

Union Calendar No. 428

112TH CONGRESS
2^D SESSION

H. R. 3862

[Report No. 112-593]

To impose certain limitations on consent decrees and settlement agreements by agencies that require the agencies to take regulatory action in accordance with the terms thereof, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 1, 2012

Mr. QUAYLE (for himself, Mr. COBLE, and Mr. ROSS of Florida) introduced the following bill; which was referred to the Committee on the Judiciary

JULY 11, 2012

Additional sponsors: Mr. GALLEGLY, Mr. HUIZENGA of Michigan, Mr. KINGSTON, Mr. MCHENRY, Mr. ROKITA, Mrs. BLACKBURN, Mr. FLORES, Mr. HARRIS, Mr. YODER, Mr. PETERSON, Mr. SCHWEIKERT, Mr. SCALISE, Mr. MILLER of Florida, Mr. PITTS, and Mrs. BLACK

JULY 11, 2012

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in *italic*]

[For text of introduced bill, see copy of bill as introduced on February 1, 2012]

A BILL

To impose certain limitations on consent decrees and settlement agreements by agencies that require the agencies to take regulatory action in accordance with the terms thereof, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 *This Act may be cited as the “Sunshine for Regulatory*
5 *Decrees and Settlements Act of 2012”.*

6 **SEC. 2. CONSENT DECREE AND SETTLEMENT REFORM.**

7 *(a) APPLICATION.—The provisions of this section*
8 *apply in the case of—*

9 *(1) a consent decree or settlement agreement in*
10 *an action to compel agency action alleged to be un-*
11 *lawfully withheld or unreasonably delayed that per-*
12 *tains to a regulatory action that affects the rights of*
13 *private parties other than the plaintiff or the rights*
14 *of State, local or Tribal government entities—*

15 *(A) brought under chapter 7 of title 5,*
16 *United States Code; or*

17 *(B) brought under any other statute author-*
18 *izing such an action; and*

19 *(2) any other consent decree or settlement agree-*
20 *ment that requires agency action that pertains to a*
21 *regulatory action that affects the rights of private*
22 *parties other than the plaintiff or the rights of State,*
23 *local or Tribal government entities.*

1 (b) *IN GENERAL.*—*In the case of an action to be re-*
2 *solved by a consent decree or a settlement agreement de-*
3 *scribed in paragraph (1), the following shall apply:*

4 (1) *The complaint in the action, the consent de-*
5 *cree or settlement agreement, the statutory basis for*
6 *the consent decree or settlement agreement and its*
7 *terms, and any award of attorneys’ fees or costs shall*
8 *be published, including electronically, in a readily ac-*
9 *cessible manner.*

10 (2) *Until the conclusion of an opportunity for*
11 *affected parties to intervene in the action, a party*
12 *may not file with the court a motion for a consent*
13 *decree or to dismiss the case pursuant to a settlement*
14 *agreement.*

15 (3) *In considering a motion to intervene by any*
16 *party that would be affected by the agency action in*
17 *dispute, the court shall presume, subject to rebuttal,*
18 *that the interests of that party would not be rep-*
19 *resented adequately by the current parties to the ac-*
20 *tion. In considering a motion to intervene filed by a*
21 *State, local or Tribal government entity, the court*
22 *shall take due account of whether the movant—*

23 (A) *administers jointly with the defendant*
24 *agency the statutory provisions that give rise to*
25 *the regulatory duty alleged in the complaint; or*

1 (B) administers State, local or Tribal regu-
2 latory authority that would be preempted by the
3 defendant agency's discharge of the regulatory
4 duty alleged in the complaint.

5 (4) If the court grants a motion to intervene in
6 the action, the court shall include the plaintiff, the de-
7 fendant agency, and the intervenors in settlement dis-
8 cussions. Settlement efforts conducted shall be pursu-
9 ant to a court's mediation or alternative dispute reso-
10 lution program, or by a district judge, magistrate
11 judge, or special master, as determined by the as-
12 signed judge.

13 (5) The defendant agency shall publish in the
14 Federal Register and by electronic means any pro-
15 posed consent decree or settlement agreement for no
16 fewer than 60 days of public comment before filing it
17 with the court, including a statement of the statutory
18 basis for the proposed consent decree or settlement
19 agreement and its terms, allowing comment on any
20 issue related to the matters alleged in the complaint
21 or addressed or affected by the consent decree or settle-
22 ment agreement.

23 (6) The defendant agency shall—

24 (A) respond to public comments received
25 under paragraph (5); and

1 (B) when moving that the court enter the
2 consent decree or for dismissal pursuant to the
3 settlement agreement—

4 (i) inform the court of the statutory
5 basis for the proposed consent decree or set-
6 tlement agreement and its terms;

7 (ii) submit to the court a summary of
8 the public comments and agency responses;

9 (iii) certify the administrative record
10 of the notice and comment proceeding to the
11 court; and

12 (iv) make that record fully accessible to
13 the court.

14 (7) The court shall include in the judicial record
15 the administrative record certified by the agency
16 under paragraph (6).

17 (8) If the consent decree or settlement agreement
18 requires an agency action by a date certain, the agen-
19 cy shall, when moving for entry of the consent decree
20 or dismissal based on the settlement agreement—

21 (A) inform the court of any uncompleted
22 mandatory duties to take regulatory action that
23 the decree or agreement does not address;

1 (B) how the decree or agreement, if ap-
2 proved, would affect the discharge of those duties;
3 and

4 (C) why the decree's or agreement's effects
5 on the order in which the agency discharges its
6 mandatory duties is in the public interest.

7 (9) The court shall presume, subject to rebuttal,
8 that it is proper to allow amicus participation by
9 any party who filed public comments on the consent
10 decree or settlement agreement during the court's con-
11 sideration of a motion to enter the decree or dismiss
12 the case on the basis of the agreement.

13 (10) The court shall ensure that the proposed
14 consent decree or settlement agreement allows suffi-
15 cient time and procedure for the agency to comply
16 with chapter 5 of title 5, United States Code, and
17 other applicable statutes that govern rule making and,
18 unless contrary to the public interest, the provisions
19 of any executive orders that govern rule making.

20 (11) The defendant agency may, at its discre-
21 tion, hold a public hearing pursuant to notice in the
22 Federal Register and by electronic means, on whether
23 to enter into the consent decree or settlement agree-
24 ment. If such a hearing is held, then, in accordance
25 with paragraph (6), a summary of the proceedings

1 *and certification of the hearing record shall be pro-*
2 *vided to the court, access to the hearing record shall*
3 *be given to the court, and the full hearing record shall*
4 *be included in the judicial record.*

5 *(12) The Attorney General, in cases litigated by*
6 *the Department of Justice, or the head of the defend-*
7 *ant Federal agency, in cases litigated independently*
8 *by that agency, shall certify to the court his or her*
9 *approval of any proposed consent decree or settlement*
10 *agreement that contains any of the following terms—*

11 *(A) in the case of a consent decree, terms*
12 *that—*

13 *(i) convert into mandatory duties the*
14 *otherwise discretionary authorities of an*
15 *agency to propose, promulgate, revise or*
16 *amend regulations;*

17 *(ii) commit the agency to expend funds*
18 *that Congress has not appropriated and*
19 *that have not been budgeted for the action*
20 *in question, or commit an agency to seek a*
21 *particular appropriation or budget author-*
22 *ization;*

23 *(iii) divest the agency of discretion*
24 *committed to it by Congress or the Constitu-*
25 *tion, whether such discretionary power was*

1 *granted to respond to changing cir-*
2 *cumstances, to make policy or managerial*
3 *choices, or to protect the rights of third par-*
4 *ties; or*

5 *(iv) otherwise afford relief that the*
6 *court could not enter on its own authority*
7 *upon a final judgment in the litigation; or*

8 *(B) in the case of a settlement agreement,*
9 *terms that—*

10 *(i) interfere with the agency's author-*
11 *ity to revise, amend, or issue rules through*
12 *the procedures set forth in chapter 5 of title*
13 *5, United States Code, or any other statute*
14 *or executive order prescribing rule making*
15 *procedures for rule makings that are the*
16 *subject of the settlement agreement;*

17 *(ii) commit the agency to expend funds*
18 *that Congress has not appropriated and*
19 *that have not been budgeted for the action*
20 *in question; or*

21 *(iii) provide a remedy for the agency's*
22 *failure to comply with the terms of the set-*
23 *tlement agreement other than the revival of*
24 *the action resolved by the settlement agree-*
25 *ment, if the agreement commits the agency*

1 to exercise its discretion in a particular
2 way and such discretionary power was com-
3 mitted to the agency by Congress or the
4 Constitution to respond to changing cir-
5 cumstances, to make policy or managerial
6 choices, or to protect the rights of third par-
7 ties.

8 (c) *ANNUAL REPORTS.*—Each agency shall submit an
9 annual report to Congress on the number, identity, and con-
10 tent of complaints, consent decrees, and settlement agree-
11 ments described in paragraph (1) for that year, the statu-
12 tory basis for each consent decree or settlement agreement
13 and its terms, and any awards of attorneys fees or costs
14 in actions resolved by such decrees or agreements.

15 **SEC. 3. MOTIONS TO MODIFY CONSENT DECREES.**

16 When a defendant agency moves the court to modify
17 a previously entered consent decree described under section
18 2 and the basis of the motion is that the terms of the decree
19 are no longer fully in the public interest due to the agency's
20 obligations to fulfill other duties or due to changed facts
21 and circumstances, the court shall review the motion and
22 the consent decree de novo.

1 **SEC. 4. EFFECTIVE DATE.**

2 *The provisions of this Act apply to any covered consent*
3 *decree or settlement agreement proposed to a court after the*
4 *date of enactment of this Act.*

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