce perceived noncompliance with the agreement by the agency."[138] Many argue that 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."[139] Therefore, even if problems are identified and there are problems with agency compliance of 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."[140] There is a need for agency ability to make necessary changes to prevent unreasonable burden on the agency or regulated entities. The determination of whether this is an unreasonable burden should be made by the courts, because each case will be different and the burden on the agency and the regulated entitles will change over time. The court will also be able to take into account the potential harm facing the public and factor into the determination.

B. Jurisdictional Consistency

Clarification of the law can begin with the repetition of the terms of the statutes on the state and federal level, with additional clarifying language explaining what a state statute must include in order to be sufficiently similar to a federal law and bar a citizen suit. One proposed standard that could be possible and offer advantages over the current state of the law details:

> Citizens suits provisions under the relevant environmental statutes (CWA, CAA, CERCLA and section 7001(a)(1)(A) of RCRA) should be prohibited if a state or federal administra-

136. Chamber Report, *supra* note 5, at 7.
137. *Id.* at 24.
138. *Id.*
139. *Id.*
140. *Id.*

> tive agency has: (1) filed suit in state or federal court under one of the above-referenced federal laws or an analogous state statute offering substantially similar penalties and citizen participation provisions, (2) entered into a consent order, filed in a state or federal court, addressing substantially the same violations advanced in the citizen suit, or (3) filed with a state or federal court an executed memorandum of understanding describing, in detail, the terms to be included in the eventual consent order. It is stressed any consent order or memorandum of understanding under either options (2) or (3) should include clear and specific procedures to ensure citizen participation and review, fixed time schedules for compliance, and effective civil remedies and default provisions.[141]

A stated advantage offered by this additional language is the removal of "ambiguity as to when an action brought under a state law will bar a citizen suit under a federal law."[142] Defendants and plaintiffs would also see benefits because with the removal of ambiguity, there would be significantly less uncertainty in this "complex and expensive process."[143] Additionally, process clarification could be provided by requiring Congress to amend the citizen suit provisions to expressly state a suit will be barred unless the relevant regulatory agency and those bringing suit commit (if applicable) to producing a consent order which includes mandatory deadlines in a timeline produced through a process that must have mandatory provisions for regulated entities or other involved parties participation as a right.

A potential change made to the sue-and-settle process through additional legislation could be based on the tracking of settlements that impose significant new rules and requirements, including notification to the public in a systematic fashion. With a statutory requirement to disclose (e.g., on the agency website), the notice of intent to sue that is received from outside parties would be accessible and not just a voluntary measure. Additionally, a statutory requirement providing public notice of the filing of a complaint and/or petitions for rulemaking would assist in making the process more transparent and open to the regulated entities. These measures would also bring the provisions in the environmental statutes in conformity with the CAA. Unlike other environmental

141. Snook, *supra* note 70, at 339.
142. *Id.*
143. *Id.*

laws, the CAA specifically requires EPA to publish notices of draft consent decrees in the Federal Register, providing:

> At least 30 days before a consent decree or settlement agreement of any kind under the this chapter to which the United States is a party (other than enforcement actions under this section, section 7420 of this title, or subchapter II of this chapter, whether or not involving civil or criminal penalties, or judgments subject to Department of Justice policy on public participation) is final or filed with a court, 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.[144]

Of all the other major environmental statutes, only a specific section of CERCLA requires an equivalent public notice of a settlement agreement.[145]

C. Analysis of Current Proposed Legislation

In the most current legislative session (2015-16), Senator Chuck Grassley (R-IA) and Representative Doug Collins (R-GA) introduced the Sunshine for Regulatory Decrees and Settlements Act,[146] requiring all proposed consent decrees to be posted for sixty days for public comment before being filed with a court, allowing affected parties to challenge them and intervene prior to the filing of the consent decree or settlement.[147] Under the proposed legislation, the agency would also have to inform the court of its other mandatory duties and explain how the agreement would be in the public interest.[148] This legislation stems from a 2012 House Judiciary Committee study into the abuses of the sue-and-settle process, and the passage of this legislation is considered key to close the

144. Clean Air Act, 42 U.S.C. § 7413(g) (2012).

145. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9622(i) (2012) ("At least 30 days before any settlement . . . may become final in the case of a settlement embodied in an administrative order, the head of the department or agency which has jurisdiction over the proposed settlement shall publish in the Federal Register notice of the proposed settlement. The notice shall identify the facility concerned and the parties to the proposed settlement.").

146. H.R. 712 and S. 378, *supra* note 64.

147. *Id.* § 103(c)(1) of H.R. 712, and § 3(d)(1) of S. 378; Chamber Report, *supra* note 5, at 8.

148. *Id.* § 103(d)(4) of H.R. 712, and § 3(d)(4) of S. 378; Chamber Report, *supra* note 5, at 28.

massive loophole in our regulatory process.[149] The proposed legislation defines a "covered civil action" as a civil action seeking to compel agency action and alleging an agency is unlawfully withholding or unreasonably delaying an agency action relating to a regulatory action that would affect: (1) the rights of private persons other than the person bringing the action; or (2) a state, local, or tribal government.[150] It also defines a "covered consent decree" or a "covered settlement agreement" as: (1) a consent decree or settlement agreement entered into in a covered civil action, and (2) any other consent decree or settlement agreement that requires agency action relating to such a regulatory action that affects the rights of such persons or a state, local, or tribal government.[151] There is a question of what exactly is meant by "private person" in the text of the statute. This is an important distinction to raise since it would be assumed most regulated entities are businesses and industries, which are many times represented by interest groups. Limiting the application of relating a regulatory action to the rights of a private person is a necessary distinction to have present and understood within the text.

In terms of publication, the proposed legislation requires an agency to publish the notice of intent to sue and the complaint in a readily accessible manner, including making it available online within fifteen days of receipt.[152] Additionally, it allows parties affected by agency actions to intervene and provides procedures and requirements for a court in considering a motion to intervene.[153] This legislation requires the agency seeking to enter the consent decree to publish it in the Federal Register and online sixty days before it is filed with the court, and additionally provides for public comment and public hearings on the decree.[154]

The legislation also requires each agency to submit to Congress an annual report including "the number, identity, and content of covered civil actions brought against, and covered consent decrees or settlement agreements entered against or into, by the agency."[155] The House and Senate versions also mandate the inclusion in the report of any award of attorneys' fees or costs in the civil action, with the Senate version additionally requiring a description of the statutory basis for each consent decree and any award of attorneys' fees or costs.[156] This portion of the proposed legislation

149. Chamber Report, supra note 5, at 27-28.
150. H.R. 712 and S. 378, supra note 64, at § 102(2) of H.R. 712, and § 2(2) of S.378.
151. *Id.* § 102(3)-(5) of H.R. 712, and § 2(3)-(5) of S. 378.
152. *Id.* § 103(a)(1) of H.R. 712, and § 3(a)(1) of S. 378.
153. *Id.* § 103(b) of H.R. 712, and § 3(b) of S. 378.
154. *Id.* § 103(c)(1) of H.R. 712, and § 3(d)(1) of S. 378.
155. *Id.* § 103(g) of H.R. 712, and § 3(g) of S. 378.
156. *Id.*

could be beneficial for all parties going forward, potentially as a mechanism for further understanding the impact of these civil actions and the related agreements made with the agency. While submitting a report to Congress may be excessive, publishing the information in an organized report online would be substantially better for transparency and still allow Congress the opportunity to have the information if needed. Inclusion of the provisions of the Senate version, which would require inclusion of the description of the statutory basis, would allow the report to provide a complete overview of the civil actions. Knowing the full extent of the awarding of attorney fees will additionally assist in determining the potential benefit the agency receives from entering into these agreements in terms of savings from preventing costly and potentially lengthy litigation. Another significant portion of the proposed legislation requires a court to grant de novo review of a covered consent decree or settlement agreement if an agency files a motion to modify such decree or agreement under certain circumstances.[157] This de novo review is granted on the basis that the decree or agreement terms are no longer fully in the public interest due to the agency's obligations to fulfill other duties or changed facts and circumstances.[158]

The remaining problem is the possibility that the agency, once leadership has changed, could go back and file a motion to modify a decree or agreement on the basis that the terms of the decree or agreement are no longer fully in the public interest. This public interest determination, which is based on the agency's obligations to fulfill other duties or due to changed facts and circumstances, could be highly susceptible to political influence. This consideration of modification could include agency budgetary concerns or just the general direction and leadership of the agency. If it was deemed to be in the public interest at the point of decision, there should only be selective reasons why there could be a reevaluation. If it was deemed to be the agency's obligation to enforce a standard through a rule, obligations to other duties should not be a valid reason for significant modification of the agreement. Even the possibility of de novo review should be approached with care because a complete change of policy occurring does not give substantial deference to the previous finding and determination of being in the public interest.

157. *Id.*
158. *Id.* § 104 of H.R. 712, and § 4 of S. 378.

VI. CONCLUSION

Through identifying and further understanding the mechanism from which the sue-and-settle litigation is based, and being able to propose targeted remedies to residual concerns identified as significant factors in the process, many of the problems and misunderstandings of the process could be alleviated or recognized for the process in government they actually provide. Understanding the evolving impact of sue-and-settle on the regulatory process and being able to identify the weaknesses in the current system allows the public to become more involved and respectful of the process as well as willing to contribute to the discussion that has taken on national significance. This analysis dealing with the issues surrounding environmental regulation can prove to be a useful part of the democratic process and better inform this ongoing discussion over sue-and-settle and provide further insight into the potential courses of action that could be taken in the future to further understand, refine, and reshape the sue-and-settle process.