

# Environmental Regulation through Litigation

Backgrounder No. 174

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*In a nation with more lawyers than doctors, Americans are all too familiar with the typical civil lawsuit: A plaintiff suffers a legal violation, sues the offender, and the two often enter into a settlement agreement with one another.<sup>1</sup>*



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But what happens when the plaintiff is the Sierra Club, the defendant is the Environmental Protection Agency (EPA) and the settlement leads each year to \$10 billion in costs — not to the parties themselves, but to states and regulated entities? Known as “sue and settle” litigation, the practice has become a common method of federal environmental rulemaking.

The economic cost of regulation through litigation is enormous. Consider:<sup>2</sup>

- In 2012, agencies published rules totaling an estimated \$112 billion in regulatory costs.
- Those costs pale in comparison to 2011, when regulators added \$236.7 billion to the books.
- From 2009 to 2013, federal agencies gave us \$494 billion dollars’ worth of final rules.

These regulations run the gamut from dictating precisely how much sulfur a gallon of gasoline can hold to setting efficiency standards for microwaves.

Through rulemaking, the EPA has issued air quality standards, set guidelines on the amount of phosphorus that can enter Chesapeake Bay and established rules for pesticide research. Unfortunately, these regulations were all achieved through settlements between environmentalists and the EPA.

How does this happen? It starts with environmental laws. Agencies are tasked with implementing rules, many of which are nondiscretionary — that is, regulations an agency is required to issue under particular federal statutes enacted into law by Congress and signed by the president. But provisions of the Clean Air Act, the Clean Water Act, the Endangered Species Act and 17 other laws allow what are known as “citizen suits.”<sup>3</sup> [See the table.] These provisions allow ordinary citizens to file suit against a federal agency when it has failed to carry out one of these nondiscretionary duties. For example, if an agency is required to develop a rule setting pollution standards but has failed to do so by the prescribed deadline, any person can file a lawsuit against the agency for missing the deadline.

### Federal Statutes with Citizen Suit Provisions

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

Source: William L. Kovacs, “Statement of the U.S. Chamber of Commerce,” testimony before the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, U.S. House of Representatives Committee on Oversight and Government Reform, June 28, 2012. Available at <http://oversight.house.gov/wp-content/uploads/2012/06/6-28-12-TechIP-Kovacs.pdf>.

The impact of these provisions is apparent in how frequently regulatory agencies miss statutory deadlines. Since 1993, according to a recent study chronicling the EPA’s tardiness, a full 98 percent of regulations relating to three major Clean Air Act programs were overdue by an average of 2,072 days — over five and a half years behind schedule!<sup>4</sup> [See Figure I.]

Enter the plaintiffs. These past-deadline rules present a veritable treasure trove of litigation opportunities, and green interest groups have not failed to notice. From 2009 to 2012, the U.S. Chamber of Commerce puts the number of sue and settle lawsuits at 71, with the Sierra Club and WildEarth Guardians leading the way as plaintiffs in 34 and 20 cases, respectively.<sup>5</sup> The EPA was a defendant in 60 of these cases. [See Figure II.] The process is simple: After the complaint is filed, the parties work out a settlement or a consent decree between themselves (or these groups simply file joint proposed consent decrees on the very same day as the plaintiffs file the complaints).<sup>6</sup> A judge enters an order affirming the consent decree, and the agency is judicially bound by its terms. This process allows regulation-friendly plaintiffs to work out a rulemaking plan with a federal agency without involving third parties.

Intervening in these cases is difficult, and affected parties are frequently unaware a lawsuit has even been filed until an agreement has already been worked out.<sup>7</sup>

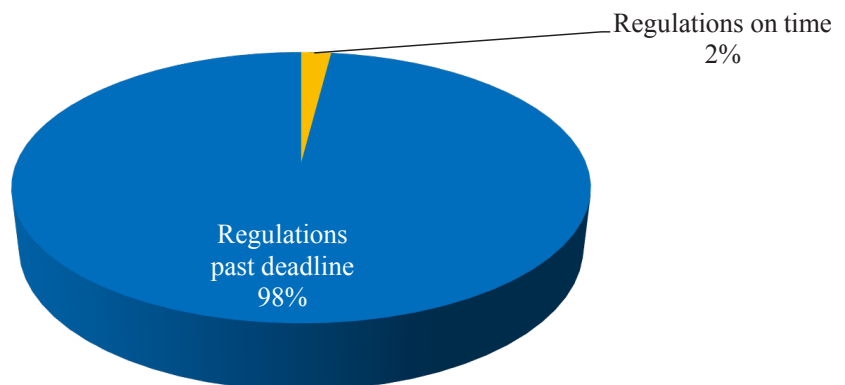
### Curbing Coal in the Courts

The case of *American Nurses Association v. Jackson* represents one of the most stunning examples of sue and settle litigation. The Environmental Defense Fund, the Sierra Club, the Waterkeeper Alliance and other plaintiffs sued the EPA, seeking to force the agency to issue mercury emissions limits for power plants. The Utility Air Regulatory Group (UARG), a collection of electric companies and trade associations, intervened on behalf of the utility industry. The plaintiffs and the EPA negotiated a consent decree, without any input from UARG, and the judge signed off on the order.<sup>8</sup>

**Federal Regulation of Power Plants.** The Clean Air Act contains a list of “hazardous air pollutants” (HAPs) the EPA is directed to regulate, in certain instances, using “maximum achievable control technology,” also known as a MACT standard.<sup>9</sup> Mercury is one of the listed HAPs. However, the Clean Air Act specifically exempts electric utilities from MACT regulation if the EPA finds such regulation would be inappropriate or unnecessary.<sup>10</sup> In the *American Nurses* consent decree, the EPA promised the plaintiffs it would propose a mercury MACT regulation for power plants by March 2011, resulting in the Mercury and Air Toxics Rule (MATS), or, as it is sometimes called, Utility MACT.

MACT regulations are stringent, as they simply use the emission levels achieved by the best performers in the industry as a baseline; new and existing emission sources must

**Figure I  
Timeliness of Major EPA Clean Air Act Regulations  
1993-2012**

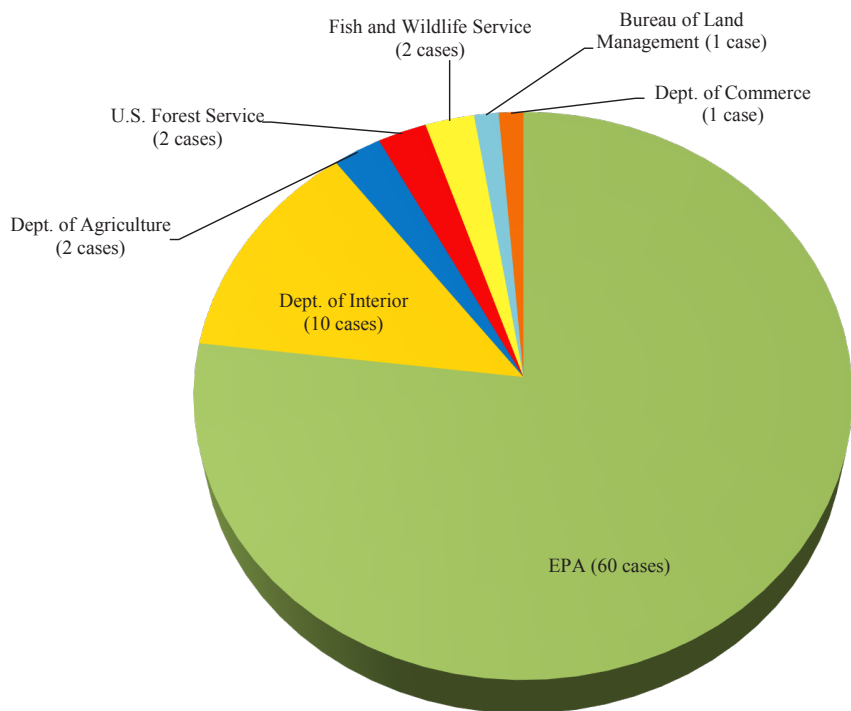


Note: This chart covers EPA regulations under the National Ambient Air Quality Standards (NAAQS) Program, New Source Performance Standards (NSPS) Program, and the National Emissions Standards for Hazardous Air Pollutants (NESHAP) Program.

Source: William Yeatman, “EPA’s Woeful Deadline Performance Raises Questions About Agency Competence, Climate Change Regulations,” Competitive Enterprise Institute, WebMemo No. 23, July 10, 2013. Available at <http://cei.org/sites/default/files/William%20Yeatman%20-%20EPA%27s%20Woeful%20Deadline%20Performance%20Raises%20Questions%20About%20Agency%20Competence.pdf>.

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**Figure II**  
**Federal Agency Defendants in Sue and Settle Cases**  
**2009-2012**



Source: “Sue and Settle: Regulating Behind Closed Doors,” U.S. Chamber of Commerce, May 2013, page 12. Available at <https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf>.

waters where it is absorbed by fish that are subsequently consumed by pregnant women. The EPA asserted such mercury consumption could have negative neurological impacts on children. However, the EPA *could not identify a single member of the population that would actually benefit from this rule*. As William Yeatman of the Competitive Enterprise Institute observed:<sup>14</sup>

“According to the EPA’s own analysis, the Utility MACT serves to protect America’s population of pregnant, subsistence fisherwomen, who eat 300 pounds of self-caught fish reeled in exclusively from the most polluted bodies of water. The EPA notably failed to identify a single member of this supposed population. Rather, their existence is assumed. EPA states that, ‘we think that they [i.e., EPA’s assumptions about the purported existence of pregnant women who eat 300 pounds of self-caught fish annually] are reasonable and that fishing populations with these attributes are likely to exist and be active to some extent.’”

The agency’s analysis of the potential harm from mercury exposure has also been questioned.<sup>15</sup> But even accepting the EPA’s mercury risk calculations, the cost of this regulation, an estimated \$9.6 billion per year, is 1,500 to 19,000 times greater than the EPA’s asserted benefit — \$500,000 to \$6.2 million annually — from reducing mercury, the element targeted by the rule.<sup>16</sup>

So how did the agency tout economic benefits of \$90 billion per

then meet those levels of emissions control.<sup>11</sup> The EPA’s promise to issue MACT standards is important because UARG argued the EPA was *not* legally obligated to issue MACT-level standards for power plants — at least, not until the EPA became bound to issue them pursuant to the consent decree. As Sen. Charles Grassley (R – Iowa), a sponsor of a bill to combat sue and settle litigation, explained to the Senate “[T]he decree prevented the agency from either declining to issue standards or adopting other standards instead of the more burdensome MACT standard.”<sup>12</sup> But because the EPA agreed to MACT standards in the decree, the standards became a court-

ordered requirement. Moreover, the district court flatly refused to delve into the Clean Air Act to determine whether or not requiring MACT for power plants was appropriate. The judge wrote, “[B]y entering this consent decree the Court is only accepting the parties’ agreement to settle, not adjudicating whether the EPA’s legal position is correct.”<sup>13</sup>

**All Cost, No Benefit.** Months later, when the EPA ultimately issued the proposed regulation required by the decree, it explained why MACT-level mercury reductions were “appropriate and necessary,” the finding required by the Clean Air Act. The agency’s main concern was that mercury enters



year from the *Mercury* and Air Toxics rule? Nearly all of those benefits — 99 percent of them — come from reductions in particulate matter (soot), not from reducing mercury or the other “air toxics” identified in the rule’s name. In fact, the agency was unable to quantify any benefits from the air toxics limits.<sup>17</sup> The reduction in particulate matter — or more specifically, PM2.5 — is a mere byproduct of mercury reduction and, furthermore, these fine particles are already regulated elsewhere in the Clean Air Act!<sup>18</sup> Amazingly, not only are fine particulates regulated elsewhere, but the limit is already set at levels deemed perfectly safe for humans *by the EPA itself*.

The EPA announced, for example, that 11,000 lives would be saved as a result of Utility MACT, but almost all the lives saved were in areas already in compliance with the EPA’s separate PM2.5 regulations.<sup>19</sup>

In an unconnected rule, the EPA dropped the allowed concentration of PM2.5 from 15 to 12 micrograms per cubic meter. But even at that stricter level, over 90 percent of Utility MACT’s purported mortality benefits come from areas

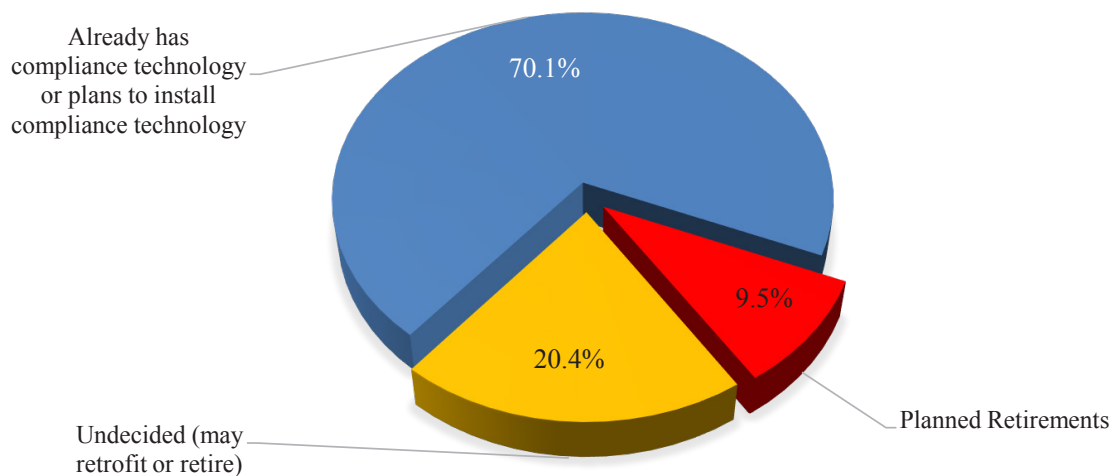
with PM2.5 concentrations below 12 micrograms, the level judged entirely safe by the EPA.<sup>20</sup> As Senator James Inhofe (R – Okla.) said, “This means EPA is justifying the rule by cleaning up what it simultaneously defines as clean air — duplicity at its best.”<sup>21</sup>

Executive Order 12866 directs agencies to assess the costs and benefits of regulations and propose rules “only upon a reasoned determination that the benefits of the intended regulation justify its costs.” “Significant regulatory actions” — that is, rules with a \$100 million or greater impact on the economy — must be submitted to the White House Office of Information and Regulatory Affairs (OIRA) for review.<sup>22</sup> The agency used the reduction of particulate matter — not the reduction of mercury itself — to proclaim

its *mercury* rule will produce \$90 billion in annual benefits in order to survive a cost-benefit analysis.<sup>23</sup> This is the shaky science behind the most expensive rule in EPA history.

**Procedural Problems.** The procedural deficiencies that followed are emblematic of sue and settle practice. Any agency rulemaking must go through “notice and comment,” a period during which the public may weigh in on proposed rules. Agencies must read, consider and respond to these comments before revising the regulation and publishing a final rule. When the consent decree was first proposed, UARG contended the short rulemaking schedule set out in the decree would make it impossible for the EPA to comply with procedural requirements and responsibly issue a final regulation. UARG raised these

**Figure III**  
**Coal-Fired Generation Capacity:**  
**MATS Compliance Strategies as of Year-end 2012**



Source: “Coal-fired power plant operators consider emissions compliance strategies,” U.S. Energy Information Administration, March 28, 2014. Available at <http://www.eia.gov/todayinenergy/detail.cfm?id=15611#>.



late in the comment process, or never provided at all, making it challenging for interested parties to assess and respond to the EPA’s proposal.<sup>30</sup> But the consent decree’s time limits meant the agency’s final rule was due on schedule, regardless of the practical impact of the deadline.

Even a scientific panel appointed by the EPA itself found that the technical support document for establishing the emissions levels was so woefully deficient it was “unsuitable in its present form to fully support Agency decision-making.”<sup>31</sup> The panel noted the document’s “lack of transparency in describing key analytical methods and findings” and urged the agency to revise the report.<sup>32</sup> The EPA did not issue a revised document until December 2011 — four months after the public comment period ended.<sup>33</sup>

**Effect on Electric Power Supply.** Moreover, the agency ignored data indicating the nation’s electricity supply could be threatened by the rule. The Energy Information Administration (EIA) projects 60 gigawatts of coal-fired electricity will shut down between 2012 and 2020. A full 90 percent of those shutdowns will occur before 2016, when Utility MACT is fully operational.<sup>34</sup>

The Federal Energy Regulatory Commission (FERC) in a preliminary assessment notified the EPA that 8 percent of U.S. electric generating capacity could be lost due to a combination of Utility MACT and other proposed regulations, eight times higher than the EPA’s own estimate. Despite FERC warning the EPA of reliability threats as early as October 2010 and expressing concerns about the EPA’s modeling, the EPA did not share FERC’s information with the public. Moreover, the consent decree

deadline prevented the EPA, as well as the public, from considering a comprehensive electricity reliability study conducted by the North American Electric Reliability Corporation (NERC), a regulatory authority overseen by FERC. NERC’s study was not due to be released until November 2011, after the close of the comment period.<sup>35</sup>

Plants must comply with Utility MACT by April 2015. States and electricity providers across the country warned compliance with the regulation would reduce the reliability of the electric power grid by reducing generating capacity. There were 310 gigawatts of coal-fired generating capacity in the United States in 2012, constituting 37 percent of total electricity generation.<sup>36</sup> In 2008, coal was responsible for 49 percent of U.S. electrical power.<sup>37</sup> Thus, the impact of losing this generating capacity could be substantial. One energy provider in Michigan said it would have to retire “hundreds, if not thousands, of [megawatts] of coal and/or oil-fired capacity.” Another agreed that installing the technologies required to comply with Utility MACT would be cost-prohibitive, leading to closures across the state.<sup>38</sup> Specifically:

- The East Kentucky Power Cooperative announced in April 2014 the retirement of four coal-fired generators, specifically due to its inability to comply with Utility MACT.<sup>39</sup>
- Similarly, FirstEnergy Corporation announced the shutdown of two of its Pennsylvania coal plants, citing EPA regulations. Utility MACT would have cost FirstEnergy \$275 million to bring the two plants into compliance.<sup>40</sup>

- PJM Interconnection, a power grid operator in 13 states, announced its members plan to shut down 14,000 megawatts of electricity by 2015 and 4,000 megawatts more by 2018, several times larger than the EPA’s projection of Utility MACT plant closures of only 4.7 gigawatts (4,700 megawatts).<sup>41</sup>
- Overall, according to a March 2014 report from the U.S. Energy Information Administration, by year-end 2012, power companies had decided to retire 9.5 percent of coal-fired generation capacity due to Utility MACT and were undecided about whether to retrofit or retire 20.4 percent of capacity in response to the EPA rule.<sup>42</sup> [See Figure III.] This means 30 percent of coal-fired generation capacity could retire, solely due to Utility MACT.

EPA’s own modeling projects power plant shutdowns, or utility operators have planned shutdowns, in 31 states specifically because of EPA regulations [see Figure IV]. Many of these shutdowns are specifically due to Utility MACT. Ohio alone is facing a full 6 gigawatts of closures.<sup>43</sup>

**Pollutant by Pollutant Approach.** The EPA has been criticized for employing a “pollutant by pollutant” approach to setting MACT floors — measuring the best performing sources for each regulated pollutant, not measuring the best performing sources overall — creating concern the agency’s final rules will set standards no existing utility can meet. Indeed, that was the case with the EPA’s Boiler MACT regulation — another product of sue and settle — when industry opined no existing operating facility met the standards set by the agency,

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though the EPA insisted “a number of units” could meet them.<sup>44</sup>

When the EPA released Utility MACT and responded to complaints about its “pollutant by pollutant” method, the agency said it believed 64 existing coal-fired electric generating units, of 252 it examined, could meet the rule’s requirements for existing plants. According to the EPA, only one existing unit met the more stringent requirements that Utility MACT imposes on new power plants.<sup>45</sup> At the end of 2012, there were 1,308 coal-fired electric generating units among 557 power plants in the U.S.<sup>46</sup> Without upgrades and expensive new technology installations, which many utilities said could not be installed by the compliance deadline, these units would have to shut down.<sup>47</sup>

### Effect on Consumers’ Costs.

Utility MACT is not just a problem for electric reliability — it will negatively impact consumers and employment. The EPA estimates its rule will cost \$9.6 billion annually, a price EPA Administrator Gina McCarthy calls “affordable.”<sup>48</sup> These costs come from requiring coal plants to install specific scrubbers and filters to achieve the emission reductions, as well as associated electricity price increases.<sup>49</sup>

Consumers can absolutely expect higher power bills. For instance:

- The American Coalition for Clean Coal Electricity estimates Utility MACT and another EPA pollution rule will increase electricity bills in 2016 by an average of 11.5 percent, including a staggering 23.5 percent increase in Kentucky and a 17.6 percent increase in Nebraska.<sup>50</sup>

- When PJM Interconnection held its capacity auction for 2015, the market-clearing price was \$136 per megawatt, a whopping 8 times higher than the \$16 per megawatt price in 2012. In northern Ohio, the price was \$357 per megawatt. PJM Executive Vice President Andy Ott explained why: “Capacity prices were higher than last year’s because of retirements of existing coal-fired generation resulting largely from environmental regulations which go into effect in 2015.”<sup>51</sup>

Notably, job losses due to the rule are not reflected in the agency’s cost estimates because the EPA actually projected job gains, not losses, in its calculation of Utility MACT benefits:

- Of the 54,000 jobs the agency says will be created, 46,000 of them are short-term jobs simply to install the new technologies mandated by the rule!<sup>52</sup>
- The United Mine Workers projects the rule will cause 54,000 direct job losses and up to 200,000 job losses in related industries.<sup>53</sup>
- SNL Energy confirms environmental regulations are wreaking havoc on mining employment. From the fourth quarter of 2011 to the end of 2013, average coal mine employment dropped a staggering 17.1 percent.<sup>54</sup>

The EPA’s cost estimates extend only through 2030. Stuningly, EPA Administrator Gina McCarthy told the House Subcommittee on Energy and Power she could not actually say how long past 2030 those costs would continue to occur.<sup>55</sup>

With so many problems apparent, a month before the final rule was due, UARG — along with 25 states that filed an amicus brief — begged the court to allow the EPA an extra year to set the new emission standards. But before the court even addressed the issue, the EPA issued its final rule in December 2011. Existing plants must comply with the regulations by April 2015.<sup>56</sup>

In short, what began as an agreement between a coalition of interest groups and the EPA ultimately produced one of the costliest rules ever issued by the agency. The consent decree drove the rulemaking, with the deadlines dictating procedures and, by extension, the rule’s content.

The rule remains controversial. On April 15, 2014, the D.C. Court of Appeals issued a decision in favor of the EPA, ruling against industry groups that had sued to invalidate the regulation.<sup>57</sup> The decision highlights why oversight and procedural integrity at the outset of a rulemaking is so important — courts grant considerable deference to agency decision-making after the fact. Remarkably, the court held that nothing required the EPA to consider the costs of its Utility MACT rule when deciding whether the regulation was “appropriate.” The plaintiffs can appeal the decision to the U.S. Supreme Court, but as of now, the rule stands.

## Regional Haze

The Utility MACT saga is staggering, but not unique. Interest groups used agreed-upon deadlines to great effect when they sued the EPA over state Regional Haze plans.

The 1990 Clean Air Act amendments grant states primary



control over measures to combat haze. States must establish their own state implantation plans (SIPs, also known as Regional Haze plans), which are submitted to the EPA for review. Only if a state fails to submit an SIP, or if a state’s SIP is disapproved, is the EPA authorized to institute a federal implementation plan (FIP) instead. The Regional Haze program is not aimed at health but, rather, at visibility, to improve viewing quality in national parks and wilderness areas.<sup>58</sup>

The WildEarth Guardians first sued the agency over its failure to act on state Regional Haze plans in 2009. Four other suits and corresponding consent decrees followed.<sup>59</sup> These five consent decrees established timeframes for the EPA to evaluate and approve state Regional Haze plans by the decrees’ respective deadlines, or institute a federal plan instead.

These court-sanctioned agreements provide cover for agencies demanding strict adherence to the rulemaking schedule. The decrees allow the agency to say, in effect, “We *must* operate according to this timetable, otherwise we would be violating a court order.” Nowhere was this more evident than in the Regional Haze cases. After the states submitted their SIPs, the EPA declared that some, or parts, of the plans were insufficient. But because of the self-imposed deadlines in the decrees, the EPA *had* to implement federal controls rather than give the states time to correct their submissions, in order to comply with court orders.<sup>60</sup>

For example, the EPA explained its reason for imposing a federal implementation plan (FIP) on Arizona rather than allowing more time for the state to develop its own SIP: “[W]hile we agree that, in the absence

of an expired statutory duty and a court-ordered deadline to issue a FIP, it would be preferable for us to give Arizona additional time to revise its Regional Haze SIP prior to promulgation of a FIP, we simply do not have this option under these circumstances.”<sup>61</sup> In one instance, the agency told North Dakota it simply did not have time to consider an amended state plan: “EPA was unable to consider this administrative record/SIP revision in this proposed action; the time available under a relevant consent decree deadline did not allow EPA to.”<sup>62</sup>

*“Green groups and the EPA used sue and settle to impose federal control over what Congress intended to be a state regulatory scheme.”*

Not only were the decrees used to justify the federal takeovers, they were also cited — in typical sue and settle form — as justification for the short comment periods when the state plans were proposed. When the EPA issued its proposed FIP for taconite (iron ore) facilities in Minnesota and Michigan, it provided only 45 days for public comment on a \$300 million rule. The affected industries said they could not develop the proper models to evaluate the federal proposal in such a short time, but the agency refused to extend the comment period.<sup>63</sup> Why? “U.S. EPA is bound by requirements of a consent decree to complete the... Federal Implementation Plan (FIP) by November 15, 2012,” the agency said. “Granting a 45-day extension would not allow us sufficient time to meet this deadline.”<sup>64</sup>

In response to the EPA’s imposition of a federal plan in the two states, the National Mining Association bluntly accused the agency of using the consent decree to exert federal control over what should be state programs.<sup>65</sup> The EPA did not deny using the consent decree as a cover for instituting a federal plan; rather, the agency simply said the association’s comments were off topic and should have been focused on the decision to disapprove the state plans.<sup>66</sup>

Thus, green groups and the EPA used sue and settle to impose federal control over what Congress intended to be a state regulatory scheme.<sup>67</sup> The displacement of state authority is concerning, especially when that shift comes as a result of a consent decree negotiated without state involvement. According to one report, there were just two federal plans imposed by the EPA from 1997 to 2009. From 2009 to 2012, the EPA issued 19 FIPs.<sup>68</sup>

The practical impact of the federal Regional Haze takeover is staggering, and consumers will pay the price.

- In Oklahoma, utility rates are expected to skyrocket by 13 percent to 20 percent over a three-year period.<sup>69</sup> The state’s Regional Haze plan proposed using low-sulfur coal to meet the haze requirements. Instead, the EPA is instead requiring coal plants to be retrofitted with controls at a cost of \$1.8 billion.<sup>70</sup>
- Similarly, Wyoming’s state plan would have used new technology to control emissions at a cost of \$20 million, but the federal plan that replaced it requires equipment costing \$659 million.<sup>71</sup>
- In sum, the EPA’s Regional Haze

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regulations will cost electricity ratepayers in Oklahoma, New Mexico and North Dakota close to \$400 million more annually than their state plans.<sup>72</sup>

### An Emerging Pattern

Utility MACT and Regional Haze are some of the most expensive — and expansive — regulations to emerge from sue and settle, but they are hardly the only ones. Environmentalists have used consent decrees to regulate everything from lead paint to parrots to pine trees.<sup>73</sup> Whatever the subject of the regulation, a common pattern has emerged: An ostensibly innocent rulemaking calendar becomes a vehicle for substantive regulation, and public participation is limited by compulsory compliance with a judicial order.

Significantly, citizen suits are supposed to be aimed at nondiscretionary duties — with plaintiffs asking the agency to do something the law requires. But, critics counter, sue and settle subtly incorporates discretionary duties into these settlements.

**Wastewater Discharge Regulations.** For example, in *Defenders of Wildlife v. Jackson*, the EPA agreed via consent decree to issue new wastewater discharge guidelines for power plants.<sup>74</sup> An industry group challenged that promise: The only requirement in the Clean Water Act with regard to such guidelines is to *review* the guidelines, and revise only if appropriate.<sup>75</sup> But by agreeing to revise the regulations — and then setting that decision in judicial stone via the consent decree — “the decree remove[d] the EPA’s discretion to decide that the present regulations are sufficient and that a rulemaking is

unnecessary.”<sup>76</sup> The EPA estimates the proposed rule will cost \$185 million to \$954 million.<sup>77</sup>

**Chesapeake Bay Pollution.** In another case — *Fowler v. EPA* — environmental groups agreed to a settlement that required the EPA to issue regulations affecting Chesapeake Bay.<sup>78</sup> The Clean Water Act gives both states and the EPA a part in improving water quality, but states are given the primary role to develop and implement pollution control measures for the waters within their borders.<sup>79</sup>

The EPA’s subsequent rulemaking set a limit on pollutants entering Chesapeake Bay called the Total

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Maximum Daily Load (TMDL). The rule was contested by trade groups and lawmakers as a usurpation of state authority, outside the scope of the Clean Water Act, because the rule makes specific pollution allocation decisions traditionally left to the states.<sup>80</sup> A federal district court upheld the EPA’s actions, but the decision has been appealed to a higher court.<sup>81</sup> The states within the Chesapeake Bay watershed — Delaware, Maryland, New York, Pennsylvania, Virginia, West Virginia and the District of Columbia — are each affected by the rule. The regulations are estimated to cost the states of Maryland and Virginia alone \$18 billion.<sup>82</sup>

When the EPA proposed the Chesapeake Bay pollution regulation,

stakeholders again decried the procedural harms that flowed from the settlement agreement. The public was given just 45 days to comment on the several thousand-page regulation.<sup>83</sup> Those challenging the process alleged the EPA had not provided the public with all of its supporting data and contended the data it did provide was too complex to review in just 45 days.<sup>84</sup>

Furthermore, the agency admitted its reason for settling with the plaintiffs. “Because EPA and the co-plaintiffs share the same goals of clean water in the Chesapeake Bay and the waterways flowing through communities in the region,” said Deputy Administrator Bob Perciasepe, “We felt that a settlement building on our common goals was far more positive than defending a lawsuit filed in the Bush administration.”<sup>85</sup>

**Allowing Environmental Groups to Dictate Policy.** Sue and settle has proven a valuable tool for environmental groups to, quite literally, write regulatory policy. Indeed, the EPA and plaintiffs’ “common goals” were on display in *Natural Resources Defense Council v. EPA*. Environmentalists sued the EPA and insisted the agency’s existing rule on pesticide research was not strong enough.<sup>86</sup> The agency actually took the plaintiffs’ proposals in the settlement agreement and incorporated them directly into the proposed rule, word-for-word. As the U.S. Chamber of Commerce reported, “[T]here are entire passages from the settlement agreement that are identical to the language included in the 2011 proposed rule.”<sup>87</sup>

Similarly, when environmental groups sought changes to an existing lead paint regulation in *Sierra Club*

*et al. v. EPA*, the EPA agreed in the settlement to amend the existing rule, remove certain provisions and add new requirements — all at a cost of \$500 million in the first year and \$300 million in the years following.<sup>88</sup> These were very specific agreements to propose new regulations.<sup>89</sup>

## States and Industries Kept Out of the Process

Sue and settle is appealing to litigants because these agreements are easily made without third party involvement. To litigate, a plaintiff must have “standing,” a legal term and constitutional prerequisite requiring a party to demonstrate an injury, link the cause of the injury to the defendant and establish that the injury can be redressed. But U.S. courts are split on the showing that a defendant intervening party — which is what a state or industry seeking to join these lawsuits would be — must make to join a case. Must the intervenors establish Article III constitutional standing, or is it enough to satisfy the requirements for intervention established by Rule 24 of the Federal Rules of Civil Procedure? Notably, the D.C. Circuit Court of Appeals, as well as the Seventh and Eighth Circuits, have required parties to fulfill both standards.<sup>90</sup>

**Powerplant Wastewater Regulation.** In 2010, the Defenders of Wildlife and the Sierra Club sued the EPA over wastewater regulations for power plants.<sup>91</sup> The energy companies to be regulated — represented by the Utility Water Act Group (UWAG) — tried to intervene. They claimed the rulemaking schedule established by the consent decree was too short and failed to provide an adequate public comment period.

The court ruled UWAG failed to meet both the constitutional requirements of standing and the procedural requirements of intervention. “UWAG has not articulated any concrete, particularized, actual, and imminent injury...its members will suffer upon entry of the consent decree,” the judge wrote, concluding UWAG could instead participate in the rulemaking process like any other member of the public, after the decree was approved.<sup>92</sup> But, as the U.S. Chamber of Commerce has pointed out, the sue and settle process grants the consent decree such control over the rulemaking schedule that the public comment period is too often rendered only a formality, and the schedule itself can have profoundly substantive implications.<sup>93</sup> As UWAG argued, the schedule “is important in determining how much the rule will cost, what the effects will be on electric power supply and reliability, and whether the electricity utility industry can comply on time at all.”<sup>94</sup> After an agreement is made, interested parties are forced to participate within the timeframe established by the EPA and the plaintiffs. And as the Utility MACT litigation illustrated, courts grant great deference to agency action, making it difficult to challenge final rules.

This type of outcome is not unusual. Because the decrees appear to be nothing more than schedules for rulemaking, judges will dismiss would-be intervenors for lack of standing.<sup>95</sup> On appeal, the D.C. Court of Appeals confirmed the denial of intervention to UWAG, specifically ruling that “inability to comment effectively or fully” does not establish standing.<sup>96</sup>

Somewhat inexplicably, this

means entities that will ultimately be regulated by the rules ensuing from these decrees are unable to join these lawsuits, while environmental organizations — mere advocacy groups with no interest in the regulation beyond their own ideological proclivities — are able to serve as parties to these agreements.

Several other sue and settle rulemakings are currently being finalized or litigated. [See the sidebar, “Other Recent Sue and Settle Cases.”]

## Taxpayers Fund “Sue and Settle”

Even more statutes give environmental interest groups incentives to litigate. For example, the Equal Access to Justice Act (EAJA) allows litigants who successfully sue the federal government to recover court costs and attorneys’ fees.<sup>97</sup> Moreover, consent decree settlements often stipulate that the agency will cover the plaintiff’s legal fees.<sup>98</sup> Why not file a lawsuit, if someone else will pay for it? In fact, green interest groups have been more than willing to allow taxpayers to foot their legal bills. A U.S. Chamber of Commerce report found attorneys’ fees were awarded in at least 65 percent of the sue and settle cases it identified from 2009 to 2012.<sup>99</sup>

From 2003 to 2010, the Government Accountability Office found the federal government paid \$14.2 million out of the Judgment Fund (a permanent fund that covers money judgments against the United States) to plaintiffs in EPA-related cases.<sup>100</sup> National environmental groups received the largest share, taking in 46 percent of the cash. Thus:

- From 1998 to 2010, Earthjustice



### Other Recent Sue and Settle Cases

Every day, sue and settle cases are having an impact on regulated parties, states and businesses. A number of cases have recently made their way through the courts:

- The EPA proposed to ban the production and sale of what would amount to 80 percent of all wood-burning stoves in the United States when it issued stringent emissions limits in January 2014. Most wood stoves currently used to heat homes cannot meet the EPA's standard. According to the Census Bureau, 2.4 million American homes use wood as their primary heating source.<sup>1</sup> An additional 10 million homes use wood as a supplementary heating source.<sup>2</sup> The regulation is yet another product of sue and settle, promulgated after a handful of states and groups, including Earthjustice, the American Lung Association and the Environmental Defense Fund, filed suit against the agency in October 2013. The rule is set to be finalized in February 2015.<sup>3</sup>
- In a settlement between the WildEarth Guardians, the U.S. Fish and Wildlife Service (FWS) and the Department of the Interior (DOI) in May 2011, FWS and DOI agreed to make endangerment determinations for 251 different species.<sup>4</sup> Pursuant to a deadline, FWS listed the lesser prairie chicken as a threatened species under the Endangered Species Act in March 2014. The lesser prairie chicken is found across Texas, Oklahoma, Colorado, New Mexico and Kansas, and the listing could significantly affect agricultural activity as well as oil and gas drilling.<sup>5</sup> In 2011, FWS spent more than 75 percent of its \$20.9 million budget for species listing and habitat designation solely to take actions required by consent decrees and settlement agreements.<sup>6</sup>
- As part of that same settlement, the agencies also agreed to make a listing determination for the greater sage grouse. The bird's habitat spans 100 million acres and 11 states, and an endangerment listing would lead to land use regulations, imperiling development across the West.<sup>7</sup> Western states are speaking out against the potential regulations, concerned that millions of acres of land could become off-limits.<sup>8</sup> The agency must make a decision by September 2015.
- The settlement agreement itself has been subject to litigation. On March 17, 2014, Oklahoma's Attorney General sued the DOI and the FWS for agreeing, in the settlement with the WildEarth Guardians, either to propose the 251 species for listing or to find listings were unwarranted. The settlement eliminated the middle-ground third option provided in the Endangered Species Act (ESA) that would find a listing petition "warranted, but precluded" by other priorities.<sup>9</sup> The latter designation would not provide federal ESA protection but would list the species as a "candidate species." The label is meant to encourage voluntary, state-based conservation programs that could eliminate the need to list the species as endangered.<sup>10</sup> Instead, regulation will be found either "warranted" or "unwarranted."
- Attorneys General in 21 states and the American Farm Bureau Federation have appealed a federal district court's ruling upholding the Chesapeake Bay TMDL regulation, a product of sue and settle. Their appeal claims the Chesapeake Bay settlement encroached upon state authority. The case is currently pending before the Third Circuit Court of Appeals; oral arguments are expected this summer.<sup>11</sup>
- In May 2013, 12 state attorneys general wrote to the EPA, warning the agency not to regulate the use of "fracking" by the oil and gas industry through sue and settle without input from producing states. The letter was a response to a threat by a collection of northern states to sue the EPA over methane emissions from oil and gas drilling.<sup>12</sup>



## Other Recent Sue and Settle Cases (Continued)

### Notes

1. Larry Bell, “EPA’s Wood-Burning Stove Ban Has Chilling Consequences For Many Rural People,” *Forbes.com*, January 29, 2014. Available at <http://www.forbes.com/sites/larrybell/2014/01/29/epas-wood-burning-stove-ban-has-chilling-consequences-for-many-rural-people/>.

2. Cheryl K. Chumley, “EPA’s Wood-Burning Stove Ban Deals Blow to Rural Homes,” *Newsmax.com*, February 18, 2014. Available at <http://www.newsmax.com/US/heat-energy-wood-stoves/2014/02/18/id/553372/>.

3. *New York v. McCarthy*, Civil Action No. 13-1553, U.S. District Court for the District of Columbia, Partial Consent Decree, April 28, 2010. Available at <http://www.ag.ny.gov/pdfs/Consent%20Decree%20--%20Lodged.pdf>.

4. *WildEarth Guardians v. Salazar*, Settlement Agreement, May 10, 2011. Available at [https://www.uschamber.com/sueandsettle/pleadings/In%20re%20ESA%20Section%204%20Deadline%20Litigation/FWS\\_ESA\\_Settlement\\_Agreement\\_As\\_Filed\\_5.10.11.pdf](https://www.uschamber.com/sueandsettle/pleadings/In%20re%20ESA%20Section%204%20Deadline%20Litigation/FWS_ESA_Settlement_Agreement_As_Filed_5.10.11.pdf).

5. “Critics cry foul as feds place lesser prairie chicken on threatened species list,” *FoxNews.com*, March 28, 2014. Available at <http://www.foxnews.com/politics/2014/03/28/critics-cry-foul-as-feds-place-lesser-prairie-chicken-on-threatened-species/>.

6. William L. Kovacs, Keith W. Holman and Jonathan A. Jackson, “Sue and Settle: Regulating Behind Closed Doors,” U.S. Chamber of Commerce, May 2013, page 22. Available at <https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPOR-Final.pdf>.

7. “Sage Grouse Rebellion,” *Wall Street Journal*, March 11, 2014. Available at <http://online.wsj.com/news/articles/SB10001424052702304858104579262383209254934>.

8. Reid Wilson, “Western states worry decision on bird’s fate could cost billions in development,” *Washington Post*, May 11, 2014. Available at <http://www.washingtonpost.com/blogs/govbeat/wp/2014/05/11/western-states-worry-decision-on-birds-fate-could-cost-billions-in-development/>.

9. *Oklahoma v. Department of the Interior*, Civil Action No. 14-CV-123-TCK-PJC, Northern District of Oklahoma, 2014, page 32, available at <http://www.ok.gov/oag/documents/Oklahoma%20v%20Dept%20Interior%20&%20USFWS.pdf>; *WildEarth Guardians v. Salazar*, Settlement Agreement, May 10, 2011, available at [https://www.uschamber.com/sueandsettle/pleadings/In%20re%20ESA%20Section%204%20Deadline%20Litigation/FWS\\_ESA\\_Settlement\\_Agreement\\_As\\_Filed\\_5.10.11.pdf](https://www.uschamber.com/sueandsettle/pleadings/In%20re%20ESA%20Section%204%20Deadline%20Litigation/FWS_ESA_Settlement_Agreement_As_Filed_5.10.11.pdf); U.S. Code Title 16, Chapter 35, Section 1533 (b)(3)(B), available at <http://www.law.cornell.edu/uscode/text/16/1533>; and “Candidate Species: Section 4 of the Endangered Species Act,” U.S. Fish and Wildlife Service, available at [http://www.fws.gov/endangered/esa-library/pdf/candidate\\_species.pdf](http://www.fws.gov/endangered/esa-library/pdf/candidate_species.pdf).

10. *Oklahoma v. Department of the Interior*, Civil Action No. 14-CV-123-TCK-PJC, Northern District of Oklahoma, 2014, pages 14-18, available at <http://www.ok.gov/oag/documents/Oklahoma%20v%20Dept%20Interior%20&%20USFWS.pdf>; and Jessica Ferrell, “Potential Sage Grouse Listing Continues to Shape Western Energy Development and Grazing Rights,” *Marten Law*, January 17, 2012, available at <http://www.martenlaw.com/newsletter/20120117-potential-esa-sage-grouse-listing>.

11. “Challenge to Chesapeake cleanup tests EPA power,” *Associated Press*, April 29, 2014. Available at <http://thedailyrecord.com/2014/04/29/challenge-to-chesapeake-cleanup-tests-epa-power/>.

12. Letter from Scott Pruitt to Bob Perciasepe and Gina McCarthy, May 2, 2013. Available at [https://www.oag.ok.gov/oagweb.nsf/3e67f1cee13bc090862572b2005ad559/23b407a5f6b5131886257b600077acf1/\\$FILE/FINAL%20-%20EPAMethane050213.pdf](https://www.oag.ok.gov/oagweb.nsf/3e67f1cee13bc090862572b2005ad559/23b407a5f6b5131886257b600077acf1/$FILE/FINAL%20-%20EPAMethane050213.pdf); and “AG Pruitt, 12 States Send Letter to EPA Warning Not to Employ Backdoor ‘Sue and Settle’ Tactic to Regulate Hydraulic Fracturing; Oil Production,” Press Release, Oklahoma Office of the Attorney General, May 3, 2013. Available at <https://www.oag.ok.gov/oagweb.nsf/3E67F1CEE13BC090862572B2005AD559/23B407A5F6B5131886257B600077ACF1>.

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alone collected \$4,655,425.60 in legal fees, the Sierra Club received \$966,687.34, and the Natural Resources Defense Council took in \$252,004.87.<sup>101</sup>

- Taxpayers, of course, are also funding the defendants. In those same years, the Department of Justice spent \$43 million representing the EPA.<sup>102</sup>

Depending upon the statute at issue, agencies sometimes compensate litigants out of their own budgets. For instance:

- From 2006 to 2010, the EPA paid out \$1.4 million from its budget in attorneys' fees and costs, with 61 percent of the funds going to local environmental groups and 23 percent going to national groups.
- Similarly, from March 2001 to September 2010, the Fish and Wildlife Service (USFWS) paid more than \$21 million in attorneys' fees out of the Judgment Fund to cover the costs of Endangered Species Act (ESA) litigation, and it paid \$1.5 million in attorneys' fees from its own appropriations from 2004 to 2010.<sup>103</sup>

These numbers may not represent a true picture of litigation costs, because agencies have not kept a full record of disbursements since the 1995 Federal Reports Elimination and Sunset Act removed any requirements for the government to report on fees awarded under the Equal Access to Justice Act. As a result, no law requires any agency or government official to report on these disbursements, and there has been no official count of payments since then.<sup>104</sup>

Notably, the EPA also routinely hands out grants to nonprofit groups that turn around and sue them.<sup>105</sup>

### Legislative Solutions

Even the famously liberal Ninth Circuit Court of Appeals, headquartered in California, has balked at the practice of sue and settle. Overturning a lower court's approval of a consent decree between a group of plaintiffs and the Bureau of Land Management, the Court of Appeals concluded that this type of substantive rulemaking should be subject to the mandatory rulemaking process. The court declared, "[A] district court abuses its discretion when it enters a consent decree that permanently and substantially amends an agency rule that would have otherwise been subject to statutory rulemaking procedures."<sup>106</sup>

Though the Ninth Circuit may have expressed reservations, many courts approve these agreements with little scrutiny, leaving affected parties out of the process and setting in motion new regulations that jump to the top of an agency's agenda. Several legislative fixes have been proposed to address these issues.

#### **Proposal: Strict Procedural Guidelines for Public Participation.**

One such bill, S. 714, the Sunshine for Regulatory Decrees and Settlements Act, would establish strict procedural guidelines to ensure meaningful public participation in these lawsuits.<sup>107</sup> Specifically:

- For suits resulting in settlement agreements, S. 714 requires that intervening parties participate in settlement talks. Moreover, such talks would have to be conducted by a judge

or pursuant to mediation or some other alternative dispute program.

- Before a consent decree could be filed with a court, an agency would first have to publish the proposed decree and allow for public comment, preventing pre-negotiated decrees from being filed the same day as the plaintiff's complaint. Currently, none of our environmental laws, other than the Clean Air Act and the Superfund law, require this type of oversight.<sup>108</sup>
- As for the mandatory deadlines often tucked into decrees, S. 714 would require the agency to explain to the judge exactly how the decree would affect the agency's ability to discharge its regulatory duties.

S. 714 is sponsored by Sen. Charles Grassley (R-Iowa). A companion version of the bill, H.R. 1493, has been introduced in the House by Rep. Doug Collins (R-Ga.). Thanks to lawmaker pressure, the EPA has begun posting the notices of intent to sue the agency receives from groups aiming to file citizen suits.<sup>109</sup> All agencies should follow suit, though that practice alone will not solve the problem. Greater oversight and procedural safeguards of the type required by S. 714 would at least make backdoor rulemaking more transparent and would impose some much-needed oversight on a litigation tactic that has thrived on limiting stakeholder participation and skirting procedural requirements.

**Proposal: Congressional Approval of Costly Rules.** Another legislative measure that would limit the efficacy of sue and settle is S. 15, the Regulations from the Executive in Need of Scrutiny, or REINS Act,

sponsored by Sen. Rand Paul (R–Ky.).<sup>110</sup> While not aimed specifically at sue and settle, the proposal would require congressional approval of any “major” rule (that is, a rule with at least a \$100 million annual economic impact) proposed by a federal agency. Had the REINS Act been in place, Utility MACT could not have been issued without approval from the House and the Senate.

**Proposal: Drop Deadlines.** One strategy to combat sue and settle has taken a more creative approach. Because all of these lawsuits are made possible by the lapsed deadlines established in their authorizing legislation, the lawmakers who introduced S. 1009, the Chemical Safety Improvement Act, simply left deadlines out of the bill entirely.<sup>111</sup> The bill would reform the Toxic Substances Control Act — one of the 20 federal laws with a citizen suit provision — but has yet to pass.

**Proposal: Report Government Payments for Plaintiffs’ Legal Costs.** Lawmakers should also address the financial incentives underlying citizen suit litigation and provide the public with information on litigation costs. One proposal has already been introduced in the House of Representatives to reinstitute reporting of disbursements under the Equal Access to Justice Act. For example, Rep. Cynthia Lummis’ (R–Wy.) H.R. 2919, the Open Book on Equal Access to Justice Act, would require EAJA payments to be tracked and reports made available to the public, reinstating the practice followed prior to 1995. Similarly, H.R. 317, the Judgment Fund Transparency Act, sponsored by Rep. Cory Gardner (R – CO), would require the establishment

of a publicly available database of Judgment Fund payments.

**Proposal: Limit Eligibility for Government Payments of Legal Costs.** Moreover, many of these organizations are more than capable of financing their own litigation. There is a net worth limit on who can recover costs under the Equal Access to Justice Act, restricting the ability of wealthy plaintiffs to recover legal fees. However, 501(c)(3)s — nonprofit charitable organizations, which most environmental groups are — are exempt. The Government Litigation Savings Act, H.R. 3037, would impose the same net worth limits on 501(c)(3)s as small businesses and other organizations — a \$7 million net worth cap.<sup>112</sup>

## Conclusion

Until there is reform, interest groups will continue using litigation as a tactic to direct agency action and circumvent standard rulemaking procedures. It is disingenuous to suggest, as some in the EPA have, that sue and settle does not actually interfere with required rulemaking procedures.<sup>113</sup> To the contrary, states and industries have watched as meticulous analysis and thorough assessment have been trumped by consent decree deadlines. While notice and comment may technically take place, too often it functions as nothing more than a formality — the Utility MACT and Regional Haze cases demonstrated this reality all too well. These agreements place agency agendas squarely in the hands of interest groups, often stifling public participation under cover of a judicial decree negotiated without public involvement.

Of course, these concerns arise from the massive delegation of power to executive agencies by the legislative branch. Agencies do not simply oversee congressional directives — they are granted a great deal of discretion to develop and design far-reaching rules. And businesses are not the only entities affected by the regulatory process — ordinary citizens are the ones who ultimately bear the costs of administrative decision making. This is why public oversight and participation is critically important to the regulatory process, and it is why tactics such as sue and settle that circumvent those procedures deserve the strictest scrutiny.

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## Notes

<sup>1</sup> Mark G. McLaughlin, “More Lawyers than Doctors; More Lawyers than Soldiers,” Examiner.com, April 15, 2012. Available at <http://www.examiner.com/article/more-lawyers-than-doctors-more-lawyers-than-soldiers>.

<sup>2</sup> Sam Batkins, “A Regulatory Flurry: The Year in Regulation, 2012,” American Action Forum, January 8, 2014, available at <http://americanactionforum.org/research/a-regulatory-flurry-the-year-in-regulation-2013>; and Michael Tennant, “Federal Regulations Imposed \$112 Billion in New Costs in 2013,” *New American*, January 10, 2014, available at <http://www.thenewamerican.com/usnews/constitution/item/17366-federal-regulations-imposed-112-billion-in-new-costs-in-2013>.

<sup>3</sup> See U.S. Code Title 42, Chapter 85, Section 7604; U.S. Code Title 33, Chapter 12, Section 1365; U.S. Code Title 16, Chapter 35, Section 1540(g). For a full list of the statutes that contain citizen suit provisions, see William L. Kovacs, Hearing on “Mandate Madness: When Sue and Settle Just Isn’t Enough,” testimony before the Subcommittee On Technology, Information Policy, Intergovernmental Relations And Procurement Reform, U.S. House of Representatives Committee on Oversight and Government Reform, June 28, 2012. Available at <http://oversight.house.gov/wp-content/uploads/2012/06/6-28-12-TechIP-Kovacs.pdf>.

<sup>4</sup> William Yeatman, “EPA’s Woeful Deadline Performance Raises Questions About Agency Competence, Climate Change Regulations,” Competitive Enterprise Institute, WebMemo No. 23, July 10, 2013. Available at <http://cei.org/sites/default/files/William%20Yeatman%20-%20EPA%27s%20Woeful%20Deadline%20Performance%20Raises%20Questions%20About%20Agency%20Competence.pdf>.

<sup>5</sup> “Sue and Settle: Regulating Behind Closed Doors,” U.S. Chamber of Commerce, May 2013, page 12. Available at <https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREREPORT-Final.pdf>.

<sup>6</sup> See, for example, *Defenders of Wildlife v. Jackson*, Civil Action No. 10-1915, U.S. District Court for the District of Columbia, 2012.

<sup>7</sup> An official from Florida’s Department of Environmental Protection told a House committee he only found out about a settlement concerning Florida’s Regional Haze program when he read about it in the *Federal Register*. William Yeatman, “The U.S. Environmental Protection Agency’s Assault on State Sovereignty,” American Legislative Exchange Council, June 2013. Available at [http://alec.org/docs/EPA\\_Assault\\_State\\_Sovereignty](http://alec.org/docs/EPA_Assault_State_Sovereignty).

<sup>8</sup> *American Nurses Association v. Jackson*, Civil Action No. 1:08-cv-02198, U.S. District Court for the District of Columbia, April 15, 2010. Available at [http://www.gpo.gov/fdsys/pkg/USCOURTS-dcd-1\\_08-cv-02198/pdf/USCOURTS-dcd-1\\_08-cv-02198-0.pdf](http://www.gpo.gov/fdsys/pkg/USCOURTS-dcd-1_08-cv-02198/pdf/USCOURTS-dcd-1_08-cv-02198-0.pdf).

<sup>9</sup> U.S. Code Title 42, Chapter 85, Section 7412.

<sup>10</sup> U.S. Code Title 42, Chapter 85, Section 7412(n)(1).

<sup>11</sup> A description of MACT standards can be found in James E. McCarthy, “EPA’s Utility MACT: Will the Lights Go Out?” Congressional Research Service, January 9, 2012. Available at [http://www.eenews.net/assets/2012/01/19/document\\_gw\\_03.pdf](http://www.eenews.net/assets/2012/01/19/document_gw_03.pdf).

<sup>12</sup> Floor Statement of Sen. Chuck Grassley, “Introduction of the Sunshine for Regulatory Decrees and Settlements Act of 2012,” July 12, 2012. Available at [http://www.grassley.senate.gov/news/Article.cfm?customel\\_dataPageID\\_1502=41771](http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=41771).

<sup>13</sup> *American Nurses Association v. Jackson*, Civil Action No. 1:08-cv-02198, U.S. District Court for the District of Columbia, April 15, 2010. Available at [http://www.gpo.gov/fdsys/pkg/USCOURTS-dcd-1\\_08-cv-02198/pdf/USCOURTS-dcd-1\\_08-cv-02198-0.pdf](http://www.gpo.gov/fdsys/pkg/USCOURTS-dcd-1_08-cv-02198/pdf/USCOURTS-dcd-1_08-cv-02198-0.pdf).

<sup>14</sup> William Yeatman, “Attack of the Scare Ads!” Competitive Enterprise Institute, July 1, 2012. Available at <http://cei.org/op-eds-articles/attack-scare-ads>. See also “Technical Support Document: National-Scale Mercury Risk Assessment Supporting the Appropriate and Necessary Finding for Coal- and Oil-Fired Electric Generating Units,” United States Environmental Protection Agency, March 2011. Available at [http://www.epa.gov/ttn/atw/utility/pro/hg\\_risk\\_tsd\\_3-17-11.pdf](http://www.epa.gov/ttn/atw/utility/pro/hg_risk_tsd_3-17-11.pdf).

<sup>15</sup> Marlo Lewis, “Big Costs, Illusory Benefits: Why Congress Should Nix The Utility MACT,” *Forbes.com*, June 12, 2012. Available at <http://www.forbes.com/sites/realspin/2012/06/12/big-costs-illusory-benefits-why-congress-should-nix-the-utility-mact/>.

<sup>16</sup> Susan E. Dudley, Hearing on “Review of Mercury Pollution’s Impacts to Public Health and the Environment,” testimony before the Subcommittee on Clean Air and Nuclear Safety, U.S. Senate, Committee on Environment and Public Works, April 17, 2012. Available at [http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=b269df79-8ef3-4897-8483-c5f33fb3ec62](http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=b269df79-8ef3-4897-8483-c5f33fb3ec62). See also “Regulatory



Impact Analysis for the Final Mercury and Air Toxics Standards,” Environmental Protection Agency, December 2011. Available at [http://www.epa.gov/air/airtrends/aqtrnd02/2002\\_airtrends\\_final.pdf](http://www.epa.gov/air/airtrends/aqtrnd02/2002_airtrends_final.pdf).

<sup>17</sup> Susan E. Dudley, Hearing on “Review of Mercury Pollution’s Impacts to Public Health and the Environment,” testimony before the Subcommittee on Clean Air and Nuclear Safety, U.S. Senate, Committee on Environment and Public Works, April 17, 2012. Available at [http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=b269df79-8ef3-4897-8483-c5f33fb3ec62](http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=b269df79-8ef3-4897-8483-c5f33fb3ec62).

<sup>18</sup> Fine particles are regulated under the National Ambient Air Quality Standards program (NAAQS).

<sup>19</sup> Anne E. Smith, Hearing on “The American Energy Initiative: What EPA’s Utility MACT Rule Will Cost U.S. Consumers,” testimony before the Subcommittee on Energy and Power, U.S. House of Representatives, Committee on Energy and Commerce, February 8, 2012, pages 16-19. Available at <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/Hearings/EP/20120208/HHRG-112-IF03-WState-ASmith-20120208.pdf>.

<sup>20</sup> Scott H. Segal, Hearing on “Energy Consumers Relief Act of 2013,” testimony before the Subcommittee on Energy and Power, U.S. House of Representatives, Committee on Energy and Commerce, April 12, 2013, page 10. Available at [http://www.electricreliability.org/sites/default/files/media\\_files/Segal%20Testimony%20on%20Energy%20Consumers%20Relief%20Act%202013.pdf](http://www.electricreliability.org/sites/default/files/media_files/Segal%20Testimony%20on%20Energy%20Consumers%20Relief%20Act%202013.pdf).

<sup>21</sup> Statement of James M. Inhofe, Hearing on “Oversight: Review of the Environmental Protection Agency’s Mercury and Air Toxics Standards (MATS) for Power Plants,” Subcommittee on Clean Air and Nuclear Safety, U.S. Senate, Committee on Environment and Public Works, March 20, 2012. Available at [http://www.epw.senate.gov/public/index.cfm?FuseAction=Hearings.Statement&Statement\\_ID=427bbbcf-2d38-42f1-a484-ecf1616d39b8](http://www.epw.senate.gov/public/index.cfm?FuseAction=Hearings.Statement&Statement_ID=427bbbcf-2d38-42f1-a484-ecf1616d39b8).

<sup>22</sup> Executive Order No. 12866, *Federal Register*, Volume 58, No. 190, page 51,735, September 30, 1993. Available at <http://www.archives.gov/federal-register/executive-orders/pdf/12866.pdf>.

<sup>23</sup> Susan E. Dudley, Hearing on “Review of Mercury Pollution’s Impacts to Public Health and the Environment,” testimony before the Subcommittee on Clean Air and Nuclear Safety, U.S. Senate, Committee on Environment and Public Works, April 17, 2012.

<sup>24</sup> *American Nurses Association v. Jackson*, Civil Action No. 1:08-cv-02198, U.S. District Court for the District of Columbia, April 15, 2010. Available at [http://www.gpo.gov/fdsys/pkg/USCOURTS-dcd-1\\_08-cv-02198/pdf/USCOURTS-dcd-1\\_08-cv-02198-0.pdf](http://www.gpo.gov/fdsys/pkg/USCOURTS-dcd-1_08-cv-02198/pdf/USCOURTS-dcd-1_08-cv-02198-0.pdf).

<sup>25</sup> *American Nurses Association v. Jackson*, Motion of Defendant-Intervenor Utility Air Regulatory Group for Equitable Relief from Judgment or Order, October 7, 2011. Available at [http://gllf-regwatch.org/documents/regulatory/other/11Oct\\_Utility\\_MACT\\_motion\\_for\\_delay.pdf](http://gllf-regwatch.org/documents/regulatory/other/11Oct_Utility_MACT_motion_for_delay.pdf). See also *American Nurses Association v. Jackson*, Brief of the States of Michigan, et al., in Support of Defendant-Intervenor Utility Air Regulatory Group’s Motion for Equitable Relief From Judgment or Order, October 10, 2011. Available at <http://energyfairness.org/wp-content/uploads/2011/10/Amicus-Brief-FINAL.pdf>.

<sup>26</sup> Curtis W. Copeland, “Length of Rule Reviews by the Office of Information and Regulatory Affairs,” Administrative Conference of the United States, December 2, 2013. Available at <http://www.acus.gov/sites/default/files/documents/OIRA%20Review%20Final%20Report%20with%20Cover%20Page.pdf>.

<sup>27</sup> *American Nurses Association v. Jackson*, Motion of Defendant-Intervenor Utility Air Regulatory Group for Equitable Relief from Judgment or Order, October 7, 2011, page 11. Available at [http://gllf-regwatch.org/documents/regulatory/other/11Oct\\_Utility\\_MACT\\_motion\\_for\\_delay.pdf](http://gllf-regwatch.org/documents/regulatory/other/11Oct_Utility_MACT_motion_for_delay.pdf).

<sup>28</sup> *Ibid.*, page 12.

<sup>29</sup> *Ibid.*, pages 12 and 14; Letter from Gina McCarthy to Lee B. Zeugin, May 18, 2011. Available at <http://www.4cleanair.org/Documents/EPAResponsetoLZeugin.pdf>.

<sup>30</sup> *Ibid.*, page 14.

<sup>31</sup> *Ibid.*, page 13; Letter from Deborah L. Swackhamer and Stephen M. Roberts to Lisa P. Jackson, September 20, 2011. Available at [http://yosemite.epa.gov/sab/sabproduct.nsf/02ad90b136fc21ef85256eba00436459/BCA23C5B7917F5BF8525791A0072CCA1/\\$File/EPA-SAB-11-017-unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/02ad90b136fc21ef85256eba00436459/BCA23C5B7917F5BF8525791A0072CCA1/$File/EPA-SAB-11-017-unsigned.pdf).

<sup>32</sup> Letter from Deborah L. Swackhamer and Stephen M. Roberts to Lisa P. Jackson, September 20, 2011.

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- <sup>33</sup> “Revised Technical Support Document: National-Scale Assessment of Mercury Risk to Populations with High Consumption of Self-caught Freshwater Fish: In Support of the Appropriate and Necessary Finding for Coal- and Oil-Fired Electric Generating Units,” Environmental Protection Agency, December 2011. Available at <http://www.epa.gov/mats/pdfs/20111216MercuryRiskAssessment.pdf>.
- <sup>34</sup> Michael Bastasch, “Federal court upholds EPA rule retiring coal plants,” *Daily Caller*, April 16, 2014. Available at <http://dailycaller.com/2014/04/16/federal-court-upholds-epa-rule-retiring-coal-plants/>.
- <sup>35</sup> *American Nurses Association v. Jackson*, Motion of Defendant-Intervenor Utility Air Regulatory Group for Equitable Relief from Judgment or Order, October 7, 2011, pages 19-20; Letter from Jon Wellinghoff, Cheryl LaFleur and John Norris to Senator Lisa Murkowski, August 1, 2011, pages 1-4 and 10-15. Available at [http://www.energy.senate.gov/public/index.cfm/files/serve?File\\_id=f8df728d-9237-7b4c-16e5-b0f962e1d9e8](http://www.energy.senate.gov/public/index.cfm/files/serve?File_id=f8df728d-9237-7b4c-16e5-b0f962e1d9e8); Petition by the Institute for Liberty, et al. for Re-proposal or Reconsideration and Stay of EPA’s Proposed Rule, Docket Nos. EPA-HQ-OAR-2009-0234, EPA-HQ-OAR-2011-0044, September 27, 2011, pages 12-17, page 21. Available at [http://www.eenews.net/assets/2011/09/29/document\\_gw\\_02.pdf](http://www.eenews.net/assets/2011/09/29/document_gw_02.pdf); and “About NERC,” North American Electric Reliability Corporation. Available at <http://www.nerc.com/AboutNERC/Pages/default.aspx>.
- <sup>36</sup> “AEO 2014 Early Release Overview: Electricity Generation,” U.S. Energy Information Administration, December 16, 2013. Available at [http://www.eia.gov/forecasts/aeo/er/early\\_elecgen.cfm](http://www.eia.gov/forecasts/aeo/er/early_elecgen.cfm).
- <sup>37</sup> Michael Patrick Leahy, “Obama’s War on Coal Raises Energy Prices Despite Falling Natural Gas Costs,” *Breitbart.com*, July 13, 2012. <http://www.breitbart.com/Big-Government/2012/07/13/Obama-s-War-on-Coal-Drives-Electricity-Prices-Up-As-Natural-Gas-Prices-Fall>.
- <sup>38</sup> *American Nurses Association v. Jackson*, Brief of the States of Michigan et al., in Support of Defendant-Intervenor Utility Air Regulatory Group’s Motion for Equitable Relief From Judgment or Order, October 10, 2011, page 13.
- <sup>39</sup> Michael Bastasch, “Federal court upholds EPA rule retiring coal plants,” *Daily Caller*, April 16, 2014. Available at <http://dailycaller.com/2014/04/16/federal-court-upholds-epa-rule-retiring-coal-plants/>; “East Kentucky Power Cooperative to deactivate 196-MW Dale coal plant,” Press Release, April 11, 2014. Available at <http://www.platts.com/latest-news/coal/louisville-kentucky/east-kentucky-power-cooperative-to-deactivate-21470513>.
- <sup>40</sup> Michael Bastasch, “Federal court upholds EPA rule retiring coal plants,” *Daily Caller*, April 16, 2014. Available at <http://dailycaller.com/2014/04/16/federal-court-upholds-epa-rule-retiring-coal-plants/>.
- <sup>41</sup> Cecil E. Roberts, “EPA rule will cost jobs,” *Pittsburgh Post-Gazette*, March 13, 2012. Available at <http://old.post-gazette.com/pg/12073/1216195-109-0.stm>; “\$2 Billion of Investments in Power Grid to Ease Power Plant Retirements,” PJM Interconnection, Press Release, May 17, 2012. Available at <http://www.pjm.com/~media/about-pjm/newsroom/2012-releases/20120517-Two-billion-dollars-of-upgrades-to-power-grid.ashx>; “EPA Fact Sheet: Mercury and Air Toxics Standards: Clean Air and Reliable Electricity,” United States Environmental Protection Agency. Available at <http://www.epa.gov/mats/pdfs/20111221MATScleanair-reliableelectricity.pdf>.
- <sup>42</sup> “Coal-fired power plant operators consider emissions compliance strategies,” U.S. Energy Information Administration, March 28, 2014. Available at <http://www.eia.gov/todayinenergy/detail.cfm?id=15611#>.
- <sup>43</sup> “Impact of EPA’s Regulatory Assault on Power Plants: New Regulations to Take 34 GW of Electricity Generation Offline and the Plant Closing Announcements Keep Coming . . .” Institute for Energy Research, June 12, 2012. Available at <http://www.instituteforenergyresearch.org/wp-content/uploads/2012/04/June-12-EPA-powerplant-shutdown-update.pdf>.
- <sup>44</sup> Adam Peshek, “The Boiler MACT Project: Regulations for the Real World,” Reason Foundation, Policy Brief No. 100, April 2012, page 5. Available at [http://reason.org/files/boiler\\_mact\\_epa\\_regulations.pdf](http://reason.org/files/boiler_mact_epa_regulations.pdf); “National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters; Final Rule,” *Federal Register*, Volume 76, No. 54, page 15,623, March 21, 2011. Available at <http://www.gpo.gov/fdsys/pkg/FR-2011-03-21/pdf/2011-4494.pdf>.
- <sup>45</sup> “National Emission Standards for Hazardous Air Pollutants From Coal and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units; Final rule,” *Federal Register*, Volume 77, No. 32, page 9,388, February 16, 2012. Available at <http://www.gpo.gov/fdsys/pkg/FR-2012-02-16/pdf/2012-806.pdf>.
- <sup>46</sup> “AEO2014 projects more coal-fired power plant retirements by 2016 than have been scheduled,” U.S. Energy Information Administration,

February 14, 2014. Available at <http://www.eia.gov/todayinenergy/detail.cfm?id=15031>; “Count of Electric Power Industry Power Plants, by Sector, by Predominant Energy Sources within Plant, 2002 through 2012,” U.S. Energy Information Administration. Available at [http://www.eia.gov/electricity/annual/html/epa\\_04\\_01.html](http://www.eia.gov/electricity/annual/html/epa_04_01.html).

<sup>47</sup> Letter from Bruce Watzman, Senior Vice President of Regulatory Affairs of the National Mining Association, to Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs, October 26, 2011. Available at [https://environmentalnewsstand.com/iwfile.html?file=oct2011%2Fepa2011\\_2080.pdf](https://environmentalnewsstand.com/iwfile.html?file=oct2011%2Fepa2011_2080.pdf).

<sup>48</sup> Regina McCarthy, Hearing on “The American Energy Initiative, Part 15: What EPA’s Utility MACT Rule Will Cost U.S. Consumers,” testimony before the Subcommittee on Energy and Power, U.S. House of Representatives, Committee on Energy and Power, February 8, 2012, page 13. Available at <http://democrats.energycommerce.house.gov/sites/default/files/documents/Final-Transcript-American-Energy-Initiative-Part-15-EPA-Utility-Mact-Rule-2012-2-8.pdf>.

<sup>49</sup> James E. McCarthy, “EPA’s Utility MACT: Will the Lights Go Out?” Congressional Research Service, January 9, 2012, page 5; Regina McCarthy, Hearing on “The American Energy Initiative, Part 15: What EPA’s Utility MACT Rule Will Cost U.S. Consumers,” testimony before the Subcommittee on Energy and Power, U.S. House of Representatives, Committee on Energy and Power, February 8, 2012, page 26. Available at <http://democrats.energycommerce.house.gov/sites/default/files/documents/Final-Transcript-American-Energy-Initiative-Part-15-EPA-Utility-Mact-Rule-2012-2-8.pdf>.

<sup>50</sup> *American Nurses Association v. Jackson*, Brief of the States of Michigan et al., in Support of Defendant-Intervenor Utility Air Regulatory Group’s Motion for Equitable Relief From Judgment or Order, October 10, 2011, page 17.

<sup>51</sup> Phil Kerpen, “Obama’s war on coal hits your electric bill,” FoxNews.com, May 22, 2013. Available at <http://www.foxnews.com/opinion/2012/05/22/obamas-war-on-coal-hits-your-electric-bill/print>.

<sup>52</sup> “Fact Sheet: EPA’s Mercury and Air Toxics Standards (MATS),” Democratic Policy & Communications Center. Available at <http://www.dpc.senate.gov/docs/fs-112-2-121.pdf>.

<sup>53</sup> Cecil E. Roberts, “EPA rule will cost jobs,” *Pittsburgh Post-Gazette*, March 13, 2012. Available at <http://old.post-gazette.com/pg/12073/1216195-109-0.stm>.

<sup>54</sup> Neil Powell and Taylor Kuykendall, “US coal mine employment continues to plummet with no bottom in sight,” SNL Financial, February 13, 2014. Available at <http://www.snl.com/InteractiveX/Article.aspx?edid=A-26821238-12590>.

<sup>55</sup> Regina McCarthy, Hearing on “The American Energy Initiative, Part 15: What EPA’s Utility MACT Rule Will Cost U.S. Consumers,” testimony before the Subcommittee on Energy and Power, U.S. House of Representatives, Committee on Energy and Power, February 8, 2012, page 30. Available at <http://democrats.energycommerce.house.gov/sites/default/files/documents/Final-Transcript-American-Energy-Initiative-Part-15-EPA-Utility-Mact-Rule-2012-2-8.pdf>.

<sup>56</sup> “National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units; Notice of final rulemaking,” *Federal Register*, Volume 77, No. 32, page 9,304, February 16, 2012. Available at <http://www.gpo.gov/fdsys/pkg/FR-2012-02-16/pdf/2012-806.pdf>.

<sup>57</sup> *White Stallion Energy Center, LLC, et al. v. EPA*, Civil Action No. 12-1100, Court of Appeals for the District of Columbia Circuit, April 15, 2014.

<sup>58</sup> See U.S. Code Title 42, Chapter 85, Section 7410(c); “EPA’s Regional Haze Program,” U.S. Environmental Protection Agency. Available at <http://www.epa.gov/visibility/program.html>.

<sup>59</sup> *WildEarth Guardians v. Jackson*, Civil Action No. 4:09-CV-02453, Northern District of California, February 23, 2010; *WildEarth Guardians v. Jackson*, Civil Action No. 1:10-cv-01218-REB-BNB, District Court of Colorado, October 28, 2010; *WildEarth Guardians v. Jackson*, No. 1:11-cv-00743-CMA-MEH, District Court of Colorado, June 16, 2011; *Sierra Club v. Jackson*, Civil Action No. 1-10-cv-02112-JEB U.S. District Court for the District of Columbia, August 18, 2011; *National Parks Conservation Association et al. v. Jackson*, Civil Action No. 1: 11-cv-01548, U.S. District Court for the District of Columbia, December 2, 2011.

<sup>60</sup> William Yeatman, “EPA’s New Regulatory Front: Regional Haze and the Takeover of State Programs,” U.S. Chamber of Commerce, 2012.

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Available at [https://www.uschamber.com/sites/default/files/legacy/reports/1207\\_ETRA\\_HazeReport\\_lr.pdf](https://www.uschamber.com/sites/default/files/legacy/reports/1207_ETRA_HazeReport_lr.pdf).

<sup>61</sup> *Federal Register*, Volume 77, No. 234, page 72,571. Available at <http://www.gpo.gov/fdsys/pkg/FR-2012-12-05/pdf/2012-28565.pdf#page=61>.

<sup>62</sup> William Yeatman, “EPA’s New Regulatory Front: Regional Haze and the Takeover of State Programs,” U.S. Chamber of Commerce, 2012, page 10, footnote 14. Available at [https://www.uschamber.com/sites/default/files/legacy/reports/1207\\_ETRA\\_HazeReport\\_lr.pdf](https://www.uschamber.com/sites/default/files/legacy/reports/1207_ETRA_HazeReport_lr.pdf); 76 Fed. Reg. 58604, available at <http://www.gpo.gov/fdsys/pkg/FR-2011-09-21/html/2011-23372.htm>.

<sup>63</sup> Douglas A. McWilliams, Drew T. Dorner and Gary L. Pasheilich, “Sue and settle: US EPA’s questionable approach to CAA rulemaking,” Squire Sanders, October 24, 2012. Available at [http://www.squiresanders.com/files/Publication/550cd09c-2ca8-4f03-a889-c7e6bddd1a3b/Presentation/PublicationAttachment/5e3b229e-f9d4-43b6-9f64-0c7a8a20dbc1/Publication-Environmental\\_Safety\\_and\\_Health\\_Review-US\\_1012.pdf](http://www.squiresanders.com/files/Publication/550cd09c-2ca8-4f03-a889-c7e6bddd1a3b/Presentation/PublicationAttachment/5e3b229e-f9d4-43b6-9f64-0c7a8a20dbc1/Publication-Environmental_Safety_and_Health_Review-US_1012.pdf).

<sup>64</sup> Letter from Douglas Aburano to Rich Zavoda, September 13, 2012. Available at [http://www.deq.state.mi.us/aps/downloads/ROP/pub\\_ntce/B4885/B4885%20ROP%20Renewal%20Application%20201200192/18\\_Reply%20in%20Support%20of%20Motion%20for%20Stay.pdf](http://www.deq.state.mi.us/aps/downloads/ROP/pub_ntce/B4885/B4885%20ROP%20Renewal%20Application%20201200192/18_Reply%20in%20Support%20of%20Motion%20for%20Stay.pdf).

<sup>65</sup> *Federal Register*, Volume 78, No. 189, page 59,836, September 30, 2013. Available at <http://www.gpo.gov/fdsys/pkg/FR-2013-09-30/html/2013-23394.htm>. The National Mining Association was not alone in objecting to the EPA’s simultaneous proposals to reject SIPs and propose FIPs, rather than first finalizing SIP disapproval. As Oklahoma Attorney General Scott Pruitt explained in congressional testimony, the agency proposed a federal takeover in his state before considering public comments and finalizing its rejection of the state’s submission: “On March 22, 2011, more than one year after Oklahoma submitted its SIP to the EPA, EPA published a proposed rule in the Federal Register proposing to approve in part and disapprove in part the Oklahoma SIP... In the same notice, and without waiting for its proposed disapproval of parts of the Oklahoma SIP to become final — i.e., without waiting for and considering public comments on its proposed disapproval of portions of the Oklahoma SIP — EPA proposed a FIP to substitute its judgment for the judgment of Oklahoma.” E. Scott Pruitt, Hearing on “Mandate Madness: When Sue and Settle Just Isn’t Enough,” testimony before the Subcommittee On Technology, Information Policy, Intergovernmental Relations And Procurement Reform, U.S. House of Representatives Committee on Oversight and Government Reform, June 28, 2012. Available at <http://oversight.house.gov/wp-content/uploads/2012/06/6-28-12-TechIP-Pruitt.pdf>.

<sup>66</sup> *Federal Register*, Volume 78, No. 189, page 59,836, September 30, 2013. Available at <http://www.gpo.gov/fdsys/pkg/FR-2013-09-30/html/2013-23394.htm>.

<sup>67</sup> The EPA has proposed FIPs in Minnesota, Michigan, Wyoming, North Dakota, Oklahoma, Nebraska, New Mexico and Arizona. See William Yeatman, “EPA’s New Regulatory Front: Regional Haze and the Takeover of State Programs,” U.S. Chamber of Commerce, 2012, page 7. Available at [https://www.uschamber.com/sites/default/files/legacy/reports/1207\\_ETRA\\_HazeReport\\_lr.pdf](https://www.uschamber.com/sites/default/files/legacy/reports/1207_ETRA_HazeReport_lr.pdf).

<sup>68</sup> William Yeatman, “The U.S. Environmental Protection Agency’s Assault on State Sovereignty,” American Legislative Exchange Council, June 2013, page 3. Available at [http://alec.org/docs/EPA\\_Assault\\_State\\_Sovereignty](http://alec.org/docs/EPA_Assault_State_Sovereignty).

<sup>69</sup> “12 states sue EPA over agency’s alleged ‘sue and settle’ tactics,” FoxNews.com, July 17, 2012. Available at <http://www.foxnews.com/politics/2013/07/17/oklahoma-11-other-states-sue-epa-over-sue-and-settle-strategy/>.

<sup>70</sup> *State of Oklahoma v. U.S. Environmental Protection Agency*, Case Nos. 12-9526, 12-9257, Petition for Panel or En Banc Rehearing, page 5, September 3, 2013. Available at [https://www.oag.ok.gov/oagweb.nsf/3e67f1cee13bc090862572b2005ad559/7215e5f60a794b3b86257bdb00756c0e/\\$FILE/9-3-13%20Regional%20Haze%20Petition%20for%20Rehearing.pdf](https://www.oag.ok.gov/oagweb.nsf/3e67f1cee13bc090862572b2005ad559/7215e5f60a794b3b86257bdb00756c0e/$FILE/9-3-13%20Regional%20Haze%20Petition%20for%20Rehearing.pdf); William Yeatman, “The Problem with the 10th Circuit’s Ruling in State of Oklahoma v. EPA,” GlobalWarming.org, July 26, 2013. Available at <http://www.globalwarming.org/2013/07/26/the-problem-with-the-10th-circuits-ruling-in-state-of-oklahoma-et-al-v-epa/>.

<sup>71</sup> William Yeatman, “EPA Seizes Wyoming Regional Haze Program (Agency’s 53rd State Takeover Since Obama Took Office),” Global Warming.org, January 12, 2014. Available at <http://www.globalwarming.org/2014/01/12/epa-seizes-wyoming-regional-haze-program-agencys-53rd-state-takeover-since-obama-took-office/>.

<sup>72</sup> William Yeatman, Hearing on “Mandate Madness: When Sue and Settle Just Isn’t Enough,” testimony before the Subcommittee On Technology, Information Policy, Intergovernmental Relations And Procurement Reform, U.S. House of Representatives Committee on Oversight and Government Reform, June 28, 2012. Available at <http://cei.org/sites/default/files/William%20Yeatman%20-%20June%2028%20Testimony%20on%20Sue%20and%20Settle.pdf>.



<sup>73</sup> *Sierra Club et al. v. EPA*, Civil Action No. 08-1258, Court of Appeals for the District of Columbia Circuit; *Friends of Animals v. Salazar*, Civil Action No. 10-00357, U.S. District Court for the District of Columbia, *Natural Resources Defense Council v. Salazar*, Civil Action No. 10-00299, U.S. District Court for the District of Columbia.

<sup>74</sup> *Defenders of Wildlife v. Jackson*, Civil Action No. 10-1915, U.S. District Court for the District of Columbia. Available at <http://water.epa.gov/scitech/wastetech/guide/steam-electric/upload/consentdecreedecree.pdf>

<sup>75</sup> See U.S. Code Title 33, Chapter 26, Section 1314(b); U.S. Code Title 33, Chapter 26, Section 1311(d).

<sup>76</sup> *Defenders of Wildlife v. Jackson*, Reply Brief of Appellant UWAG, Civil Action No. 12-5122, 2012 Westlaw 4808441, United States Court of Appeals for the District of Columbia Circuit, page 12.

<sup>77</sup> “Proposed Effluent Guidelines for the Steam Electric Power Generating Category,” Environmental Protection Agency. Available at <http://water.epa.gov/scitech/wastetech/guide/steam-electric/proposed.cfm>.

<sup>78</sup> *Fowler v. EPA*, Civil Action No. 1:09-cv-00005, U.S. District Court for the District of Columbia, 2010. The settlement agreement is available at <https://www.uschamber.com/sueandsettle/pleadings/Fowler%20v.%20EPA/Settlement%20Agreement.pdf>.

<sup>79</sup> “Clean Water Act: Changes Needed if Key EPA Program is to Help Fulfill the Nation’s Water Quality Goals,” U.S. Government Accountability Office, December 2013, page 18. Available at <http://www.gao.gov/assets/660/659496.pdf>.

<sup>80</sup> Letter from John L. Mica, James Inhofe, Bob Gibbs and Jeff Sessions to Lisa Jackson, January 20, 2012. Available at [http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord\\_id=fbc69a1-802a-23ad-4767-8b1337aba45f](http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=fbc69a1-802a-23ad-4767-8b1337aba45f); Andrew Etter, “21 US states and 8 counties join in debate on Chesapeake Bay TMDL,” Squire Sanders, February 21, 2014. Available at <http://www.lexology.com/library/detail.aspx?g=63a6b2a6-20f6-4575-a3df-fc0556d45b31>.

<sup>81</sup> *American Farm Bureau Federation v. EPA*, Civil Action No. 1:11-CV-0067 Middle District of Pennsylvania, 2013. Available at [http://www.eenews.net/assets/2013/09/16/document\\_gw\\_03.pdf](http://www.eenews.net/assets/2013/09/16/document_gw_03.pdf). The notice of appeal is available at [http://www.eenews.net/assets/2013/10/08/document\\_pm\\_01.pdf](http://www.eenews.net/assets/2013/10/08/document_pm_01.pdf).

<sup>82</sup> William L. Kovacs, Keith W. Holman and Jonathan A. Jackson, “Sue and Settle: Regulating Behind Closed Doors,” U.S. Chamber of Commerce, May 2013, page 18. Available at <https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf>.

<sup>83</sup> Karl Blankenship, “Court hears arguments on challenges to Bay TMDL,” November 1, 2012. Available at [http://www.bayjournal.com/article/court\\_hears\\_arguments\\_on\\_challenges\\_to\\_bay\\_tmdl](http://www.bayjournal.com/article/court_hears_arguments_on_challenges_to_bay_tmdl); *American Farm Bureau Federation v. EPA*, Case No. 1:11-CV-0067, Middle District of Pennsylvania, September 13, 2013, page 53. Available at [http://www.nahb.org/fileUpload\\_details.aspx?contentTypeID=3&contentID=166277&subContentID=543050](http://www.nahb.org/fileUpload_details.aspx?contentTypeID=3&contentID=166277&subContentID=543050).

<sup>84</sup> National Association of Home Builders Comments on the Proposed Chesapeake Bay TMDL, November 8, 2010, page 4. Available at [http://www.nahb.org/fileUpload\\_details.aspx?contentID=148270](http://www.nahb.org/fileUpload_details.aspx?contentID=148270).

<sup>85</sup> “EPA Reaches Settlement in Chesapeake Bay Lawsuit,” Environmental Protection Agency, May 11, 2010. Available at <http://yosemite.epa.gov/opa/admpress.nsf/0/ac46af32562521d48525772000591133>.

<sup>86</sup> *Natural Resources Defense Council v. EPA*, Civil Action No. 06-0820-ag, Court of Appeals for the Second Circuit. Settlement agreement available at [https://www.uschamber.com/sueandsettle/pleadings/NRDC%20v.%20EPA%20pesticide%20human%20studies%20lawsuit/settlement\\_agreement%20May%2018%202010.pdf](https://www.uschamber.com/sueandsettle/pleadings/NRDC%20v.%20EPA%20pesticide%20human%20studies%20lawsuit/settlement_agreement%20May%2018%202010.pdf).

<sup>87</sup> William L. Kovacs, Keith W. Holman and Jonathan A. Jackson, “Sue and Settle: Regulating Behind Closed Doors,” page 21.

<sup>88</sup> Ibid. See also “Amendment to the Opt-Out and Recordkeeping Provisions in the Renovation, Repair, and Painting Program,” *Federal Register*, Volume 75, No. 87, page 24,812, May 6, 2010. Available at <http://www.gpo.gov/fdsys/pkg/FR-2010-05-06/pdf/2010-10100.pdf>.

<sup>89</sup> For example, the agency agreed, among other things, to include a “proposal to remove the provision regarding the applicability of the work practice requirements currently found at 40 C.F.R. Sec. 745.82(c).” *Sierra Club v. EPA*, Civil Action No. 08-1258, Court of Appeals for the District of Columbia Circuit. Settlement available at <https://www.uschamber.com/sueandsettle/pleadings/Sierra%20Club%20et.%20al.%20v.%20>

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EPA%20lead%20case/Settlement%20Agreement.pdf.

<sup>90</sup> Other federal circuits only require an intervening party to establish the requirements of Rule 24. Under Rule 24, courts must allow a party to intervene if he holds an interest relating to the lawsuit and his ability to protect that interest could be impaired by the existing litigation. Or, a party may intervene with the court's permission if he "has a claim or defense that shares with the main action a common question of law or fact." See Federal Rule of Civil Procedure 24(a)(2), 24(b)(1)(B); Renee Choy Ohlendorf, "Intervenors Still in Limbo on Standing Requirements," American Bar Association, March 26, 2012. Available at [http://apps.americanbar.org/litigation/litigationnews/top\\_stories/032612-intervenor-circuit-split.html](http://apps.americanbar.org/litigation/litigationnews/top_stories/032612-intervenor-circuit-split.html). Also see Matthew I. Hall, "Standing of Intervenor-Defendants in Public Law Litigation," *Fordham Law Review*, Volume 80, Issue 4, page 1,539, 2012. Available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4775&context=fldr>.

<sup>91</sup> *Defenders of Wildlife v. Jackson*, Civil Action No. 10-1915, U.S. District Court for the District of Columbia. Consent decree available at <http://water.epa.gov/scitech/wastetech/guide/steam-electric/upload/consentdecree.pdf>.

<sup>92</sup> *Defenders of Wildlife v. Jackson*, Civil Action No. 10-1915, U.S. District Court for the District of Columbia, page 11. Available at [https://www.uschamber.com/sueandsettle/pleadings/Defenders%20of%20Wildlife%20v.%20Jackson/USCOURTS-dcd-1\\_10-cv-01915-0.pdf](https://www.uschamber.com/sueandsettle/pleadings/Defenders%20of%20Wildlife%20v.%20Jackson/USCOURTS-dcd-1_10-cv-01915-0.pdf).

<sup>93</sup> William Kovacs, Introduction to "EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs," U.S. Chamber of Commerce, 2012, page 2. Available at [https://www.uschamber.com/sites/default/files/legacy/reports/1207\\_ETRA\\_HazeReport\\_lr.pdf](https://www.uschamber.com/sites/default/files/legacy/reports/1207_ETRA_HazeReport_lr.pdf).

<sup>94</sup> *Defenders of Wildlife v. Jackson*, Case No. 10-1915, U.S. District Court for the District of Columbia, Motion by Utility Water Act Group to Intervene as a Defendant, November 16, 2010. Available at [https://environmentalnewsstand.com/iwpfile.html?file=mar2012/epa2012\\_0504b.pdf](https://environmentalnewsstand.com/iwpfile.html?file=mar2012/epa2012_0504b.pdf)

<sup>95</sup> U.S. courts are split on whether it is sufficient for intervening parties to satisfy the requirements of Rule 24 (which governs intervention in civil cases) or whether those parties must additionally establish constitutional standing (which requires an injury). Notably, the D.C. Circuit, as well as the Seventh and Eighth Circuits, require a party to fulfill both requirements. Other federal circuits only require an intervening party to establish the requirements of Rule 24. Under that rule, courts must allow a party to intervene if he holds an interest relating to the lawsuit and his ability to protect that interest could be impaired by the existing litigation. Federal Rule of Civil Procedure 24(a)(2); Renee Choy Ohlendorf, "Intervenors Still in Limbo on Standing Requirements," American Bar Association, March 26, 2012. Available at [http://apps.americanbar.org/litigation/litigationnews/top\\_stories/032612-intervenor-circuit-split.html](http://apps.americanbar.org/litigation/litigationnews/top_stories/032612-intervenor-circuit-split.html).

<sup>96</sup> *Defenders of Wildlife v. Perciasepe*, Civil Action No. 12-5122, United States Court of Appeals for the District of Columbia Circuit, April 23, 2013. Available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/FD60C998FBC4DAB585257B5600524689/\\$file/12-5122-1432098.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/FD60C998FBC4DAB585257B5600524689/$file/12-5122-1432098.pdf).

<sup>97</sup> See U.S. Code Title 28, Chapter 161, Section 2412(b) and (d).

<sup>98</sup> William L. Kovacs, "Statement of the U.S. Chamber of Commerce," Hearing on "Mandate Madness: When Sue and Settle Just Isn't Enough," testimony before the Subcommittee On Technology, Information Policy, Intergovernmental Relations And Procurement Reform, U.S. House of Representatives Committee on Oversight and Government Reform, June 28, 2012. Available at <http://oversight.house.gov/wp-content/uploads/2012/06/6-28-12-TechIP-Kovacs.pdf>.

<sup>99</sup> William L. Kovacs, Keith W. Holman and Jonathan A. Jackson, "Sue and Settle: Regulating Behind Closed Doors," pages 12-13.

<sup>100</sup> "Environmental Litigation: Cases against EPA and Associated Costs over Time," Government Accountability Office, August 2011. Available at [http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=0964024a-c1f8-49f2-ab5d-99458408aff5](http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=0964024a-c1f8-49f2-ab5d-99458408aff5).

<sup>101</sup> "GAO Report Exposes Millions In Environmental Litigation Fees For First Time," U.S. Senate Committee on Environment and Public Works, August 31, 2011. Available at [http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord\\_id=20ba71b7-802a-23ad-4ca7-a06341934622\\_](http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=20ba71b7-802a-23ad-4ca7-a06341934622_)

<sup>102</sup> "Environmental Litigation: Cases against EPA and Associated Costs over Time," Government Accountability Office, August 2011.

<sup>103</sup> "Limited Data Available on USDA and Interior Attorney Fee Claims and Payments," Government Accountability Office, April 12, 2012. Available at <http://www.gao.gov/assets/600/590084.pdf>.

<sup>104</sup> "Environmental Litigation: Cases against EPA and Associated Costs over Time," Government Accountability Office, August 2011; and Letter from United States Government Accountability Office to Congressional Requesters, April 12, 2012, page 3. Available at <http://www.gao.gov/assets/600/590084.pdf>.

- <sup>105</sup> John Merline, “EPA Funds Green Groups That Sue The Agency To Expand,” *Investor’s Business Daily*, July 6, 2011. Available at <http://news.investors.com/070611-577430-epa-funds-green-groups-that-sue-the-agency-to-expand.htm>.
- <sup>106</sup> *Conservation Northwest v. Sherman*, Civil Action No. 11-35729, U.S. Court of Appeals for the Ninth Circuit, 2013. Available at <http://cdn.ca9.uscourts.gov/datastore/opinions/2013/04/25/11-35729.pdf>.
- <sup>107</sup> U.S. Senate, 113th Congress, “S. 714, Sunshine for Regulatory Decrees and Settlements Act.” Available at <http://beta.congress.gov/bill/113th/senate-bill/714>.
- <sup>108</sup> William L. Kovacs, Keith W. Holman and Jonathan A. Jackson, “Sue and Settle: Regulating Behind Closed Doors,” page 13.
- <sup>109</sup> “Notices of Intent to Sue the U.S. Environmental Protection Agency,” Environmental Protection Agency. Available at <http://www.epa.gov/ogc/noi.html>.
- <sup>110</sup> U.S. Senate, 113th Congress, “S. 15, REINS Act.” Available at <http://beta.congress.gov/bill/113th/senate-bill/15>.
- <sup>111</sup> Mark N. Duvall and Alexandra M. Wyatt, “Bipartisan TSCA Modernization Bill, Chemical Safety Improvement Act, Introduced in Senate,” Beveridge & Diamond, P.C. Available at <http://www.environmentallawportal.com/Chemical-Safety-Improvement-Act-Introduced-in-Senate;Fearing-Sue-and-Settle-Republicans-Resist-EPA-Deadlines-In-TSCA-Bill>,” InsideEpa.com, *Risk Policy Report*, Volume 20, No. 31, July 30, 2013. Available at <http://insideepa.com/Risk-Policy-Report/Risk-Policy-Report-07/30/2013/fearing-sue-and-settle-republicans-resist-epa-deadlines-in-tsca-bill/menu-id-1098.html>.
- <sup>112</sup> U.S. Code Title 28, Chapter 161, Section 2412(d)(2)(B)(ii).
- <sup>113</sup> Avi Garbow, “Setting the Record Straight,” EPA Connect, February 12, 2014. Available at <http://blog.epa.gov/epaconnect/2014/02/setting-the-record-straight/?ut>.

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