113TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
113–230

SUNSHINE FOR REGULATORY DECREES AND SETTLEMENTS ACT OF 2013

SEPTEMBER 26, 2013.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1493]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1493) 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, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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Purpose and Summary

H.R. 1493, the "Sunshine for Regulatory Decrees and Settlements Act of 2013," limits the ability of defendant Federal regulators and pro-regulatory plaintiffs to abuse Federal consent decrees and settlement agreements to require new regulations, reorder regulatory priorities, bind the discretion of future administrations, and limit the rights of regulated entities and State, local and Tribal co-regulators affected by actions taken under such decrees and settlements. The bill accomplishes this by improving transparency, increasing participation by affected regulated entities and co-regulators in the negotiation and consideration of decrees and settlements, strengthening public comment on and judicial review of proposed decrees and settlements, and assuring review by the Attorney General and agency heads of the types of proposed decrees and settlements that would most intrusively involve the Judiciary in the administration of agencies' regulatory duties.

Background and Need for the Legislation

I. ABUSE OF REGULATORY CONSENT DECREES AND SETTLEMENT AGREEMENTS AND THE RISE OF "SUE-AND-SETTLE" LITIGATION

Since the 1960's and 1970's, consent decrees and settlement agreements increasingly have been used in Federal litigation to bind executive discretion under judicial authority, including to bind executive discretion over successive administrations. This trend has arisen in litigation against both Federal defendants and State and local defendants. In litigation against Federal defendants, the problem has been concentrated in litigation against regulatory agencies over allegations that agency action has been unlawfully withheld or unreasonably delayed at the Federal level.

In such cases, the tactical use of consent decrees and settlement agreements has, over the decades, essentially been refined into an art form, commonly known as "sue-and-settle" litigation. In sue-and-settle litigation, defendant regulatory agencies, such as the U.S. Environmental Protection Agency, typically have failed to meet mandatory statutory deadlines for new regulations or allegedly have unreasonably delayed discretionary action. Plaintiffs in such matters often have strong cases on liability, giving them substantial leverage over the defending agencies. That leverage is heightened when, as often is the case, the agency actions at issue are politically sensitive, such as major, new anti-pollution regulations to impose high costs on regulated industry. Political and practical concerns in sue-and-settle cases frequently give rise to perverse agency incentives to cooperate with actual or threatened litigation and negotiate a consent decree or settlement agreement to resolve it. This is because, once a decree or agreement is in place, the defendant agency has a litigation-based excuse to expedite action that helps to diminish political costs, reorder agency funding priorities, or serve other pro-regulatory ends.

As a result of these factors, it has become common in these cases for pro-regulatory plaintiffs to approach vulnerable Federal agencies with threats of lawsuits, negotiate consent decrees or settlement agreements in secret in advance of suit, and propose the decrees or settlements to the courts contemporaneously with the fil-

ing of the plaintiffs' complaints. The resulting decrees and settlement agreements often come as surprises to the regulated community, State, local and Tribal regulators who share responsibility for regulatory programs at issue, and the general public. Further, these decrees and settlements often provide short timelines for agency action, particularly the proposal and promulgation of new regulations. The lack of advance notice and judicially-backed, minimal timeframes for proposal and promulgation allow defendant agencies to undercut the public participation and analytical requirements of the Administrative Procedure Act, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and other regulatory process statutes. Similarly, accelerated timeframes for proposal and promulgation allow agencies to short-circuit review of new regulations by OIRA under executive orders applicable to the rulemaking process. Incentives for agencies to pursue these ends—which leave the agencies freer to frame new regulations to fit preconceived agency preferences, rather than public preferences, sound policy and the facts—is particularly strong when plaintiffs and defendant agencies agree on what the content of proposed and final agency action should be, and seek to effectuate that agreement without interference by other interested parties and OIRA.

In many cases, agencies also may not be able to conclude desired but controversial rulemakings before a succeeding administration—with potentially different views and priorities—takes office. The approaching expiration of an administration's term in office gives agency officials a powerful incentive to control the incoming administration's regulatory agenda through consent decrees and settlement agreements finalized before the new administration can assume its duties. That is particularly true when agencies have failed to meet a number of mandatory rulemaking deadlines under one statute. A current example of that potential was offered by the set of rulemakings required under the Dodd-Frank Wall Street Reform and Consumer Protection Act. Estimates in 2012 were that relevant agencies had missed three-quarters of the pre-2012 rulemaking deadlines in that legislation.[1] Had the Obama administration been voted out of office in November 2012, a high potential for Dodd-Frank sue-and-settle decrees and settlements would have existed.

When pro-regulatory interest groups and regulatory agencies engage in sue-and-settle practices, the end result is rulemaking that implements the priorities of pro-regulatory advocates, limits the discretion of succeeding administrations, and takes place under schedules that render notice-and-comment rulemaking a formality, depriving regulated entities, the public and OIRA of sufficient opportunities to influence the content of final rules.

II. SUE-AND-SETTLE TRENDS UNDER THE OBAMA ADMINISTRATION

Under the Obama administration, this phenomenon has become particularly troubling. Not only has the Administration generally increased the number of major rulemakings, but it has engaged in a flurry of sue-and-settle cases. According to a recent study of

[1] Reuters, *"Regulators Inching Forward on Dodd-Frank Rules"* (Jan. 3, 2012) (available at http://news.yahoo.com/regulators-inching-forward-dodd-frank-rules-210003595.html).

Clean Air Act and Clean Water Act sue-and-settle cases, the U.S. Chamber of Commerce found that:

- The sue-and-settle process is increasingly being used as a technique to shape agencies' regulatory agendas, without input from the public or the regulated community.
- The Obama administration has entered into more than 70 sue-and-settle agreements which have led to the issuance of at least 100 regulations, including the Utility MACT rule, the Chesapeake Bay Clean Water Act rules, and various regional haze implementation rules.
- The Sierra Club was responsible for 34 of the 71 lawsuits, with WildEarth Guardians coming in second with 20 suits.
- Six of the Obama administration's sue-and-settle regulations alone reportedly would impose $101 billion in estimated annual costs, while another four would impose compliance costs of as much as $23.66 billion.
- In fiscal year 2011, Congress appropriated $20.9 million to the U.S. Fish and Wildlife Service for endangered species listing and critical habitat designation. That year, the agency spent $15.8 million in response to court orders or settlement agreements.[2]

To provide further examples of sue-and-settle trends, just two agencies, EPA and the Department of the Interior, have been able to institute the following major policy changes under sue-and-settle rulemakings during the Obama administration:

- the Utility Maximum Achievable Control Technology rule on coal-fired electric utilities;
- the Cement Maximum Achievable Control Technology rule on cement manufacturing;
- the Stream Buffer Zone rule on coal mining;
- the Cooling Water Intake Structure regulations on electric utilities;
- revisions to the definition of solid waste under the Resource Conservation and Recovery Act;
- regulation of greenhouse gases under the Clean Water Act;
- numeric nutrient criteria for the State of Florida under the Clean Water Act;
- Federal implementation plans for regional haze in North Dakota and Oklahoma under the Clean Air Act;
- reconsideration of National Ambient Air Quality Standards for ozone;
- New Source Performance, Maximum Achievable Control Technology and residual risk standards for oil and gas drilling operations;

[2] U.S. Chamber of Commerce, "Sue-and-Settle—Regulating Behind Closed Doors" (May 20, 2013) (available at http://www.uschamber.com/sites/default/files/reports/SUEANDSETTLEREPORT-Final.pdf).

- first-ever greenhouse gas New Source Performance Standards for coal- and oil-fired electric utilities;
- first-ever greenhouse gas New Source Performance Standards for oil refiners; and
- a commitment to move forward with Endangered Species Act protections for over 250 candidate species.

III. HISTORY OF ADMINISTRATIVE REFORMS IN PAST ADMINISTRATIONS

During the Reagan and George H.W. Bush administrations, sue-and-settle problems were alleviated under policy set by Attorney General Meese in 1986. Under this policy, set forth in a memorandum commonly known as the "Meese Memo," the Department of Justice generally refused to enter into consent decrees that:

- converted into a mandatory duty the otherwise discretionary authority of an agency to propose, promulgate, revise or amend regulations;
- committed the agency to expend funds that Congress had not appropriated and that had not been budgeted for the action in question, or committed an agency to seek a particular appropriation or budget authorization;
- divested the agency of discretion committed to it by Congress or the Constitution whether such discretionary power was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties; or
- otherwise afforded relief that the court could not enter on its own authority upon a final judgment in the litigation.

The Meese Memo also generally prevented the Department from entering into settlement agreements that:

- interfered with the agency's authority to revise, amend or promulgate regulations through the procedures set forth in the Administrative Procedure Act or other statutes prescribing rulemaking procedures for rulemakings that were the subject of the settlement agreement;
- committed the agency to expend funds that Congress had not appropriated and that had not been budgeted for the action in question; or
- provided a remedy for the agency's failure to comply with the terms of the settlement agreement other than the revival of the suit resolved by the agreement, if the agreement committed the agency to exercise its discretion in a particular way and such discretionary power was committed to the agency by Congress or the Constitution to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties.[3]

The Meese Memo was grounded in separation-of-powers concerns. The Clinton administration reviewed the questions ad-

[3] Memorandum from Attorney General Edwin Meese III to all Assistant Attorneys General and United States Attorneys, *Department Policy regarding Consent Decrees and Settlement Agreements* (Mar. 13, 1986).

dressed by the Memo and found that these policy concerns were sound. It did not, however, conclude that the Department was legally bound to respect the lines drawn in the Memo, and it substantially relaxed the Department's policy in 1999. [4]

IV. RESOLUTION OF THE ENVIRONMENTAL COUNCIL OF THE STATES ON SUE-AND-SETTLE PRACTICES

In light of the impacts that sue-and-settle consent decrees and settlement agreements often have on State agencies that co-regulate with the Federal Government (*e.g.*, under the Clean Air Act), the Environmental Council for the States (ECOS) recently undertook a review of the concerns raised by sue-and-settle practices.[5] This review culminated in ECOS Resolution 13–2, effective March 6, 2013. The resolution emphasized that States may be adversely affected by consent decrees or settlement agreements in sue-and-settle cases, may have information that would help the Federal Government defend or settle sue-and-settle cases, and may have interests that should be accounted for in the consideration of settlements in these cases. It also stressed that States are not always given notice of such suits, are often not parties to them, and are typically not afforded an opportunity to assist in the negotiation of relevant settlements. In light of these concerns, in Resolution 13–2, ECOS stated that it:

- "Affirms that states have stand alone rights and responsibilities under Federal environmental laws, and that the state environmental agencies are co-regulators, co-funders and partners with U.S. EPA;"
- "Urges the U.S. EPA to devote the resources necessary to perform its nondiscretionary duties within the timeframes specified under Federal law, especially when required to take action on a state submission made under an independent right or responsibility (e.g., State Implementation Plans under the Clean Air Act)."
- "Specifically calls on U.S. EPA to notify all affected state environmental agencies of citizen suits filed against U.S. EPA that allege a failure of the Federal agency to perform its nondiscretionary duties;"
- "Believes that providing an opportunity for state environmental agencies to participate in the negotiation of citizen suit settlement agreements will often be necessary to protect the states' role in implementing Federal environmental programs and for the administration of authorized or delegated environmental programs in the most effective and efficient manner;"

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[4] Memorandum from Randolph D. Moss, Acting Assistant Attorney General for Office of Legal Policy, to Associate Attorney General Raymond C. Fisher, *Authority of the United State to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion* (June 15, 1999).

[5] As described on its website, "[t]he Environmental Council of the States (ECOS) is the national non-profit, non-partisan association of state and territorial environmental agency leaders. ECOS was established in December 1993 at a meeting of approximately 20 states in Phoenix, Arizona and is a 501(c)(6) non-profit organization." *See* http://www.ecos.org/section/__aboutecos. "The purpose of ECOS is to improve the capability of state environmental agencies and their leaders to protect and improve human health and the environment of the United States of America." *Id.* ECOS' membership currently includes 48 States, plus the District of Columbia and Commonwealth of Puerto Rico.

- "Specifically calls on U.S. EPA to support the intervention of state environmental agencies in citizen suits and meaningful participation in the negotiation of citizen suit settlement agreements when the state agency has either made a submission to EPA related to the citizen suit or when the state agency either implements, or is likely to implement, the authorized or delegated environmental program at issue;"
- "Believes that no settlement agreement should extend any power to U.S. EPA that it does not have in current law;"
- "Believes that greater transparency of citizen suit settlement agreements is needed for the public to understand the impact of these agreements on the administration of environmental programs;"
- "Affirms the need for the Federal Government to publish for public review all settlement agreements and consider public comments on any proposed settlement agreements;" and,
- "Encourages EPA to respond in writing to all public comments received on proposed citizen suit settlement agreements, including consent decrees."[6]

V. REFORMS EMBODIED IN THE "SUNSHINE FOR REGULATORY DECREES AND SETTLEMENTS ACT OF 2013"

Consistent with the record compiled by the Committee, the measures in H.R. 1493 include provisions that: (1) require notices of intent to sue, complaints, consent decrees and settlement agreements, and attorneys' fee agreements in lawsuits attempting to force regulatory action be more transparent to the public and regulated entities; (2) give to regulated entities, State, local and Tribal co-regulators, and the public more rights to participate in the shaping or judicial evaluation of sue-and-settle consent decrees and settlement agreements, whether through notice-and-comment procedures or rights to participate in litigation as intervenors or amici curiae; (3) provide courts with more complete records and tools to review proposed sue-and-settle consent decrees and settlement agreements; and, (4) codify key Meese Memo's restrictions to constrain the authority of the Department of Justice and defendant agencies to agree to sue-and-settle consent decrees and settlements that present separation-of-powers concerns.

VI. PROCEEDINGS ON THE SUNSHINE FOR REGULATORY DECREES AND SETTLEMENTS ACT IN THE 112TH CONGRESS

During the 112th Congress, the Subcommittee on Courts, Commercial and Administrative Law held a hearing on H.R. 1493's predecessor legislation, H.R. 3862. Testimony was received from Roger R. Martella, Jr., Sidley Austin LLP, former general counsel of the U.S. Environmental Protection Agency; Professor David Schoenbrod, New York Law School; Andrew M. Grossman, the Heritage Foundation; and John C. Cruden, president of the Environmental Law Institute and former Deputy Assistant Attorney General for the Department of Justice's Environment and Natural Re-

[6] The full, official text of Resolution 13–2 is available at http://www.ecos.org/section/policy/resolution and http://dl.dropboxusercontent.com/u/8005220/Resolutions/Resolution%2013-2%20Consent%20Decrees.pdf.

sources Division, with additional material submitted by the Natural Resources Defense Council, the American Bar Association, and Kenny, Kenneth and Paula Cieplik. The Committee on the Judiciary reported H.R. 3862 favorably to the House, and the bill passed the House on July 26, 2012, as title V of H.R. 4078, the "Red Tape Reduction and Small Business Job Creation Act of 2012," on a bipartisan vote (245–172).

Hearings

The Committee's Subcommittee on Regulatory, Commercial and Antitrust Law held 1 day of hearings on H.R. 1493, on June 5, 2013. Testimony was received from Commissioner Tom Easterly, Indiana Department of Environmental Management, on behalf of the State of Indiana and the Environmental Council of the States, William L. Kovacs, Senior Vice President for Environment, Technology & Regulatory Affairs, U.S. Chamber of Commerce, Allen Puckett, Columbus Brick Co., Columbus Mississippi, and John Walke, Director, Climate and Air Quality Program, Natural Resources Defense Council, with additional material submitted by the Attorney General for the State of Georgia, the Associated Builders and Contractors, Inc., the American Sheep Industry Association, the Association of National Grasslands, the National Cattlemen's Beef Association, and the Public Lands Council.

Committee Consideration

On July 10, 2013, the Subcommittee on Regulatory Reform, Commercial and Antitrust Law met in open session and ordered the bill H.R. 1493 favorably reported, without amendment, by voice vote, a quorum being present. On July 24, 2013, the Committee met in open session and ordered the bill H.R. 1493 favorably reported without amendment, by a rollcall vote of 17 to 12, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R. 1493.

1. The amendment offered by Mr. Conyers exempts from requirements of H.R. 1493 consent decrees and settlement agreements that pertain "to the protection of the privacy of Americans." The amendment was defeated by a rollcall vote of 12–16.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)		X	
Mr. Coble (NC)			
Mr. Smith (TX)		X	
Mr. Chabot (OH)			
Mr. Bachus (AL)		X	
Mr. Issa (CA)			

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Forbes (VA)			
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)			
Mr. Poe (TX)		X	
Mr. Chaffetz (UT)		X	
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Amodei (NV)		X	
Mr. Labrador (ID)			
Ms. Farenthold (TX)		X	
Mr. Holding (NC)			
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Mr. Smith (MO)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Mr. Scott (VA)	X		
Mr. Watt (NC)	X		
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)			
Ms. Chu (CA)	X		
Mr. Deutch (FL)	X		
Mr. Gutiérrez (IL)			
Ms. Bass (CA)	X		
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Garcia (FL)			
Mr. Jeffries (NY)	X		
Total	12	16	

2. The amendment offered by Mr. Cohen exempts from requirements of H.R. 1493 consent decrees and settlement agreements "that prevents or is intended to prevent discrimination on the basis of race, religion, national origin, or any other protected category." The amendment was defeated by a rollcall vote of 13–16.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Coble (NC)			
Mr. Smith (TX)		X	
Mr. Chabot (OH)		X	

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Bachus (AL)	X		
Mr. Issa (CA)		X	
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)			
Mr. Jordan (OH)			
Mr. Poe (TX)			
Mr. Chaffetz (UT)		X	
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Amodei (NV)			
Mr. Labrador (ID)		X	
Ms. Farenthold (TX)		X	
Mr. Holding (NC)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Mr. Smith (MO)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)			
Mr. Scott (VA)	X		
Mr. Watt (NC)	X		
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)			
Ms. Chu (CA)	X		
Mr. Deutch (FL)			
Mr. Gutiérrez (IL)			
Ms. Bass (CA)	X		
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Garcia (FL)	X		
Mr. Jeffries (NY)	X		
Total	13	16	

3. The amendment offered by Ms. Jackson Lee exempts from requirements of H.R. 1493 consent decrees and settlement agreements that pertain "to a reduction in illness or death from exposure to toxic substances or hazardous waste in communities that are protected by Executive Order 12898." The amendment was defeated by a rollcall vote of 9–17.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Coble (NC)			
Mr. Smith (TX)		X	
Mr. Chabot (OH)		X	
Mr. Bachus (AL)		X	
Mr. Issa (CA)			
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)			
Mr. Chaffetz (UT)		X	
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Amodei (NV)			
Mr. Labrador (ID)		X	
Ms. Farenthold (TX)			
Mr. Holding (NC)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Mr. Smith (MO)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)			
Mr. Scott (VA)	X		
Mr. Watt (NC)	X		
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)			
Ms. Chu (CA)			
Mr. Deutch (FL)			
Mr. Gutiérrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Garcia (FL)	X		
Mr. Jeffries (NY)	X		
Total	9	17	

4. The amendment offered by Mr. Watt strikes from the bill provisions that establish a rebuttable presumption that a regulated party's interests are not adequately represented by the parties in a covered civil action or a civil action in which a covered consent decree or settlement agreement has been proposed. The amendment was defeated by a rollcall vote of 11–17.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Coble (NC)			
Mr. Smith (TX)		X	
Mr. Chabot (OH)		X	
Mr. Bachus (AL)		X	
Mr. Issa (CA)			
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Amodei (NV)			
Mr. Labrador (ID)		X	
Ms. Farenthold (TX)		X	
Mr. Holding (NC)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Mr. Smith (MO)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)			
Mr. Scott (VA)	X		
Mr. Watt (NC)	X		
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)	X		
Mr. Deutch (FL)			
Mr. Gutiérrez (IL)			
Ms. Bass (CA)	X		
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Garcia (FL)	X		
Mr. Jeffries (NY)	X		
Total	11	17	

5. The amendment offered by Mr. Johnson exempts from requirements of H.R. 1493 consent decrees and settlement agreements "that the Director of the Office of Management and Budget determines would result in net job creation." The amendment was defeated by a rollcall vote of 11–17.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Coble (NC)			
Mr. Smith (TX)		X	
Mr. Chabot (OH)		X	
Mr. Bachus (AL)		X	
Mr. Issa (CA)			
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Amodei (NV)			
Mr. Labrador (ID)		X	
Ms. Farenthold (TX)		X	
Mr. Holding (NC)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Mr. Smith (MO)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)			
Mr. Scott (VA)	X		
Mr. Watt (NC)	X		
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)	X		
Mr. Deutch (FL)			
Mr. Gutiérrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Garcia (FL)	X		
Mr. Jeffries (NY)	X		
Total	11	17	

6. The bill was reported by a rollcall vote of 17–12.

ROLLCALL NO. 6

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman	X		
Mr. Sensenbrenner, Jr. (WI)			

ROLLCALL NO. 6—Continued

	Ayes	Nays	Present
Mr. Coble (NC)			
Mr. Smith (TX)	X		
Mr. Chabot (OH)	X		
Mr. Bachus (AL)	X		
Mr. Issa (CA)			
Mr. Forbes (VA)	X		
Mr. King (IA)	X		
Mr. Franks (AZ)	X		
Mr. Gohmert (TX)	X		
Mr. Jordan (OH)	X		
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)	X		
Mr. Gowdy (SC)	X		
Mr. Amodei (NV)			
Mr. Labrador (ID)	X		
Ms. Farenthold (TX)	X		
Mr. Holding (NC)	X		
Mr. Collins (GA)	X		
Mr. DeSantis (FL)	X		
Mr. Smith (MO)	X		
Mr. Conyers, Jr. (MI), Ranking Member		X	
Mr. Nadler (NY)			
Mr. Scott (VA)		X	
Mr. Watt (NC)			
Ms. Lofgren (CA)		X	
Ms. Jackson Lee (TX)		X	
Mr. Cohen (TN)		X	
Mr. Johnson (GA)		X	
Mr. Pierluisi (PR)		X	
Ms. Chu (CA)		X	
Mr. Deutch (FL)		X	
Mr. Gutiérrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)		X	
Mr. Garcia (FL)		X	
Mr. Jeffries (NY)		X	
Total	17	12	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1493, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 20, 2013.

Hon. BOB GOODLATTE, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1493, the "Sunshine for Regulatory Decrees and Settlements Act of 2013."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Martin von Gnechten, who can be reached at 226–2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 1493—Sunshine for Regulatory Decrees and Settlements Act of 2013.

As ordered reported by the House Committee on the Judiciary on September 20, 2013.

H.R. 1493 would modify the process used to develop consent decrees and settlement agreements that require Federal agencies to take specified regulatory actions. Under the bill, complaints against Federal agencies, the terms of the consent decree or settlement agreement, and the award of attorneys' fees would need to be published and accessible to the public in an electronic format. The legislation would require that any proposed consent decree or settlement agreement be published in the Federal Register for 60 days for public comment prior to filing with the court. H.R. 1493 also would require that settlement negotiations be conducted through mediation or alternative dispute resolution programs.

Under the bill, agencies that submit certain consent decrees or settlement agreements to the court would be required to inform the court of the agency's other outstanding mandatory duties under current law and explain how the proposed consent decree or settle-

ment agreement would further the public interest. The legislation would require the Attorney General (for cases litigated by the Department of Justice) or the head of a Federal agency that independently litigates a case to certify to the court his or her approval of certain types of settlement agreements and consent decrees. Finally, H.R. 1493 also would require courts to more closely review consent decrees when agencies seek to modify them.

Based on information provided by the Department of Justice and assuming the appropriation of the necessary funds, CBO estimates that implementing H.R. 1493 would cost $7 million over the 2014–2018 period, primarily because litigation involving consent decrees and settlement agreements would probably take longer and agencies would face additional administrative requirements, including new requirements to report more information to the public.

Enacting H.R. 1493 could affect direct spending; therefore, pay-as-you-go procedures apply. Under the Clean Air Act, the Clean Water Act, and other statutes, successful plaintiffs are entitled to repayment of attorneys' fees through the Treasury's Judgment Fund. Such payments have averaged about $2 million annually in recent years. By lengthening the process of developing consent decrees, H.R. 1493 could increase the amount of reimbursable attorneys' fees, thus increasing the amount of such payments from the Judgment Fund. However, the increased length of the process to finalize consent decrees and settlement agreements might deter some future lawsuits and decrease the number of future cases. On net, CBO estimates that enacting the legislation would increase annual direct spending by an insignificant amount. Enacting the bill would not affect revenues.

H.R. 1493 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Martin von Gnechten. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 1493 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 1493 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 1493 limits the ability of defendant Federal regulators and pro-regulatory plaintiffs to abuse Federal consent decrees and settlement agreements to require new regulations, reorder regulatory priorities, bind the dis-

cretion of future administrations, and limit the rights of regulated entities and State, local and Tribal co-regulators affected by actions taken under such decrees and settlements.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1493 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short Title.

Section 1 sets forth the short title of the bill as the "Sunshine for Regulatory Decrees and Settlements Act of 2013."

Sec. 2. Definitions.

Under the definitions in Section 2, the bill applies to specific classes of consent decrees and settlements, as follows:

Subsec. 2(1): "Agency" and "Agency action" have the meanings given those terms under 5 U.S.C. § 551.

Subsec. 2(2): "Covered civil action" means a civil action brought under chapter 7 of title 5, United States Code, or any other statute authorizing suit against the United States, to compel agency action alleged to be unlawfully withheld or unreasonably delayed that pertains to a regulatory action that affects the rights of private parties other than the plaintiff or the rights of state, local or tribal governments.

Subsec. 2(3): "Covered consent decree" means any consent decree entered in a covered civil action and any consent decree that requires agency action that pertains to a regulatory action that affects the rights of private parties other than the plaintiff or the rights of state, local or tribal governments.

Subsec. 2(4): "Covered consent decree or settlement agreement" means a covered consent decree and a covered settlement agreement.

Subsec. 2(5): "Covered settlement agreement" means any settlement agreement entered in a covered civil action and any settlement agreement that requires agency action that pertains to a regulatory action that affects the rights of private parties other than the plaintiff or the rights of state, local or tribal governments.

Sec. 3. Consent Decree and Settlement Reform.

Section 3 of the bill sets forth the following requirements applicable to consent decrees and settlement agreements covered by the bill:

Subsec. 3(a)(1)—notice of intent to sue and complaints in covered civil actions must be made publicly available, within 15 days after receipt of service of the notice of intent to sue or the com-

plaint, respectively, through readily accessible means, including electronic means by the agency against which the action is filed.

Subsec. 3(a)(2)—the opportunity for affected parties to intervene in the litigation must conclude before covered consent decrees and settlement agreements may be proposed to the court.

Subsec. 3(b)(1)—in considering motions to intervene, the court must adopt a rebuttable presumption that an intervenor-movant's rights are not adequately represented by the plaintiff or defendant agency.

Subsec. 3(b)(2)—in considering motions to intervene, the court must take due account of whether the movant is a state, local or tribal government that co-administers with the Federal Government the statutory provisions at issue in the litigation or administers state, local or tribal regulatory authority that would be preempted by the defendant agency's discharge of the regulatory duty alleged in the complaint.

Subsec. 3(c)(1)-(2)—if the court grants intervention, it must include the plaintiff, defendant agency and intervenor(s) in court-supervised settlement talks. Settlement negotiations are to occur in the court's mediation or ADR program or to be presided over by a district judge other than the presiding judge, a magistrate judge, or a special master, as determined appropriate by the presiding judge.

Subsec. 3(d)(1)—the defendant agency must publish in the Federal Register and online any proposed consent decree or settlement agreement for no fewer than 60 days of public comment before filing it with the court and must specify the statutory basis for the covered consent decree or settlement. The agency must also publish a description of the covered consent decree or settlement, including whether it provides for an award of attorney's fees.

Subsec. 3(d)(2)(A)—during the 60 day period, the defendant agency must allow public comment on any issue related to the matters alleged in the complaint in the applicable civil action or addressed or affected by the covered consent decree or settlement agreement.

Subsec. 3(d)(2)(B)—the defendant agency must respond to any public comments received.

Subsec. 3(d)(2)(C)—the defendant agency must submit to the court a summary of the public comments and agency responses when it moves for entry of the covered consent decree or dismissal of the case based on the settlement agreement, inform the court of the statutory basis for the proposed covered consent decree or settlement, certify an index of the administrative record for the notice and comment proceeding to the court, and make the administrative record fully accessible to the court.

Subsec. 3(d)(2)(D)—the court must include in the record the index of the administrative record certified by the agency under subparagraph (C) and any documents listed in the index which any party or amicus curiae appearing before the court in the action submits to the court.

Subsec. 3(d)(3)(A)—the defendant agency may, at its discretion, hold a public agency hearing on whether to enter into the proposed consent decree or settlement agreement.

Subsec. 3(d)(3)(B)—if such a hearing is held, then a summary of the proceedings must be filed with the court, the hearing record must be certified to the court and included in the judicial record, and full access to the hearing record must be given to the court.

Subsec. 3(d)(4)—if a proposed consent decree or settlement agreement requires agency action by a date-certain, the defendant agency must inform the court of any uncompleted mandatory agency duties the covered consent decree or settlement agreement does not address, how the covered consent decree or settlement agreement would affect the discharge of those duties, and why the covered consent decree's or settlement agreement's effects on the order in which the agency discharges its mandatory duties is in the public interest.

Subsec. 3(e)(1)-(2)—in the case of a covered consent decree, the Attorney General or, in cases litigated by agencies with independent litigating authority, the defendant agency head, must certify to the court that he or she approves of a proposed covered consent decree that includes terms that: (i) convert into a nondiscretionary duty a discretionary authority of an agency to propose, promulgate, revise, or amend regulations; (ii) commit an agency to expend funds that have not been appropriated and that have not been budgeted for the regulatory action in question; (iii) commit an agency to seek a particular appropriation or budget authorization; (iv) divest an agency of discretion committed to the agency by statute or the Constitution of the United States, without regard to whether the discretion was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties; or (v) otherwise affords relief that the court could not enter under its own authority upon a final judgment in the civil action.

In the case of a covered settlement agreement, the Attorney General or, in cases litigated by agencies with independent litigating authority, the defendant agency head, must certify to the court that he or she approves of a proposed covered settlement agreement that provides a remedy for failure by the agency to comply with the terms of the covered settlement agreement other than the revival of the civil action resolved by the covered settlement agreement and that: (i) interferes with the authority of an agency to revise, amend, or issue rules under the procedures set forth in chapter 5 of title 5, United States Code, or any other statute or executive order prescribing rulemaking procedures for a rulemaking that is the subject of the covered settlement agreement; (ii) commits the agency to expend funds that have not been appropriated and that have not been budgeted for the regulatory action in question; or (iii) for a covered settlement agreement that commits the agency to exercise in a particular way discretion which was committed to the agency by statute or the Constitution of the United States to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties.

Subsec. 3(f)(1)—when it considers motions to participate as *amicus curiae* in briefing over whether it should enter or approve a consent decree or settlement, the court must adopt a rebuttable presumption that favors *amicus* participation by those who filed public comments on the covered consent decree or settlement agreement during the agency's notice and comment process.

Subsec. 3(f)(2)(A)-(B)—the court must ensure that a proposed consent decree or settlement agreement allows sufficient time and procedure for the agency to comply with the Administrative Procedure Act and other applicable statutes that govern rulemaking, and, unless contrary to the public interest, any executive orders that govern rulemaking;

Subsec. 3(g)—requires agencies to submit annual reports to Congress on the number, identity, and content of covered civil actions brought against and covered consent decrees and settlement agreements, including the statutory bases of the covered consent decrees and settlement agreements, and the decrees' and settlements' related complaints and attorneys' fee awards.

Sec. 4. Motions to Modify Consent Decrees.

The bill establishes a *de novo* standard of review for the courts' consideration of motions to modify covered consent decrees and settlement agreements due to agency obligations to fulfill other duties or changed facts and circumstances.

Sec. 5. Effective Date.

The bill becomes effective upon enactment and applies to any covered civil action filed or covered consent decree or settlement agreement proposed to a court on or after that date.

Dissenting Views

INTRODUCTION

H.R. 1493, the "Sunshine for Regulatory Decrees and Settlements Act of 2013," is yet another attack on the Federal rulemaking process. Consent decrees and settlements generate many benefits by facilitating the enforcement of laws, ensuring judicial efficiency, and protecting the public fisc. Notwithstanding these benefits, this ill-conceived bill imposes numerous new procedural burdens on agencies and courts with respect to the entry of consent decrees and settlement agreements that seek to compel agency action that involves regulatory power and affects the rights of nonparties to such actions. Among these burdens are the requirement that agencies solicit public comments on such proposed consent decrees or settlement agreements and respond to each public comment before entering such agreements in court. The bill would also require courts to presume, subject to rebuttal, that almost *any* private third party be allowed to intervene in litigation between a public interest group and a Federal agency concerning a regulatory action and would require that such third party be permitted to participate in settlement negotiations between the two litigants.

Without any evidence, proponents of this legislation allege that it is needed to restrain agencies and interest groups from colluding to "sue and settle," whereby sympathetic Federal agencies enter into consent decrees or settlement agreements with public interest groups or other private citizen plaintiffs as a form of informal rulemaking that avoids compliance with the rulemaking procedures outlined in the Administrative Procedure Act[1] (APA) and other statutes. Procedures have long been in place that circumscribe the ability of agencies to enter consent decrees and settlement agreements so as to avoid any potential "sue and settle" situations. By undermining citizen attempts to enforce statutory rulemaking duties on agencies, H.R. 1493 ultimately threatens public health and safety by undermining the promulgation of new safeguards. Also, by discouraging the use of consent decrees and settlement agreements, encouraging costly and protracted litigation over ambiguous and ill-defined terms, imposing unduly burdensome procedural requirements on agencies and courts, and providing increased opportunities for dilatory tactics by those opposed to the agency action at issue in the underlying litigation, H.R. 1493 will exponentially increase costs for American taxpayers. Finally, this bill improperly undermines the judiciary's traditional role in managing litigation and resolving disputes equitably and efficiently.

A broad coalition of civil rights, environmental, consumer protection, and other public interest groups opposed a substantially simi-

[1] 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 5372, 7521 (2013).

lar bill in the 112th Congress, including the Alliance for Justice, the American Association for Justice, the Center for Food Safety, the Center for Science in the Public Interest, Defenders of Wildlife, Earthjustice, the Natural Resources Defense Council, OMB Watch (now the Center for Effective Government), Public Citizen, and the Sierra Club.[2] Additionally, the Administration threatened to veto H.R. 1493's predecessor from the 112th Congress, stating that it would "spawn excessive regulatory litigation, and introduce redundant processes for litigation settlements."[3]

We likewise strongly oppose H.R. 1493 and respectfully dissent.

DESCRIPTION AND BACKGROUND

H.R. 1493, the "Sunshine for Regulatory Decrees and Settlements Act of 2013," is intended to address the perceived problem of collusion between public interest plaintiffs and sympathetic Federal agencies in entering into consent decrees or settlement agreements that oblige the agency to take a particular action regarding a regulatory action (e.g., a rulemaking), often under a certain timeline. Proponents of the bill call this phenomenon "sue and settle." H.R. 1493 would impose various burdensome procedural requirements on Federal agencies and Federal courts when a consent decree or settlement agreement prescribes regulatory action affecting a private third party. These new procedures include a virtually unlimited right for almost any private party to intervene in ongoing litigation and settlement negotiations between a Federal agency and plaintiffs that have sued it to enforce a statutory obligation to undertake a regulatory action. The bill also includes a requirement that agencies accept and respond to public comments about a proposed consent decree or settlement agreement. It also limits the kinds of consent decrees and settlement agreements that executive departments and agencies may agree to. This legislation is freestanding and does not amend any current law or statute.

A detailed description of the bills substantive provisions follows.

Section 2 defines several key terms. Section 2(1) imports the definitions of "agency" and "agency action" from the APA. Thus, the bill's provisions apply to Executive Branch and independent agencies alike.[4]

Section 2(2) defines "covered civil action" as meaning a civil action that: (1) seeks to compel agency action; (2) alleges that an agency is unlawfully withholding or unreasonably delaying "agency action relating to a regulatory action" that affects the rights of private third parties or state, local, or tribal governments; and (3) is brought pursuant to the judicial review provisions of the APA or any other statute authorizing judicial review of agency action. The

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[2] Letter to Rep. John Conyers, Jr. (D-MI), Ranking Member, H. Committee on the Judiciary from 41 public interest groups (Mar. 19, 2012) (on file with the H. Committee on the Judiciary, Democratic Staff).

[3] Executive Office of the President, Office of Management and Budget, Statement of Administration Policy on H.R. 4078—the Regulatory Freeze for Jobs Act of 2012 (July 23, 2012), *available at* http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr4078r__20120723.pdf.

[4] Independent regulatory agencies, as opposed to executive branch agencies, are considered "independent"because the President has limited authority to remove their leaders, who can only be removed for cause, rather than simply serving at the President's pleasure. Such agencies are usually styled "commissions" or "boards" (e.g., National Labor Relations Board, Securities and Exchange Commission). Stephen G. Breyer, *et al.,* ADMINISTRATIVE LAW AND REGULATORY POLICY, at 100 (4th ed. 1999).

scope of and distinction between "agency action" and "regulatory action" are not entirely clear, nor is the meaning of "rights" or "private persons." Given that these are threshold terms, their vagueness is likely to lead to litigation over whether H.R. 1493's provisions apply to a given proposed consent decree or settlement agreement.

Section 2(3) defines "covered consent decree" as a consent decree in a covered civil action and any other consent decree requiring agency action concerning a rulemaking or other regulatory action that affects private third parties or state, local, or tribal governments. Thus, H.R. 1493 could apply to consent decrees in cases that are not "covered civil actions" under the bill.

Section 2(4) defines "covered consent decree or settlement agreement" as a covered consent decree *and* a covered settlement agreement. This definition's purpose is unclear.

Section 2(5) defines "covered settlement agreement" in a manner similar to the definition for "covered consent decree," except that it applies to settlement agreements rather than consent decrees. As with "covered consent decrees," this means that H.R. 1493 could apply to settlement agreements in cases that are not "covered civil actions" under the bill.

Section 3 of the bill sets forth several new procedures that agencies and parties in litigation must follow before a court can enter a consent decree or settlement agreement, as well as certain rebuttable presumptions that courts must make.

Section 3(a)(1) requires a defendant agency in a covered civil action to post online a copy of the notice of intent to sue and the complaint in the covered civil action not later than 15 days after receiving service of each. Section 3(a)(2) prohibits a party to a civil action from moving to enter a covered consent decree or to dismiss a civil action pursuant to a covered settlement agreement until after compliance with the bill's notice and comment requirements or after a public hearing allowed under the bill, whichever is later.

Section 3(b)(1) applies a unique standard for third-party intervention in covered civil actions. Specifically, it requires a court, when considering a motion to intervene in a covered civil action or in a civil action in which a covered consent decree or settlement agreement is proposed, to presume that the interests of "a person who alleges that the agency action in dispute would affect the person" would not be adequately represented by the parties to the action. This places the burden on the non-moving parties to show that they can adequately represent the putative intervenor's interests, in contrast to current law, which places the burden on the party seeking intervention to demonstrate that its interests are not adequately represented by the parties per Federal Rule of Civil Procedure 24.

With respect to motions to intervene by state, local, and tribal governments, section 3(b)(2) requires a court to "take due account of whether the movant" jointly administers with a defendant agency the statutory provisions giving rise to the underlying lawsuit or administers under state, local, or tribal law an authority that would be preempted by the regulatory action at issue in the underlying lawsuit.

Section 3(c) outlines certain requirements regarding the negotiation to settle a covered civil action or to reach an agreement on a covered consent decree or settlement agreement. Section 3(c)(1) requires that such negotiations be conducted pursuant to the court's alternative dispute resolution program or by a judge other than the presiding judge, a magistrate, or a special master, as the presiding judge may determine. Such settlement negotiations must also include any intervening party.

Section 3(d) imposes a number of notice and comment procedures on agencies before they can file a consent decree or settlement agreement with a court. Section 3(d)(1) requires that an agency publish in the Federal Register and post online a proposed covered consent decree or settlement agreement and a description of its terms, including whether it provides for attorneys' fees or costs and a basis for such award, at least 60 days before such consent decree or settlement agreement is filed with a court.

Section 3(d)(2)(A) requires that the agency accept public comment on any issue in the underlying civil action or regarding the proposed consent decree or settlement agreement during that minimum 60-day period provided for in section 3(d)(1). Section 3(d)(2)(B) requires the agency to respond to any public comments. Section 3(d)(2)(C) requires an agency to: (1) inform the court of the statutory basis for the proposed consent decree or settlement agreement and a summary of public comments that it has received; (2) submit to the court a certified index of the administrative record of the notice and comment proceeding; and (3) make the administrative record available to the court. Finally, section 3(d)(2)(D) requires the court to include in the record of the underlying civil action the administrative record submitted by an agency, as well as any documents listed in the index that any party or *amicus curiae* appearing before the court submits.

Section 3(d)(3) allows an agency to hold a public hearing regarding whether to enter into a proposed covered consent decree or settlement agreement and outlines the procedures for holding such a hearing.

Section 3(d)(4) requires an agency to present to the court certain explanations before moving to enter a covered consent decree or settlement agreement, or to dismiss the civil action based on the covered consent decree or settlement agreement, when the agency is required to take an action by a date certain pursuant to such decree or settlement. The required explanations must describe: (1) any required regulatory action that the agency has not taken and that the decree or settlement does not address; (2) a description of how the decree or settlement would affect the discharge of such required regulatory action; and (3) why the effects of the decree or settlement on the discharge of required regulatory action would be in the public interest.

Section 3(e) codifies long-standing guidelines that Department of Justice and agency attorneys follow to ensure that their use of consent decrees or settlement agreements are not used to circumvent the normal rulemaking process, known as the "Meese Memo" (which is itself already codified in the Code of Federal Regula-

tions).[5] Section 3(e)(1) states the general rule that for a covered consent decree or settlement agreement containing certain terms that are proscribed by the Meese Memo, the Attorney General or the head of an independent agency (depending on which agency is the litigating party), must submit to the court a signed certification that he or she approves the proposed consent decree or settlement agreement. Section 3(e)(2) sets forth the terms that would subject a proposed covered decree or settlement to the certification requirement. For covered consent decrees, these terms are those that: (1) convert an agency's discretionary rulemaking authority into a non-discretionary rulemaking obligation; (2) commit an agency to expend funds for the regulatory action at issue that have not been appropriated and budgeted; (3) commit an agency to seek a particular appropriation or budget authorization; (4) divest an agency of discretion committed to it by statute or the Constitution; or (5) affords relief that the court otherwise would not have authority to grant. For covered settlement agreements, the terms triggering the certification requirement are those that: (1) remedy the agency's failure to comply with the covered settlement agreement, other than a revival of the underlying civil action; and (2) interferes with agency rulemaking procedures under the APA, another statute, or executive order, commits the agency to expend non-appropriated and non-budgeted funds for the regulatory action at issue, or commits the agency to exercise discretion in a particular way when the discretion was committed to it by statute or the Constitution to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties.

Section 3(f) imposes certain requirements on courts for judicial consideration of proposed covered consent decrees and settlement agreements. Section 3(f)(1) requires a court reviewing a proposed covered consent decree or settlement agreement to presumptively allow *amicus* participation by any party who filed public comments or participated in a public hearing regarding such proposed decree or settlement under the bill. Section 3(f)(2) prohibits a court from entering a consent decree unless it provides for sufficient time or procedures for the agency to comply with the APA's rulemaking procedures or other statutes and executive orders that govern rulemaking. The court must also "ensure" that such provisions are contained in any proposed settlement agreement.

Section 3(g) requires agencies to submit annual reports to Congress. These reports must include the number, "identity," and content of covered civil actions brought against the agency as well as covered consent decrees or settlement agreements that the agency has entered into. Additionally, the report must describe the statutory basis for each covered consent decree or settlement agreement entered into by the agency and for any award of attorneys' fees or costs in the underlying civil action.

Section 4 of the bill specifies that when an agency moves to modify a covered consent decree or settlement agreement because it is no longer "fully in the public interest due to the obligations of the agency to fulfill other duties or due to changed facts and cir-

[5] 28 C.F.R. §§ 0.160–0.163 (2013).

cumstances," the court must review the decree or settlement *de novo.*

Section 5 states that the bill's provisions apply to covered civil actions pending on the bill's enactment date. Section 5 further provides that the bill's provisions apply to all covered consent decrees and covered settlement agreements proposed on or after the bill's enactment date.

CONCERNS WITH H.R. 1493

I. H.R. 1493 is a Solution in Search of a Problem

No reliable evidence supports the assertion that H.R. 1493 is needed. Federal agencies do not collude with public interest organizations and other private-citizen plaintiffs in entering into consent decrees or settlements as a way of circumventing proper rulemaking procedures. Nevertheless, proponents of H.R. 1493 repeatedly contend that such collusion takes place, without citing evidence in support of that contention. For example, Roger Martella testified before the Judiciary Committee's Subcommittee on Courts, Commercial and Administrative Law in the 112th Congress that "certain groups increasingly are employing a 'sue and settle' approach to interactions with the government on regulatory issues."[6] According to Mr. Martella, under such arrangements, non-governmental organizations use consent decrees and settlements with agencies to dictate agency priorities and set timelines for rulemakings without transparency, opportunity for input from the to-be-regulated entities, or opportunity for judicial review of such agreements.[7] At this year's hearing on H.R. 1493, the bill's proponents cited a faulty U.S. Chamber of Commerce study to support their bald assertions of collusion.[8]

The facts, however, are bereft of any evidence of such collusion. For example, John Walke of the Natural Resources Defense Council thoroughly de-bunked the Chamber study. Mr. Walke testified that the Chamber's methodology relied entirely on "Internet searches identifying all cases in which [the Environmental Protection Agency or EPA] and an environmental group entered into a consent decree or settlement agreement between 2009 and 2012."[9] In doing so, he explained, the report ignored EPA settlements with industry parties or conservative groups and did not examine any EPA settlements during the Bush administration, during which the EPA also entered into settlements and consent decrees. Mr. Walke further noted:

> Most striking of all is that by merely compiling EPA settlements (with just environmental groups, under just [the Obama] administration), the report's methodology quietly dispenses with any need for proof of collusion or impropriety in consent decrees or settlement agreements. The

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[6] *The Federal Consent Decree Fairness Act and the Sunshine for Regulatory Decrees and Settlements Act: Hearings on H.R. 3041 and H.R. 3862 Before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary,* 112th Cong. (2012) [hereinafter "2012 Hearing"] (statement of Roger R. Martella, Jr., Partner, Sidley Austin LLP).

[7] 2012 Hearing at 26–28.

[8] U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors,* May 2013, *available at* http://www.uschamber.com/reports/sue-and-settle-regulating-behind-closed-doors.

[9] 2013 Hearing at 115.

> Chamber cannot remotely back up the charge that collusion was involved in all of these settlements, or even in any of them, so the report does not even try.[10]

Mr. Walke observed that the Chamber report simply sought to transform evidence of the use of a "common and long-accepted form of resolving litigation over clear legal violations under any administration" into evidence of inappropriate collusion.[11] It is also critical to note that, while much of the justification that H.R. 1493's proponents—including the Chamber of Commerce—have centered on consent decrees and settlements involving the EPA, the bill itself is drafted in general language and would apply to consent decrees and settlement agreements involving *all* Federal agencies, not just the EPA.

The testimony of John Cruden, a senior career official in the Department of Justice (DoJ) Environment and Natural Resources Division (ENRD) for more than two decades during two Republican and two Democratic administrations, bolsters Mr. Walke's conclusion that there is no evidence of "sue and settle" collusion. Mr. Cruden testified on a substantially similar bill in the 112th Congress that he was unaware of any instance of this so-called collusive "sue and settle" activity occurring during his long tenure as a senior ENRD official. He also emphasized that agencies enter settlements only when they have failed to meet mandatory rulemaking obligations:

> In my long experience with the types of cases covered by [this legislation], EPA only agreed to settle when the agency had a mandatory duty to take an action, or to prepare a rule, based on specific legislation enacted by Congress. The settlement in those cases was straightforward: setting a date by which the agency would propose a draft rule and, quite often, a date for final action. Had there not been such a settlement, a Federal court would have issued an injunction setting the date for EPA to take action, since the agency's legal responsibility was quite clear.
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> Because a proposed rule emerging from a settlement would provide the same notice-and-comment opportunities as any other rulemaking, and because the final rules still would be subject to challenge under the Administrative Procedure Act, this existing process obviously does not avoid public comment, and already allows interested parties their full range of substantive and procedural rights.
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> . . .
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> I am not aware of any instance of a settlement, and certainly none I personally approved, that could remotely be described as "collusive." Quite the opposite: in every case of which I am aware, the Department of Justice vigorously represented the Federal agency, defending the agency's legal position and obtaining in any settlement the best

[10] *Id.* at 116.
[11] *Id.*

possible terms that were consistent with the controlling law.[12]

Others have also refuted the "sue and settle" allegation. As a Sierra Club representative observed, this theory is a "sad attempt to create a boogie man out of vital and broadly supported protections that have improved and saved millions of Americans' lives."[13] Likewise, David Goldston of the Natural Resources Defense Council testified in 2011 at a House Energy and Commerce Subcommittee hearing that the "whole 'sue and settle' narrative is faulty."[14]

Mr. Walke also noted in his testimony that the Chamber report ultimately identifies as its culprit the citizen-suits that Congress has authorized under various environmental statutes.[15] The entire "sue and settle" allegation that undergirds H.R. 1493, therefore, is really aimed at congressionally authorized provisions that permit citizens to sue agencies so as to enforce statutory requirements. If these citizen-suit provisions are the true cause for concern, then it is for H.R. 1493's proponents to push for their repeal by Congress, rather than seek to disrupt the use of longstanding mechanisms for resolving litigation.

In the absence of genuine evidence that Federal agencies collude with plaintiffs to circumvent proper rulemaking procedures by use of consent decrees and settlement agreements, H.R. 1493 simply addresses a non-existent problem.

II. By Undermining Enforcement of Mandatory Rulemaking Duties, H.R. 1493 Threatens Public Health and Safety

To the extent that H.R. 1493 undermines attempts to enforce statutory mandates on agencies, it potentially undermines public health and safety. As noted, most consent decrees and settlement agreements arising from civil actions where a citizen lawsuit has been filed against an agency stem from the fact that the agency failed to meet a statutory rulemaking deadline or other rulemaking duty. Congress assigned these mandatory duties to agencies because it concluded that a particular public health or safety concern merited such action by the agencies. Moreover, Congress added citizen-lawsuit provisions in these statutes in order to allow private citizens to help enforce its statutory mandates. Therefore, when agencies fail to meet such mandatory duties, the harm that they were supposed to address remains unaddressed. By making it harder for citizens to compel agencies to meet their duties, H.R. 1493 jeopardizes public health and safety.

Health and safety concerns are not a mere abstraction. Regarding the issue of workplace safety alone, there were 4,383 fatal occupational injuries last year, according to the Bureau of Labor Statistics.[16] Additionally, an analysis by the National Institute for Occupational Safety and Health, the American Cancer Society, and

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[12] 2012 Hearing at 106–107.

[13] John McCardle, *House Republicans Accuse EPA, Enviros of Collusion,* N.Y. TIMES, July 15, 2011, available at http://www.nytimes.com/gwire/2011/07/15/15greenwire-house-republicans-accuse-epa-enviros-of-collus-69925.html

[14] *Id*

[15] 2013 Hearing at 116–117.

[16] Press Release, U.S. Dep't of Labor Bureau of Labor Statistics, National Census of Fatal Occupational Census of Fatal Occupational Injuries in 2012 (Preliminary Results), Aug. 13, 2013, available at http://www.bls.gov/news.release/pdf/cfoi.pdf.

Emory University's School of Public Health estimates that after factoring in disease and injury data "there are a total of 55,200 US deaths annually resulting from occupational disease or injury (range 32,200–78,200)."[17] To the degree that H.R. 1493 makes it harder for citizens to force agencies to address these kinds of concerns, it unnecessarily puts the American people at risk.

III. H.R. 1493 is Unnecessary in Light of the Justice Department's "Meese Memo" and Other Existing Legal Mechanisms

H.R. 1493's proponents have never explained why, to the extent that collusive settlement agreements are an actual problem, the so-called "Meese Memo" is insufficient to address such a problem, nor have they offered evidence that the DoJ and Federal agencies are not complying with its requirements. Moreover, H.R. 1493's proponents offer no rationale as to why the Meese Memo needs to be codified in statute, as this bill does. Finally, in addition to the Meese Memo, other legal mechanisms exist for addressing the proponents' purported concerns about transparency and public input in consent decree and settlement negotiations.

The Meese Memo, codified in the Code of Federal Regulations,[18] specifies a process that already addresses the purported problem sought to be addressed by H.R. 1493's proponents. In 1986, then-United States Attorney General Edwin Meese issued a set of guidelines for DoJ and other government attorneys in entering into consent decrees and settlement agreements in response to the following concerns:

> In the past . . . executive departments and agencies have, on occasion, misused [consent decrees] and forfeited the prerogatives of the Executive in order to preempt the exercise of those prerogatives by a subsequent Administration. These errors sometimes have resulted in an unwarranted expansion of the powers of [sic] judiciary—often with the consent of government parties—at the expense of the executive and legislative branches.[19]

The Meese Memo identified three types of potentially problematic provisions in consent decrees: (1) a department or agency agreed to promulgate regulations and may have relinquished its power to amend those regulations or promulgate new ones without court participation; (2) a consent decree may divest a department or agency of discretion committed to it by the Constitution or a statute where exercise of discretion is ultimately subject to court approval; and (3) a department or agency has agreed to use its best efforts to obtain funding from Congress in order to enforce the decree.[20]

As a result, the Meese Memo states that departments and agencies should not enter into a consent decree that: (1) "converts into

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[17] Kyle Steenland *et al.,* Dying for Work: The Magnitude of US Mortality from Selected Cases of Death Associated with Occupation, 43 Am. J. Industrial Medicine 461 (2003).

[18] 28 C.F.R. §§ 0.160–0.163 (2012).

[19] Memorandum from Edwin Meese III, Attorney General, to All Assistant Attorneys General and All United States Attorneys Regarding Department Policy Regarding Consent Decrees and Settlement Agreements (Mar. 13, 1986), available at http://www.archives.gov/news/samuel-alito/accession-060-89-1/Acc060-89-1-box9-memoAyer-LSWG-1986.pdf.

[20] *Id.*

a mandatory duty the otherwise discretionary authority of the Secretary or agency administrator to revise, amend, or promulgate regulations;" (2) "commits the department or agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question, or commits a department or agency to seek a particular appropriation or budget authorization;" or (3) "divests the Secretary or agency administrator, or his successors, of discretion committed to him by Congress, or the Constitution where such discretionary power was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties." [21] The policy outlines similar restrictions on settlement agreements.[22] If special circumstances require departure from these guidelines, the Attorney General, the Deputy Attorney General, or the Associate Attorney General must authorize such a departure.[23] The Meese Memo ultimately was incorporated into the Code of Federal Regulations.[24]

H.R. 1493's proponents offer no evidence that the DoJ and agencies are not complying with the Meese Memo. As Mr. Cruden noted, "I am personally unaware of any examples of the Department failing to comply with the existing C.F.R. provision [codifying the Meese Memo]; nor did the other witnesses present any such examples at the hearing." [25] Moreover, the Majority's witnesses at last year's hearing on H.R. 1493's predecessor specifically praised the Meese Memo and offered no argument as to why it was insufficient to address the alleged "sue and settle" problem.[26]

In addition to the Meese Memo, there are other mechanisms available that already address the purported concerns of H.R. 1493's proponents. For example, parties whose interests may be affected by a consent decree or settlement may move to intervene in the case pursuant to Federal Rule of Civil Procedure 24, with the moving party bearing the burden of demonstrating that the parties to the case do not adequately represent the movant's interest.[27] Similarly, any rulemaking that is required pursuant to a consent decree or settlement agreement would still be subject to the APA's notice and comment procedures, and affected parties who are not parties to the consent decree or settlement agreement would still have the opportunity to weigh in on any negative impacts of a proposed rule.[28]

In sum, to the extent that the Federal Government is, in fact, tempted to use consent decrees and settlement agreements to do an end-run around the rulemaking procedures, the Meese Memo and other mechanisms already address such concerns, making H.R. 1493 unnecessary.

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[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] 28 C.F.R. §§ 0.160–0.163 (2013).
[25] 2012 Hearing at 111.
[26] *See id.* at 60 (statement of Andrew M. Grossman) ("The Meese Policy was, and remains, notable for its identification of a serious breach of separation of powers, with serious consequences, and its straightforward approach to resolving that problem. By reducing the issue, and its remedy, to their essentials, the Meese Policy identifies and protects the core principles at stake. This explains its continued relevance.").
[27] Fed. R. Civ. P. 24(a)(2).
[28] 5 U.S.C. § 553 (2013).

IV. H.R. 1493 Will Favor Industry Interests at Taxpayers' Expense

In addition to being unnecessary, H.R. 1493 threatens to impose tremendous financial costs on taxpayers. It would do so in several ways. First, it provides numerous new opportunities for opponents of regulation to engage in dilatory tactics to delay resolution of pending litigation, further increasing costs for agencies and courts and, ultimately, taxpayers. Second, many of its key terms are ambiguous, which will lead to confusion, litigation, and delay in any proposed consent decree or settlement negotiation. Third, it imposes numerous burdensome procedural requirements on agencies and courts when they are considering consent decrees and settlements concerning regulatory action, which will further add to the costs borne by those entities. Fourth, the bill's cumulative effect would be to discourage agencies from entering into consent decrees and settlement agreements when they might otherwise have done so, leading to unnecessarily protracted and costly litigation.

A. H.R. 1493 opens the door to dilatory tactics by industry and other opponents of agency action.

Various provisions of H.R. 1493 would give opponents of regulations opportunities to effectively stifle rulemaking by allowing them to slow down one of the processes by which agencies agree to abide by their congressionally-assigned duty to regulate. As Mr. Walke and Mr. Cruden noted in their testimony, agencies enter into consent decrees and settlement agreements when they have a mandatory duty to act, including the requirement to promulgate a new rule.[29] By opening opportunities for industry to slow down this process, H.R. 1493 effectively makes it more expensive for agencies to do what Congress has mandated it to do.

Section 3(b)(1) of the bill, for example, contains a nearly open-ended intervention right by mandating that a court presume, subject to rebuttal, that the interests of any private third party affected by the agency action in dispute in the underlying litigation will not be represented by the parties to that litigation.[30] This presumption upends current law, which places the burden of proof on a third party to show that its interests are not represented by the parties in the case.[31] Effectively, this shift in the burden of proof on the question of the representation of third-party interests is a way to make it much easier for any entity not a party to the case to intervene in a case involving a consent decree or settlement agreement that seeks to compel agency action.

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[29] 2013 Hearing at 117–118; 2012 Hearing at 106–107.
[30] H.R. 1493, 113th Cong. § 3(b)(1) (2013).
[31] Rule 24 of the Federal Rules of Civil Procedure states, in pertinent part:

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a Federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention.

(1) In General. On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a Federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

Hypothetically, under H.R. 1493, if the regulatory action at issue involved the Clean Air Act, a person who breathes air would have the right to intervene in a consent decree or settlement agreement, as would any affected industry entity, or anyone else in the United States, subject to a refutable presumption that the parties to the litigation do not adequately represent the third party's interest. If a court were to read section 3(b)(1) broadly, this provision could open the door to almost anyone intervening in a covered civil action under the bill.

Section 3(c) of H.R. 1493 also tilts the playing field sharply in favor of industry interests by giving them an opportunity to slow down agency compliance with Federal law. Under this provision, courts must delay entry of a consent decree or settlement agreement by referring settlement discussions to the court's mediation or alternative dispute resolution program, or to a district judge, magistrate judge, or special master.[32] Such discussions must include the plaintiff, defendant agency, and any third party intervenors.[33] In addition to delaying the settlement process, this provision would impose costs on plaintiffs and defendant agencies alike by forcing them to pay mediation and other dispute resolution costs beyond what they may have had to pay in the absence of this process.

H.R. 1493 provides other opportunities for industry to engage in dilatory tactics in sections 3(d)(1) and 3(d)(2)(A), which require an agency to publish any proposed consent decree or settlement agreement and to allow at least 60 days for public comments.[34] The agency must then respond to every comment pursuant to section 3(d)(2)(B).[35] Under these provisions, any industry would be able to flood an agency with comments in an effort to stall resolution of the underlying dispute, which, as noted, usually concern enforcement of rulemaking deadlines.

As if forcing an agency to respond to potentially numerous public comments on a proposed consent decree or settlement agreement was not enough, section 3(f)(1) requires a court to presume *amicus* status for any member of the public who submits comments on a proposed consent decree or settlement agreement, subject to rebuttal, in any proceeding on a motion to enter such consent decree or settlement agreement.[36] This provision would further allow industry and other regulatory opponents to delay resolution of the underlying dispute between the plaintiff and the defendant agency.

B. H.R. 1493 uses ambiguous language in many key provisions, opening the door to confusion, litigation, and delay in resolving disputes.

Many of H.R. 1493's key provisions are written in ambiguous, ill-defined language, which will foster costly litigation over their meaning and cause delay in resolving the underlying lawsuit against the Federal agency. For example, section 2(2) states that the bill applies to consent decrees and settlement agreements in an

[32] H.R. 1493, 113th Cong. § 3(c) (2013).
[33] *Id.*
[34] *Id.* at §§ 3(d)(1), 3(d)(2)(A).
[35] *Id.* at § 3(d)(2)(B).
[36] *Id.* at § 3(f)(1).

action seeking to compel agency action and alleging that the agency is "unlawfully withhodling or unreasonably delaying agency action relating to a regulatory action."[37] It is unclear what the distinction is between "agency action" and "regulatory action," what the scope of the phrase "relating to" is, or what "unlawfully withholding" and "unreasonably delaying" mean, opening the door to litigation over the meaning of these threshold terms.

Additionally, section 2(2) refers to "private persons" whose "rights" are affected by the regulatory action, but the bill fails to define what "private persons" or "rights" means.[38] As noted above, without a definition, almost any third party could, in theory, intervene in a consent decree or settlement discussion under this bill. As with other ambiguous language in this bill, confusion and a lack of clarity over the meaning of these terms will lead to litigation.

Finally, H.R. 1493's requirement that, under certain circumstances, agencies must inform the court of all mandatory rulemaking deadlines and describe how a consent decree or settlement agreement "would affect the discharge of those duties," in addition to being open-ended, burdensome, time-consuming, and a drain on limited agency resources, is also full of ambiguity.[39] The requirement, outlined in section 3(d)(4), does not define what "affect the discharge of those duties" means.

C. H.R. 1493 imposes several burdensome procedural requirements on agencies and courts with respect to entering into consent decrees and settlement agreements.

H.R. 1493 imposes several new procedural requirements on agencies and courts that are designed to slow down the resolution of litigation over an agency's failure to meet a statutory deadline or other regulatory obligation. These include: (1) a limitation on when a party may file a motion for a consent decree or to dismiss the case pursuant to a settlement agreement; (2) a mandate requiring the court to presume that the interests of a third party seeking to intervene in settlement discussions is not adequately represented; (3) a requirement that the court refer consent decree or settlement discussions to mediation or another alternative dispute resolution mechanism; (4) a requirement that the defendant agency publish a proposed consent decree or settlement agreement; (5) a requirement that agencies accept public comments on proposed consent decrees or settlements to which the agency must respond; (6) a requirement that an agency submit to a court explanations of vaguely defined factors underlying a proposed consent decree or settlement agreement whenever such decree or agreement requires agency action by a date certain; and (7) a requirement that a court allow *amicus* participation in any motion to enter a consent decree or settlement agreement by any party that submitted public comments on such decree or agreement.

Implementing any one of these new requirements, much less all of them, drains agency and judicial time and resources without adding to the fairness of any consent decree or settlement agreement. In times such as now when Federal agencies and the court

[37] *Id.* at § 2(2).
[38] *Id.*
[39] *Id.* at § 3(d)(4).

system are facing budgetary shortfalls, we should be crafting legislation to streamline and improve efficiencies for all. Unfortunately, H.R. 1493 will have the opposite result.

D. The cumulative effect of H.R. 1493's provisions will be to discourage the use of consent decrees and settlement agreements, forcing expensive and time-consuming litigation.

By facilitating dilatory conduct by anti-regulatory forces, using vague language in key provisions, and imposing numerous and burdensome procedural requirements on agencies and courts with respect to consideration of consent decrees and settlement agreements, H.R. 1493's cumulative effect will be to discourage the use of consent decrees and settlement agreements and thereby delay or eliminate early resolution of litigation against the government. This legislation will ultimately increase costs for taxpayers, who must pay for the protracted litigation associated with fewer consent decrees and settlement agreements. Indeed, the Congressional Budget Office noted in its analysis of H.R. 1493 that the bill would impose millions of dollars in costs, "primarily because litigation involving consent decrees and settlement agreements would probably take longer under the bill and agencies would face additional administrative burdens, including new requirements to report more information to the public."[40]

Consent decrees benefit both plaintiffs and defendants. For plaintiffs, consent decrees allow for meaningful and timely relief without the risks and costs associated with prolonged litigation. Governmental and other defendants can also avoid the burdens and costs of protracted litigation and the particular risk that a costly or cumbersome solution simply will be imposed on them should they lose the suit. Additionally, defendants can avoid judicial determination of liability and obtain flexibility in terms of how they implement needed reforms. This is why the use of consent decrees in Federal court litigation is a longstanding part of the judicial and Congressional policy of encouraging alternative dispute resolution.[41] H.R. 1493 flies in the face of this policy and will ultimately cost plaintiffs and governmental defendants more in litigation costs by making consent decrees and settlements more difficult to obtain. As John Cruden explained:

> The judicially approved consent decree is a valuable settlement tool that promotes expeditious resolution of cases, saves transaction costs for all parties and for the judicial system, and achieves finality while protecting the parties to the agreement.

[40] Congressional Budget Office, Cost Estimate for H.R. 1493, the Sunshine for Regulatory Decrees and Settlements Act of 2013, at 1 (Sept. 20, 2013), *available at* http://cbo.gov/publication/44606.

[41] *See* Timothy Stoltzfus Jost, *Breaking the Deal: Proposed Limits on Federal Consent Decrees Would Let States Abandon Commitments,* LEGAL TIMES, Apr. 25, 2005, at 59 ("Yet the Supreme Court has long articulated a policy encouraging settlement of cases, as has Congress.").

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> As compared to full-blown litigation, consent decrees allow for a faster and less expensive, but still comprehensive resolution of a dispute. Congress' underlying statutory objectives are satisfied, while at the same time, the [defendant] is able to exercise its sovereignty through the negotiation of binding contracts and the resolution of potentially onerous pending litigation. Indeed, the finality and certainty afforded by the consent decree makes it far easier for a [defendant] to follow through on its commitments. . . .[42]

By making consent decrees and settlement agreements more difficult and costly to enter into, H.R. 1493 will ultimately cost the taxpayer more in litigation costs and, possibly, expensive judgments.

V. H.R. 1493 Subverts the Federal Rules of Civil Procedure and Judicial Discretion

H.R. 1493 overrides the Federal Rules of Civil Procedure, the courts' power to manage litigation in several respects, and their authority to consider equities in their decisionmaking. First, it undermines Federal Rule of Civil Procedure 24, which sets forth the process for determining when a third party can intervene in a pending case, placing the burden on the third party to show that its interests are not adequately represented by the plaintiff and the defendant. As already discussed, H.R. 1493 overrides this Rule by requiring courts to presume the opposite, namely that the parties in the litigation do not adequately represent the interests of the third party.

Second, H.R. 1493 tampers with the process for modifying consent decrees under Federal Rule of Civil Procedure 60(b)(5). Under that provision, a court can modify a consent decree when "the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable."[43] Section 4 of H.R. 1493 attempts to skew the result of such a motion to modify by specifying that when a defendant agency moves to modify a previously entered consent decree, the court "shall" review the motion and consent decree *de novo* whenever the motion to modify is based on the grounds that the decree is "no longer fully in the public interest due to the agency's obligations to fulfill other duties or due to changed facts and circumstances." This provision clearly is intended to result in modification or revocation of an existing consent decree when a government agency moves to do so, regardless of the equities involved, which Rule 60 permits a court to consider.

Beyond the specific changes that H.R. 1493 makes to the civil procedure rules at issue, the bill hamstrings a judge's discretion in managing matters concerning litigation pending before his or her court. In addition to questions about intervention or modification of consent decrees, H.R. 1493 repeatedly requires courts to make certain presumptions (subject to rebuttal) on other similar litigation

[42] 2012 Hearing at 108.
[43] Fed. R. Civ. P. 60(b)(5).

management issues such as when to permit *amicus* participation by third parties, when to enter a consent decree or settlement agreement, and when to refer matters to mediation, other alternative dispute resolution, a special master, or another judge. In short, H.R. 1493 seeks to dictate courtroom management issues that have traditionally been left to judges to decide. Such a lack of deference to courts is a troubling result for this Committee, in particular, to embrace.

VI. The Bill's Open-ended Intervention Provision Could Undo Critical Civil Rights Protections

Section 3(b)(1) of the bill would create a rebuttable presumption that the interests of "a person who alleges that the agency action in dispute would affect the person . . . would not be represented adequately by the existing parties to the action," and then require that such party must be included in "[e]fforts to settle a covered civil action or otherwise reach an agreement on a covered consent decrees or settlement agreement." In effect, this rebuttable presumption would reverse the burden for intervention currently in Rule 24 of the Federal Rules of Civil Procedure from the party seeking to intervene in the case to the parties themselves.[44]

During the markup, Members attempted to elicit from the bill's supporters some clear explanation of the limits of this right to intervene. Representative Melvin L. Watt (D-NC) observed, "This bill has no boundaries around it, from my perspective. And if we are going to do this, it does seem to me that we need to put some boundaries around who can be parties. Otherwise, you have no limits on the litigation or no limits on the regulatory action."[45]

In response to this concern Representative Steve Cohen (D-TN) offered an amendment that would have excluded from the coverage of the bill "a covered consent decree or settlement agreement that prevents or is intended to prevent discrimination based on race, religion, national origin, or any other protected category." Subcommittee Chairman Spencer Bachus (R-AL) recognized to a degree the validity of this concern and suggested that his Republican colleagues consider accepting the amendment because, as he explained, "[e]verybody in the United States is affected by every consent settlement on race."[46]

Urging his colleagues to reject this amendment, Chairman Bob Goodlatte (R-VA) contended that current standing requirements would continue to act as a limit on intervention.[47] Standing, however, affords weak limits on the bill's intervention right. The U.S. Supreme Court's guidance on this issue appears to have evolved over the years and is one that it has revisited on numerous occasions.[48] The Court has acknowledged that the "concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court . . . [and] this very fact is

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[44] Fed. R. Civ. P. 24.

[45] Unofficial Tr. of Markup of H.R. 1493, the Sunshine for Regulatory Decrees and Settlements Act of 2013, by the H. Comm. on the Judiciary, 113th Cong. at 37 (July 24, 2013).

[46] *Id.* at 40.

[47] *Id.* at 46.

[48] *See, e.g.*, Monsanto Co. v. Geerston Seed Farms, 130 S.Ct. 2743 (2010); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Allen v. Wright, 468 U.S. 737 (1984); Valley Forge Christian College v. Americans United, 454 U.S. 464 (1982); Ass'n of Data Processing Service Org. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970).

probably proof that the concept cannot be reduced to a one-sentence or one-paragraph definition."[49] Similarly, the Court in another case observed that "[g]eneralizations about standing to sue are largely worthless as such."[50]

Standing doctrines do not offer bright-line rules regarding when a party may intervene in a pending case. Resolving questions about a party's standing will result in extensive litigation. Therefore, to the extent that H.R. 1493 potentially further opens the door for any private party to claim the right to intervene, it would have the effect of delaying any settlement for years even if the party claiming intervenor status ultimately is unable to establish proper standing.

VII. Amendments

To highlight the foregoing concerns, several Members offered amendments illustrating the effect it would have on rules to protect public health and safety. Most of these amendments exempted from H.R. 1493 consent decrees and settlement agreements concerning certain categories of potential rules.

For example, Representative John Conyers, Jr. (D-MI), the Committee's Ranking Member, offered an amendment that would have exempted from the bill any consent decree or settlement agreement concerning privacy protection. Notwithstanding the numerous privacy concerns expressed by Members of Congress on both sides of the aisle in connection with recent revelations of government surveillance activities, the amendment was defeated by a 12 to16 vote.

As discussed in the prior section, Representative Steve Cohen (D-TN), the Subcommittee's Ranking Member, offered an amendment that would have exempted from the bill any consent decree or settlement agreement concerning a potential rule protecting against discrimination on the basis of race, sex, national origin, or other protected characteristic. Although the Subcommittee's Chairman made a principled argument in favor of this amendment, the amendment failed by a vote of 13 to 16.

Representative Sheila Jackson Lee (D-TX) offered an amendment that would have exempted from the bill any consent decree or settlement agreement concerning a potential rule regarding environmental justice in low-income minority communities as defined by Executive Order 12898. This amendment failed by a 9 to 17 vote.

Representative Hank Johnson (D-GA) offered an amendment that would have exempted from the bill any consent decree or settlement agreement concerning a potential rule that the Office of Management and Budget determines would result in net job creation. Belying the repeated assertion by the Majority that regulations undermine job creation, this amendment failed by a vote of 11 to 17.

Finally, Representative Mel Watt (D-NC) offered an amendment that would have stricken the bill's open-ended intervention provision. This amendment failed by a vote of 11 to 17.

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[49] Valley Forge Christian College v. Americans United, 454 U.S. 464, 475 (1982).
[50] Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150, 151 (1970).

CONCLUSION

Like the myriad anti-regulatory proposals this Committee has already considered, H.R. 1493 is another solution in search of a problem. Proponents have failed to present any evidence to support the claim that agencies "collude" with plaintiffs to enter consent decrees or settlement agreements. Nonetheless, under the guise of transparency, this legislation will pile on new procedural requirements for agencies and courts that will hamstring, or outright discourage, the use of consent decrees and settlements. As a result, well-funded third party interests will have more opportunities to delay the resolution of litigation intended to force agencies to meet their legal obligations and it will become much harder to resolve such litigation quickly and cost-effectively. The cumulative effect will be to derail a time-honored tool that has helped protect the American public from harms including dirty air and water, unsafe products, and contaminated food.

There are already procedures in place that could address any purported collusion or lack of transparency. Procedures originally implemented during the Reagan administration and carried forward to this day, along with other existing legal mechanisms, have been more than adequate to deal with any such problem. Other than unsupported allegations, however, proponents of H.R. 1493 have failed to offer a convincing explanation as to why current law is insufficient in that regard. Instead, the bill employs ambiguous terms in key provisions that will actually generate additional litigation over their meaning, and could be used to undo critical civil rights protections. Finally, H.R. 1493 undermines existing civil procedure rules and undermines judicial discretion.

For these reasons, we respectfully dissent and urge our colleagues to oppose this bill.

JOHN CONYERS, JR.
JERROLD NADLER.
ROBERT C. "BOBBY" SCOTT.
MELVIN L. WATT.
ZOE LOFGREN.
SHEILA JACKSON LEE.
STEVE COHEN.
HENRY C. "HANK" JOHNSON, JR.
LUIS V. GUTIÉRREZ.
KAREN BASS.
HAKEEM JEFFRIES.

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