

SUE AND SETTLE: FORCING GOVERNMENT REGULATION THROUGH LITIGATION

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I. INTRODUCTION

In response to an increasing number of complaints from the business community, the U.S. Chamber of Commerce launched an investigation into what is known as “sue and settle.”² In its May 2013 report titled “Sue and Settle: Regulating Behind Closed Doors,” the U.S. Chamber of Commerce found that, between 2009 and 2012, the Environmental Protection Agency (“EPA”) chose not to defend itself in lawsuits brought by advocacy groups in at least sixty instances.³ As a result of these settlements, the EPA has published more than 100 new binding regulations that affect various industries, which will impose estimated tens of millions, if not billions, of dollars in compliance costs.⁴ Although sue-and-settle has been

¹ Many thanks to my family for their support, and to Professor Blake Watson for his guidance and feedback when I felt I was most lost in the weeds that is environmental law.

² William L. Kovacs, Keith W. Holman & Jonathan A. Jackson, *Sue and Settle: Regulating Behind Closed Doors*, U.S. CHAMBER OF COMMERCE, 5 (May 2013), <http://www.uschamber.com/sites/default/files/reports/SUEANDSETTLEREPORT-Final.pdf>.

³ *Id.*

⁴ *Id.*

utilized for decades, the EPA has taken advantage of the tactic adding an estimated \$12.1 billion in regulatory costs in 2012 alone.⁵

The EPA is an administrative agency with the ability to affect the rights of private parties in environment-related disputes.⁶ It carries out its statutory mandate through informal action, adjudication, rulemaking, prosecution, negotiations, investigations, and settlements.⁷ The EPA is neither a court nor a legislative body and, in simplest terms, the EPA is cloaked with authority to regulate the private sector's business.⁸ The EPA has the potential to give the executive branch "untrammelled power to dictate the vitality and even survival of whatever segments of American business it might choose."⁹ From a policy perspective, sue-and-settle can be very effective. It allows the EPA to effectuate new policy in a more timely and cost-effective manner than the formal rulemaking processes; however, sue-and-settle raises several questions. First, is the EPA abusing its regulatory authority by purposively choosing not to defend lawsuits and accepting proposed settlements? Second, does sue-and-settle violate established principles of political accountability and transparency by pushing forth a "green" agenda that might otherwise fail to pass in Congress? Sue-and-settle not only denies affected industries meaningful participation in the rulemaking process, but with a lack of transparency in the process, it allows for the passage of a progressive agenda that might not otherwise pass in Congress or garner significant support amongst voters.

Part II of this Comment sets forth the relevant legal background. First, it discusses the sue-and-settle tactic, including its origins, and how frequently it has been used. Second, it discusses the EPA's history in regulating greenhouse gases. It then discusses the effects on one particular industry, the coal industry, and newly imposed regulations through the settlement negotiated in *New York v. EPA*.¹⁰ Finally, it discusses the Administrative Procedure Act ("APA") and the Clean Air Act ("CAA") to the extent that they govern rulemaking processes, and the use of each to bring suits before the courts in order to negotiate settlements.

Part III addresses the implicated constitutional and policy questions. This Comment argues that, although sue-and-settle has existed for decades, the tactic is being abused in order to dictate the vitality of the coal industry.

⁵ *Id.* at 14; Sam Batkins, *President Obama's \$488 Billion Regulatory Burden*, AMERICAN ACTION FORUM (Sept. 19, 2012), <http://americanactionforum.org/research/president-obamas-488-billion-regulatory-burden>.

⁶ 1 CHARLES H. KOCH JR., *ADMINISTRATIVE LAW AND PRACTICE* 44 (3d ed. 2010).

⁷ *Id.*

⁸ *Id.*

⁹ *E.g.*, *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Occupational Safety & Health Admin.*, U.S. Dep't. of Labor, 938 F.2d 1310, 1318 (D.C. Cir. 1991).

¹⁰ Settlement Agreement at 3, *New York v. EPA*, 2007 U.S. App. LEXIS 22688 (D.C. Cir. 2007) (No. 06-1322), available at <http://www.ect.coop/wp-content/uploads/2011/02/NSPSsetCmts-2.pdf>

First, the EPA's promulgation of new regulations through adherence to a settlement agreement undermines the purpose of the APA and CAA by denying affected businesses in the coal industry meaningful participation in the rulemaking process. Second, the tactic of sue-and-settle violates the theory of political accountability because, for the first time in history, the EPA is regulating greenhouse gas emissions from coal-fired plants absent a clear congressional mandate. Third, sue-and-settle creates tensions between the branches of government as current presidential administrations are able to bind the hands of future administrations; and the executive branch is able to pursue an agenda absent a congressional mandate. As a solution to the EPA's abuse of power, this Comment proposes an amendment to the APA, or passing the Sunshine for Regulatory Decrees and Settlements Act of 2013.

II. BACKGROUND

A. *What Is Sue-and-Settle?*

Sue-and-settle is the process where an advocacy group files a lawsuit against an agency alleging the agency failed to fulfill its statutory requirements.¹¹ In the context of environmental law, the tactic of sue-and-settle occurs when an environmental advocacy group files suit against an agency alleging it missed a deadline or failed to meet some other regulatory requirement.¹² Rather than defend itself, the agency chooses to settle the lawsuit by putting in place the advocacy group's desired regulation.¹³ The negotiation is court-ordered, thus it is legally binding.¹⁴ Each settlement is negotiated behind closed doors, and neither the affected industry nor the public is able to participate in the negotiation.¹⁵

The U.S. Chamber of Commerce describes sue-and-settle as a process where "the agency intentionally transforms itself from an independent actor that has discretion to perform its duties . . . into an actor subservient to the binding terms of settlement agreements, which includes using congressionally appropriated funds to achieve the demands of specific outside groups."¹⁶ As a result of this tactic, agencies relinquish statutory discretion because outside lawsuits filed by advocacy groups "effectively dictate the priorities and duties of the agency."¹⁷ Oftentimes, these

¹¹ Sheryll Poe, 'Sue and Settle' Threatens Business, FREE ENTERPRISE (Mar. 22, 2012), <http://www.freeenterprise.com/energy-environment/sue-and-settle-threatens-business>.

¹² Kovacs, *supra* note 2, at 10.

¹³ Poe, *supra* note 11.

¹⁴ *Id.*

¹⁵ Kovacs, *supra* note 2, at 10–11.

¹⁶ *Id.* at 11.

¹⁷ *Id.* at 3; see also Julian Hattam, *Business Groups Push for Regulatory Transparency*, THE HILL (Apr. 11, 2013, 9:38 PM), <http://thehill.com/blogs/regwatch/legislation/293473-business-groups-push-for-regulatory-transparency->; Larry Bell, *EPA's Secret and Costly 'Sue and Settle' Collusion with*

settlements become the legal authority behind expansive regulatory action as opposed to legal authority for a new regulation being derived from a bill passed in Congress.¹⁸

Sue-and-settle has been utilized off and on since at least the Carter Administration by both Republican and Democratic administrations.¹⁹ In addition to environmental groups taking advantage of the tactic, it has also been utilized by businesses in order to influence the outcome of an EPA action.²⁰ Several government agencies, including the EPA, the U.S. Forest Service, the U.S. Department of Agriculture, the Bureau of Land Management, and the U.S. Department of Commerce have employed this tactic to their advantage.²¹

While sue-and-settle has been used “occasionally” since the 1970s, between 2009 and 2012, seventy-one separate lawsuits were settled in a manner that can be classified as sue-and-settle.²² The U.S. of Chamber of Commerce found that more than 100 new federal rules were implemented as a result of the settlements.²³ Additionally, in 2011 the U.S. Government

Environmental Organizations, FORBES (Feb. 17, 2013, 8:00 AM), <http://www.forbes.com/sites/larrybell/2013/02/17/epas-secret-and-costly-sue-and-settle-collusion-with-environmental-organizations/> (“‘Consent decrees’ are issued based upon a prearranged settlement agreement [far-left radical environment groups and federal agencies] collaboratively craft together in advance behind closed doors . . . [and] rather than allowing the entire process to play out, the agency being sued settles the lawsuit by agreeing to move forward with the requested action they and the litigants both want.”); *Does EPA’s Sue-and-Settle Policy Circumvent the Legislative, and Regulatory Process?*, THE CALIFORNIAN.COM (Dec. 21, 2013, 6:24 AM), <http://www.thecalifornian.com/article/20131221/OPINION05/312210028/Does-EPA-s-sue-settle-policy-circumvent-legislative-regulatory-process-> (“What’s more insidious is that once the agency is under the consent decree, future administrations are bound by it. That means the agency not only loses its own discretion and disregards congressional priorities, but it deprives future presidents of the ability to change the agency’s policy.”).

¹⁸ Kovacs, *supra* note 2, at 11.

¹⁹ William Kovacs, *Does EPA’s Policy to “Sue and Settle” Work Fairly?*, ERIE TIMES-NEWS (Dec. 26, 2013, 12:01 AM), <http://www.goerie.com/article/20131226/OPINION09/312269989/Does-EPA-s-policy-to-sue-and-settle-work-fairly%3F>; Kovacs, *supra* note 2, at 14. Compare Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 36–37 (1982) (“Interestingly, the settlement of litigation challenging rules has generated little attention in either the literature or regulatory theory. It is a relatively common occurrence, however, for parties that have challenged a regulation to negotiate an acceptable agreement. In return for withdrawing the petition challenging the rule, the agency frequently agrees to publish a change in the regulation as a proposed rule.”), with Timothy Stoltzfus Jost, *The Attorney General’s Policy on Consent Decrees and Settlement Agreements*, 39 ADMIN. L. REV. 101, 101–102 (1987) (in 1986, U.S. Attorney General Edwin Meese III issued a policy forbidding departments and agencies from entering into consent decrees that mandated the revision or promulgation of regulations).

²⁰ Kovacs, *supra* note 2, at 14.

²¹ *Id.* at 5.

²² Kovacs, *supra* note 19; Kovacs, *supra* note 2, at 12. Research revealed sue-and-settle cases brought under the Clean Air Act have risen under the Obama Administration as compared to past administrations: twenty-seven cases during President Clinton’s second term; thirty-eight cases during President Bush’s first term; twenty-eight cases during President Bush’s second term; and sixty cases during President Obama’s first term. *Id.* at 14.

²³ Kovacs, *supra* note 2, at 12; James L. Gattuso, *Reforming Regulations: Some Sensible Steps*, THE HERITAGE FOUNDATION (Jul. 25, 2012), <http://www.heritage.org/research/reports/2012/07/how-to-reduce-red-tape-and-reform-government-regulation> (“According to the most recent Heritage Foundation analysis, 106 major new regulations—each imposing \$100 million or more in new costs on Americans—were adopted in the first three years of President Obama’s tenure. That compares to 28 during the first three years under President Bush.”); see, e.g., *Am. Nurses Assoc. v. Jackson*, No. 08-2198, 2010 WL

Accountability Office issued a report detailing the millions of taxpayer dollars that courts awarded to environmental groups in connection with EPA litigation between 1995 and 2011.²⁴ Of the millions awarded to environmental attorneys, Earthjustice, the Sierra Club, and the Natural Resources Defense Council received forty-one percent of the money for suits filed under the CAA and the Clean Water Act (“CWA”).²⁵ These costs also do not include the amount of tax dollars spent on the EPA’s attorney fees.²⁶

B. EPA and the Evolution of Regulating Greenhouse Gases

The EPA has the authority under the CAA to promulgate regulations without first finding actual harm to people or the environment.²⁷ In 1976, in *Ethyl Corporation v. EPA*, the D.C. Circuit Court of Appeals ruled that a “‘will endanger’ standard is precautionary in nature and does not require proof of actual harm before regulation is appropriate.”²⁸ In so ruling, however, the court noted that the application of this principle must be confined within “reasonable limits.”²⁹ Shortly thereafter in 1977, Congress amended the “endangerment standard” of § 202 of the CAA to “cement the statute’s precautionary and preventative purpose.”³⁰

In 2007, the 5-4 ruling in *Massachusetts v. EPA* ordered the EPA to begin regulating greenhouse gases in spite of the EPA initially declining to do so under § 202 of the CAA.³¹ The Court reasoned, “[t]he harms associated with climate change are serious and well recognized.”³² The Court stopped short of establishing greenhouse gas standards for motor vehicles at the time, but it concluded that sufficient information existed for

1506913, at *2–3, (D.C. Cir. Apr. 15, 2010) (court granted consent decree requiring EPA to issue maximum achievable control technology emission standards under § 304(a)(2) of the Clean Air Act for hazardous air pollutants from coal- and oil-fired electric utility steam generating units); *see also* WildEarth Guardians v. Jackson, Nos. 11-CV-00001, 2011 WL4485964, at *3–4 (D. Colo. Sept. 27, 2011) (granting consent decree to allow EPA to decide for certain states whether to approve or deny State Implementation Plan (“SIP”) submissions).

²⁴ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-650, CASES AGAINST EPA AND ASSOCIATED COSTS OVER TIME, REPORT TO CONGRESSIONAL REQUESTERS 14 (2011).

²⁵ *Id.* at 24; Bell, *supra* note 17.

²⁶ Bell, *supra* note 17.

²⁷ *Ethyl Corp. v. EPA*, 541 F.2d 1, 17 (D.C. Cir. 1976).

²⁸ *Id.*

²⁹ *Id.* at n.32, 18.

³⁰ Erica Rancilio, *Massachusetts v. EPA: The D.C. Circuit Stretches Precedent and Ignores the Statutory Standard to Uphold EPA’s Unlawful Rulemaking Petition Denial*, 20 TUL. ENVTL. L.J. 207, 209 (2006) (citing *Massachusetts v. EPA*, 415 F.3d 50, 77 (2007); 42 U.S.C. § 7521(a)(1) (2012)).

³¹ *Massachusetts v. E.P.A.*, 549 U.S. 497, 528 (2007); *see also* Nathan Richardson, *Greenhouse Gas Regulation Under the Clean Air Act: Does Chevron v. NRDC Set the EPA Free?*, RESOURCES FOR THE FUTURE 8 (Dec. 2009), <http://www.rff.org/documents/RFF-DP-09-50.pdf> (“The Bush-administration EPA did not make an endangerment decision under §202. . . .”).

³² *Massachusetts*, 549 U.S. at 521. The issue of whether climate change is a serious or well-recognized is outside the scope of his comment; however, “[c]arbon dioxide has always been present in the atmosphere, albeit at varying concentrations.” Brief of Landmark Legal Foundation in Support of Petitioners as Amici Curiae at 16, *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (No. 12-1268).

the EPA to make an Endangerment Finding.³³ The case was remanded for the EPA to determine whether greenhouse gases are air pollutants that “endanger public health or welfare.”³⁴

Following the ruling in *Massachusetts v. EPA*, the EPA promulgated several rules relating to greenhouse gases.³⁵ The EPA interpreted the CAA broadly, and admitted the new rules were contrary to congressional intent, but felt it was nonetheless compelled to issue the rules under the *Massachusetts v. EPA* ruling.³⁶ In 2009, the EPA issued an Endangerment Finding under the CAA where it determined that greenhouse gases may “reasonably be anticipated to endanger public health or welfare.”³⁷ Then, in 2010, the EPA issued the Tailpipe Rule and set the greenhouse gas emission standards for cars and light trucks.³⁸ Neither the Endangerment Finding, nor the Tailpipe Rule explicitly addressed the EPA’s authority to regulate greenhouse gases emitted from stationary sources, such as coal-fired power plants; thus, the EPA opted to act indirectly in order to regulate greenhouse gases from these sources.³⁹ In 2012, the EPA promulgated the Timing and Tailoring Rules where it determined the largest stationary sources of greenhouse gas emissions are required to obtain construction and operating permits.⁴⁰

In 2012, cloaked with authority from *Massachusetts v. EPA*, the D.C. Circuit Court of Appeals upheld the EPA’s regulations of greenhouse gases under the CAA.⁴¹ In *Coalition for Responsible Regulation v. EPA*, petitioners, several state and industry groups, challenged the Endangerment Finding, the Tailpipe Rule, and the Timing and Tailoring Rules arguing they were “based on improper constructions of the CAA and [were] otherwise arbitrary and capricious.”⁴² The Court of Appeals held the Endangerment Finding and Tailpipe Rule neither arbitrary, nor capricious, and the EPA’s interpretation of the governing portions of the CAA was unambiguously correct.⁴³ The Court also held the petitioners lacked jurisdiction to

³³ *Massachusetts*, 549 U.S. at 534–35.

³⁴ *Id.* at 528–29.

³⁵ *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 113 (D.C. Cir. 2012), *cert denied*, 2012 U.S. App. LEXIS 26313 (D.C. Cir. Dec. 20, 2012).

³⁶ John S. Gray, *Utility Air Regulatory Group v. EPA: The Sequel to Massachusetts Arrives*, 34 No. 12 WESTLAW JOURNAL ENVIRONMENTAL 1, 3 (Jan. 8, 2014).

³⁷ *Coal. for Responsible Regulation, Inc.*, 684 F.3d at 113 (citing 42 U.S.C. § 7521(a)(1)); Protection of Environment, 40 C.F.R. § 49.135 (2009); Gray, *supra* note 36, at 4.

³⁸ *Coal. for Responsible Regulation, Inc.*, 684 F.3d at 113.

³⁹ Gray, *supra* note 36, at 5; Settlement Agreement, *supra* note 10, at 3.

⁴⁰ *Coal. for Responsible Regulation, Inc.*, 684 F.3d at 113; *see also* Protection of Environment, 40 C.F.R. §§ 52.01–39 (2014).

⁴¹ *Coal. for Responsible Regulation, Inc.*, 684 F.3d at 113.

⁴² *Id.*

⁴³ *Id.* Petitions for writs of certiorari were granted for several cases and limited to one question: “Did the EPA permissibly determine that its regulation of greenhouse gas emissions from new motor vehicles under the Clean Air Act also triggered permit requirements for stationary sources of greenhouse gas emissions?” *Utility Air Regulatory Group v. EPA*, THE OYEZ PROJECT AT IIT CHICAGO-KENT

challenge the Timing and Tailoring Rules.⁴⁴ The Supreme Court consolidated a group of petitions and granted certiorari to hear challenges to these EPA regulations on greenhouse gas emissions in *Utility Air Regulatory Group v. EPA*.⁴⁵ The issue before the Court was whether the EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the CAA for greenhouse gases emitted from stationary sources.⁴⁶

In *Utility Air Regulatory Group v. EPA*, the Court addressed whether the EPA permissibly interpreted the CAA to mean that a stationary source may be required to obtain a permit on the basis that it may potentially emit greenhouse gases; it also determined that the statute did not compel the EPA's "greenhouse-gas-inclusive interpretation" with respect to permitting programs under the CAA, the Prevention of Significant Deterioration ("PSD") program and Title V.⁴⁷ The Court reasoned that since 1978, the EPA's regulations of "air pollutants" with regard to PSD permitting trigger only as to certain, limited air pollutants, and since 1993 the EPA has "informally taken the same position" with respect to the air pollutants that trigger Title V.⁴⁸ In assessing the EPA's alternative position that "its interpretation was justified as an exercise of its 'discretion' to adopt 'a reasonable construction of the statute'" promulgated by the Tailoring Rule, the Court again concluded the interpretation impermissible.⁴⁹ The Court held that because the greenhouse-gas-inclusive interpretation of the permitting triggers was not compelled, the EPA's rewriting of the statutory thresholds in the Tailoring Rule was impermissible.⁵⁰ The Court noted that the EPA lacked authority to "tailor" legislation to adhere to "bureaucratic policy goals" by rewriting clear-cut terms of a statute.⁵¹

C. Proposed Regulations as a Direct Result of Sue-and-Settle

On February 27, 2006, the EPA published a final rule, the "2006

COLLEGE OF LAW, (Sept. 4, 2014), http://www.oyez.org/cases/2010-2019/2013/2013_12_1146 [hereinafter OYEZ].

⁴⁴ *Coal. for Responsible Regulation, Inc.*, 684 F.3d at 148.

⁴⁵ See OYEZ, *supra* note 43.

⁴⁶ *Id.*; Gray, *supra* note 36, at 9.

⁴⁷ *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2439 (2014).

⁴⁸ *Id.* at 2440.

⁴⁹ *Id.* at 2442.

⁵⁰ *Id.* at 2445.

⁵¹ *Id.*

In the Tailoring Rule, [the] EPA asserts newfound authority to regulate millions of small sources—including retail stores, offices, apartment buildings, shopping centers, schools, and churches—and to decide, on an ongoing basis and without regard for the thresholds prescribed by Congress, how many of those sources to regulate. We are not willing to stand on the dock and wave goodbye as [the] EPA embarks on this multiyear voyage of discovery. We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.

Id. at 2446.

Final Rule,” revising performance standards for pollutant emissions of Electronic Generating Units (“EGUs”), or power plants (stationary sources) that generate electricity from burning fossil fuels such as coal, natural gas, or petroleum liquids.⁵² Several entities, collectively “New York,” appealed to the D.C. Circuit against the EPA.⁵³ As is typical of sue-and-settle, petitioners included several advocacy groups such as the Natural Resources Defense Council, the Sierra Club, and the Environmental Defense Fund, as well as several states.⁵⁴ The petitioners argued the 2006 Final Rule was required to include performance standards for carbon pollutants and other greenhouse gases for EGUs.⁵⁵ Following the decision in *Massachusetts v. EPA*, the Court remanded the 2006 Final Rule for consideration by the EPA given the EPA could now regulate greenhouse gases.⁵⁶ Rather than act on the remand, the petitioners and the EPA negotiated a settlement agreement in an effort to “avoid further litigation.”⁵⁷ The settlement agreement set deadlines for the EPA to propose a new rule under the CAA that set performance standards for greenhouse gases for new, modified, and existing EGUs.⁵⁸

In 2011, the proposed regulation was posted in the Federal Register, and following a comment period, the EPA concluded the comments did not give rise to facts or considerations that the settlement agreement was “inappropriate, improper, inadequate or inconsistent with the CAA.”⁵⁹ According to the terms of the settlement agreement, under § 111 of the CAA, the EPA must set and regularly update the performance standards for stationary sources.⁶⁰ Under § 111(b), the set standards apply to new facilities; that is, new facilities cannot be built (and existing facilities cannot be modified) unless they meet the standards.⁶¹ Additionally, under § 111(d), the EPA has now set guidelines for existing facilities.⁶² As a result of sue-

⁵² Settlement Agreement, *supra* note 10, at 1; *see also* U.S. ENVIRONMENTAL PROTECTION AGENCY, SECTOR POLICIES AND PROGRAMS DIVISION, OFFICE OF AIR QUALITY PLANNING AND STANDARDS: AVAILABLE AND EMERGING TECHNOLOGIES FOR REDUCING GREENHOUSE GAS EMISSIONS FROM COAL-FIRED ELECTRIC GENERATING UNITS 1, 5 (Oct. 2010), http://www.epa.gov/nsr/ghgdocs/electric_generation.pdf.

⁵³ Settlement Agreement, *supra* note 10, at 1–2.

⁵⁴ *New York v. EPA*, 2007 U.S. App. LEXIS 22688, at *1–3 (D.C. Cir. 2007).

⁵⁵ Settlement Agreement, *supra* note 10, at 1.

⁵⁶ *New York*, 2007 U.S. App. LEXIS 22688, at *3.

⁵⁷ Settlement Agreement, *supra* note 10, at 2; Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units, 77 Fed. Reg. 22392; Protection of Environment, 40 C.F.R. § 60.40Da (2013).

⁵⁸ Settlement Agreement, *supra* note 10, at 3; Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units, 77 Fed. Reg. 22392; Protection of Environment, 40 C.F.R. § 60.41Da (2013).

⁵⁹ Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units, 77 Fed. Reg. 22392; Protection of Environment, 40 C.F.R. § 60.41Da (2013).

⁶⁰ Nathan Richardson, *EPA Greenhouse Gas Performance Standards: What the Settlement Agreement Means*, RESOURCES FOR THE FUTURE 3 (Feb. 2011), <http://www.rff.org/RFF/Documents/RFF-IB-11-02.pdf>.

⁶¹ *Id.*

⁶² *Id.*

and-settle, the EPA agreed to implement the first-ever greenhouse gas regulations for coal-fired power plants.⁶³

D. Administrative Procedure Act Governing the EPA

1. Background

At its core, administrative law is “the legal vehicle for organizing and structuring government.”⁶⁴ It is defined as “the law concerning the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action.”⁶⁵ Congress delegates to an agency the power to promulgate rules and regulations, and occasionally the power to hear disputes.⁶⁶ All regulations issued by an agency are issued under the authority delegated by a Presidential Executive Order or a federal statute.⁶⁷

In terms of decision-making, agencies may engage in both adjudication and rulemaking.⁶⁸ Rulemaking is similar to the activities carried out by the legislature where rules are created when an agency wishes to interpret, implement, or prescribe policy or law.⁶⁹ Some rules merely disclose the agency’s position about a particular law, and thus have no binding legal effect.⁷⁰ Other rules, however, are legally binding and must be followed unless they are found to be capricious.⁷¹

Rulemaking encompasses three characteristics: generalized nature; policy orientation; and prospective applicability.⁷² Generalized nature relates to the policy issues and the general or “legislative facts supporting a resolution of those issues.”⁷³ Policy orientation refers to fact gathering, investigation, and determinations made in connection to policies.⁷⁴ In terms of prospective applicability, rulemaking does not focus on past conduct, but rather on future conduct.⁷⁵ Agencies gather information about past conduct,

⁶³ Richardson, *supra* note 31, at 4.; Phil Impellizzeri, *Overzealous GHG Regulations Aren’t the Only Way the EPA Is Putting the Boots to Kentucky’s Energy Sector*, BLUEGRASS INSTITUTE (June 13, 2013) <http://www.bipps.org/overzealous-ghg-regulations-arent-the-only-way-the-epa-is-putting-the-boots-to-kentuckys-energy-sector/>; H.R. Rep. No. 113-230, at 4 (2013).

⁶⁴ KOCH, *supra* note 6, at 1.

⁶⁵ *Id.* at 44.

⁶⁶ *Id.* at 44–45 (stating that the NLRB both promulgates regulations, and is also authorized to adjudicate disputes arising between management and labor unions).

⁶⁷ *Id.* at 45.

⁶⁸ *Id.* at 70. “Adjudication is a determination of [legal] rights or duties,” and is not a function the EPA generally engages in. *Id.*

⁶⁹ 5 U.S.C. § 551(4) (2012); KOCH at 71–72; Edward Rubin, *It’s Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 106 (2003) (“Rulemaking is a generic term for legislation . . .”).

⁷⁰ KOCH, *supra* note 6, at 72.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 73.

⁷⁵ *Id.*

but solely for the purpose of making judgments that will have a prospective effect.⁷⁶

“Before 1936, no official source for publication of rules and regulations of federal agencies existed.”⁷⁷ Because of the confusion stemming from not knowing whether a proposed action was prohibited by a federal agency, Congress passed the Federal Register Act (“FRA”).⁷⁸ According to the FRA, any agency that issues a rule with “general applicability and legal effect must be published in the *Federal Register*.”⁷⁹ “[G]eneral applicability and legal effect” is defined as “any document issued under proper authority prescribing a penalty or course of conduct, conferring a right, privilege, authority, or immunity, or imposing an obligation, [which is] relevant or applicable to the general public”⁸⁰

Although the public had access to all rules and regulations promulgated by federal agencies, the public had no right to participate in the process and procedures of rulemaking.⁸¹ In 1946, Congress passed the APA in an attempt to address the situation.⁸² The APA granted the public the right to engage in the rulemaking process by compelling agencies to publish their proposed regulations in the Federal Register so that the public had the opportunity to comment.⁸³ In order to improve the public’s access to agency practices and procedures, Congress subsequently passed three more statutes: the Freedom of Information Act, the Government in the Sunshine Act, and the Regulatory Flexibility Act (“RFA”).⁸⁴ Passed in 1966, the Freedom of Information Act requires agencies publish in the Federal Register descriptions of their organizations, their rules of procedure, and policy statements and interpretations.⁸⁵ The Government in the Sunshine Act of 1976 was then passed to compel agencies to publish notices of meetings in the Federal Register.⁸⁶

In 1980, the RFA was passed.⁸⁷ According to the RFA, agencies must perform “regulatory flexibility analysis” in their rule making processes.⁸⁸ Under regulatory flexibility analysis, agencies must publish an agenda in the Federal Register every spring and fall.⁸⁹ The agenda must

⁷⁶ *Id.*

⁷⁷ *Id.* at 45.

⁷⁸ *Id.* at 46; *see also* 44 U.S.C. §§ 1501–11 (2012).

⁷⁹ KOCH, *supra* note 6, at 46.

⁸⁰ *Id.*

⁸¹ *Id.* at 47.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Paul R. Verkuil, *A Critical Guide to the Regulatory Flexibility Act*, 1982 DUKE L. J. 213, 215 (1982).

⁸⁹ KOCH, *supra* note 6, at 47–48.

include the subject details of any rule the agency expects to promulgate that will have a significant economic impact on a considerable number of small entities, a summary of the rules being considered, including their objectives and the legal basis for each, and the name and contact information of the agency official with knowledge of the rule.⁹⁰

The RFA was passed in response to the concerns of small businesses to increasing government regulation.⁹¹ Rather than mandating a particular outcome in an agency's rulemaking processes, the RFA requires consideration of alternatives to proposed regulations that are less burdensome to small businesses, and an explanation as to why the alternatives were rejected by the agency.⁹² When an agency promulgates its final rule, it must make its regulatory flexibility analysis available at the same time (or in the case of an emergency, within 180 days from the date of the final rule's publication).⁹³ If the agency fails to publish the required regulatory flexibility analysis, the rule is invalid.⁹⁴ The analysis must include a summary of the issues raised in public comments, a summary of the agency's assessment of those comments, a statement of any changes made in the proposed rule as a result of those comments, a description of the significant alternatives to the rule that are consistent with the regulatory objectives, and a statement as to why the alternatives were rejected.⁹⁵

2. Administrative Procedure Act as it Governs the EPA

The APA imposes three requirements on agencies and their administrative processes.⁹⁶ First, the APA requires that various agency actions be made public.⁹⁷ Second, it imposes procedural requirements in rulemaking, including publishing the proposed version of the rule and allowing a private party-comment period.⁹⁸ Third, once all the comments have been received, the APA then requires the agency publish the final rule with a statement of the legal basis and purpose of the rule.⁹⁹ Additionally, through judicial review, the APA allows for aggrieved parties to challenge the rule or agency action in court on the grounds that it is either unconstitutional or violates a federal statute, including the procedural requirements of the APA.¹⁰⁰

⁹⁰ *Id.*

⁹¹ Verkuil, *supra* note 88, at 215–16.

⁹² *Id.* at 230.

⁹³ 5 U.S.C. § 604 (2012); Doris S. Freedman, *The Regulatory Flexibility Act: Orienting Federal Regulation to Small Business*, 93 DICK. L. REV. 439, 447 (1989).

⁹⁴ Freedman, *supra* note 93, at 447.

⁹⁵ *Id.*

⁹⁶ Rubin, *supra* note 69, at 100.

⁹⁷ *Id.*

⁹⁸ *Id.* at 100–01.

⁹⁹ *Id.* at 101.

¹⁰⁰ *Id.*

When it comes to agency rulemaking, the APA is the default rule.¹⁰¹ Specific statutes, such as the CAA, may modify rulemaking processes and procedures.¹⁰² Specifically, the CAA sets out statutory procedures “that require considerably more of all participants than do the simple notice-and-comment requirements of the [APA],” such as requiring both the EPA and other participants in the rulemaking to follow supplementary rules designed to probe the issues at stake and create a record for judicial review.¹⁰³ Section 307(d) of the CAA applies to most of the EPA’s actions under this particular statute.¹⁰⁴ Actions taken under the CAA include the promulgation or revision of National Ambient Air Quality Standards (“NAAQS”), Federal Implementation Plans (“FIPs”), and most rules relating to regulating air pollutants, such as carbon and greenhouse gases and rules in relation to fuels, auto emission standards, etc.¹⁰⁵

Under § 307(d), the EPA must begin the rulemaking process for any new regulations by publishing notice of the proposed rule in the Federal Register.¹⁰⁶ The notice must include a statement of the rule’s purpose and basis, as well as a summary of the factual data on which the proposed rule is based, the methodology utilized in obtaining the factual data, and any major legal interpretations and policy considerations that underlie the proposed rule.¹⁰⁷

At the time the proposed rule is published, the EPA must also publish a rulemaking docket.¹⁰⁸ In the docket, the EPA must include all documents it relied on to support its proposal, as well as all drafts of the proposal that were provided to the Office of Management and Budget.¹⁰⁹ Section 307(d) further requires that the EPA allow for at least thirty days of public comment followed by an opportunity for a public hearing.¹¹⁰ The EPA must then subsequently supplement the rulemaking docket with all comments, or other documents that “become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking,” such as a summary of comments received and the EPA’s responses.¹¹¹ The final rule is promulgated by publication in the Federal Register, in accordance with 5 U.S.C. § 553(b),

¹⁰¹ 5 U.S.C. § 553 (2012).

¹⁰² 42 U.S.C. § 7607 (2012).

¹⁰³ THE CLEAN AIR ACT HANDBOOK 695 (Julie R. Domike & Alec C. Zaccaroli eds., ABA Publishing 3d ed. 2013).

¹⁰⁴ *Id.* at 696.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*; Ethyl Corp. v. EPA, 541 F.2d 1, 48 (D.C. Cir. 1976) (“[N]otice should be sufficiently descriptive of the ‘subjects and issues involved’ so that interested parties may offer informed criticism and comments.”); *see, e.g.*, Cement Assn. v. Ruckelshaus, 486 F.2d 375, 392–94 (D.C. Cir. 1973).

¹⁰⁷ THE CLEAN AIR ACT HANDBOOK, *supra* note 103, at 696.

¹⁰⁸ *Id.*

¹⁰⁹ 42 U.S.C. § 7607(d)(2) (2012).

¹¹⁰ THE CLEAN AIR ACT HANDBOOK, *supra* note 103, at 697; 42 U.S.C. § 7607(d)(5) (2012).

¹¹¹ THE CLEAN AIR ACT HANDBOOK, *supra* note 103, at 697; 42 U.S.C. § 7607(d)(4)(B)(ii).

rulemaking under the APA, and the EPA's final action notice must again include a statement of the basis and purpose of the rule, the factual data, methodology, policy considerations, and legal interpretations.¹¹²

Once a final rule has been promulgated, both the APA and the CAA allow for a private party to challenge the rule through judicial review.¹¹³ Under CAA § 307(d)(7), the U.S. Court of Appeals is vested with jurisdiction for challenges to final rules.¹¹⁴ If the rule is challenged under § 307(b) via administrative proceedings and judicial review, the D.C. Circuit is the proper venue.¹¹⁵ If the challenge is to a local or a regional-specific action, the appropriate circuit court is the proper venue.¹¹⁶

Under § 307(b), a final EPA action may be challenged if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹¹⁷ Section 307(b) also provides for challenges to rules that are “contrary to [a] constitutional right, power, privilege, or immunity” or “in excess [to] statutory jurisdiction, authority, or limitations, or short of statutory right.”¹¹⁸ Another challenge allowed under this Section is a failure to observe the procedures required by law.¹¹⁹ Generally, the most successful challenges to an EPA final rule are challenges that the rule was promulgated without observing the proper procedure; the rule is arbitrary or capricious, and the rule exceeds the EPA's legal authority.¹²⁰

According to § 302(a)(2), citizens may file an action in federal district court in order to compel the EPA to perform duties that are “non-discretionary.”¹²¹ The CAA allows for the compulsion of the EPA to comply with statutory deadlines, or a deadline suit.¹²² In a deadline suit, the citizen must file a sixty-day notice of intent to sue, and then file the complaint in the appropriate court when the sixty days have run.¹²³ Such a suit allows for the plaintiff to recover attorney fees if he or she is successful.¹²⁴ More often than not, the suits that are brought by environmental groups are usually settled; and the negotiations conclude with the filing of a consent decree asking the court to set the final schedule for

¹¹² THE CLEAN AIR ACT HANDBOOK, *supra* note 103, at 697; 5 U.S.C. § 553(b) (2012); 42 U.S.C. § 7607(d)(3).

¹¹³ Rubin, *supra* note 68, at 101; THE CLEAN AIR ACT HANDBOOK, *supra* note 102, at 699.

¹¹⁴ THE CLEAN AIR ACT HANDBOOK, *supra* note 103, at 699–700.

¹¹⁵ *Id.* at 700. *But see* Friends of the Earth v. U.S. EPA, 934 F. Supp. 2d 40, 41 (D.D.C. 2013) (“[P]laintiff's claim does not satisfy the condition for jurisdiction . . .”).

¹¹⁶ THE CLEAN AIR ACT HANDBOOK, *supra* note 103, at 700.

¹¹⁷ 42 U.S.C. § 7607.

¹¹⁸ *Id.*

¹¹⁹ 42 U.S.C. § 7607(d)(9)(D).

¹²⁰ THE CLEAN AIR ACT HANDBOOK, *supra* note 103, at 703.

¹²¹ 42 U.S.C. § 7604.

¹²² THE CLEAN AIR ACT HANDBOOK, *supra* note 103, at 706.

¹²³ 42 U.S.C. § 7604.

¹²⁴ *Id.*

the EPA to abide by nondiscretionary actions.¹²⁵

III. ANALYSIS

Sue-and-settle denies meaningful participation in rulemaking, lacks transparency, and undermines the mechanisms put in place to hold politicians accountable to the people. With respect to the APA, sue-and-settle destroys the ability of citizens to have sufficient participation in shaping the rules that affect the country's industries. Additionally, there is a lack in transparency in government actions as sue-and-settle occurs behind closed doors, and it further creates tensions among the different branches of government.

A. *APA Is Undermined*

The Supreme Court encourages procedures that simplify complex litigation, but remains mindful that “there is ‘a failure of due process . . . where it cannot be said that the procedure adopted fairly insures the protection of the interests of absent parties who are bound by it.’”¹²⁶ Over time, negotiated settlements have become the “tool of choice” for environmental law disputes, as it is entirely up to the parties to negotiate the terms, and once the settlement is submitted to the court, it is usually approved with little revision or review.¹²⁷

In theory, due process requirements are central to rulemaking under the APA.¹²⁸ The notice requirement of the APA dictates that the EPA makes available any and all documents significant to the final rule.¹²⁹ The EPA is also required to give adequate notice and opportunity for affected industries to comment.¹³⁰ The U.S. Court of Appeals for the First Circuit has stated that an adequate comment and notice period turns on “whether the

¹²⁵ THE CLEAN AIR ACT HANDBOOK, *supra* note 103, at 706; *see, e.g.*, *Sierra Club v. Johnson*, 444 F. Supp. 2d 46, 52–53 (D.D.C. 2006).

¹²⁶ Christopher D. Man, *The Constitutional Rights of Nonsettling Potentially Responsible Parties in the Allocation of CERCLA Liability*, 27 ENVTL. L. 375, 382 (1997) (quoting *Hansberry v. Lee*, 311 U.S. 32, 42 (1940)). The Due Process Clause of the Fifth Amendment of the U.S. Constitution, the foundation of American jurisprudence, guarantees that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . .” U.S. CONST. amend. V.

¹²⁷ Timothy K. Webster, *Protecting Environmental Consent Decrees from Third Party Challenges*, 10 VA. ENVTL. L.J. 137, 142 (1990).

¹²⁸ 5 U.S.C. § 706 (2012); Margret Carde, *Can Bambi Ride Herd over Godzilla? The Role of Executive Oversight in EPA's Rulemaking for the Waste Isolation Pilot Plant*, 36 NAT. RESOURCES J. 643, 663 (1996). *But see* *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915).

Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes . . . are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard.

Id.

¹²⁹ Carde, *supra* note 128, at 663–64.

¹³⁰ 5 U.S.C. § 553(b)–(c) (2012); *see also* *Natural Res. Def. Council, Inc. v. U.S. EPA*, 824 F.2d 1258, 1282 (1st Cir. 1987).

commenters have had a fair opportunity to present their views on the contents of the final plan.”¹³¹ Similarly, under the CAA, the only way for persons outside the EPA to voice their concerns before the agency, in an attempt to shape the result, is to *participate* in the rule making process.¹³²

A consensus amongst courts is that the notice and comment requirements of § 553(b) of the APA are to allow the public to participate in the promulgation of rules.¹³³ In *National Retired Teachers Association v. U.S. Postal Service*, the Court stated that, “as a general rule, thirty days notice for solicitation of comments must precede all substantive, or legislative, rules and those interpretive rules which both constitute a change in prior agency position and have a ‘substantial impact on private rights and obligations.’”¹³⁴ Although affected parties are eventually afforded an opportunity to comment on a proposed rule, sue-and-settle undermines the underlying purpose of § 553(b).¹³⁵ The sue-and-settle tactic allows certain stakeholders, namely plaintiff-environmental group and defendant-EPA, a seat at the table while leaving other stakeholders out, such as states, businesses, and consumers.¹³⁶ Further, when a negotiated settlement forces the EPA’s hand, the notice and comment period becomes much less meaningful.¹³⁷

When it comes to negotiating behind closed doors, cries from both sides of the political spectrum are loud. In 2003, the State of Utah and the federal government under President George W. Bush entered into a settlement agreement concerning 2.6 million acres of wilderness in the Red Rock Canyons of Southern Utah, and the extent to which that land was opened up for commercial development.¹³⁸ The settlement’s critics asked several key questions: Where was the communication with the owners of the land?; where was the consultation with Congress on its options to designate the land as wilderness?; where was the cooperation with other states that might have supported expanding the wilderness areas?; and where was the

¹³¹ *Natural Res. Def. Council, Inc.*, 824 F.2d at 1283.

¹³² THE CLEAN AIR ACT HANDBOOK, *supra* note 103, at 695 (emphasis added).

¹³³ Russell G. Donaldson, *Exceptions under 5 U.S.C.A. § 553(b)(A) and § 553(b)(B)*, 45 A.L.R. FED. 12, 24 (1979).

¹³⁴ *Nat'l Retired Teachers Ass'n v. U.S. Postal Serv.*, 430 F. Supp. 141, 147 (D.D.C. 1977) (quoting KENNETH C. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES SUPPLEMENTING ADMINISTRATIVE LAW TREATISE § 6.01-7 (1976)).

¹³⁵ *E.g.*, *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 251 (2d Cir. 1977) (noting that the agency failed to notify interested parties of the scientific research it relied upon to fashion the proposed rule). In considering the underlying purposes of notice and comment in rulemaking, the Court stated “[w]e can think of no sound reasons for secrecy or reluctance to expose to public view . . . the ingredients of the deliberative process.” *Id.*

¹³⁶ Press Release, Oklahoma Office of the Attorney General E. Scott Pruitt, *Attorney General Pruitt Leads Multi-State Lawsuit Demanding Transparency in EPA's Sweetheart Settlements with Environmental Groups* (July 16, 2013), <http://www.oag.state.ok.us/oagweb.nsf/0/4483F57934B29C1F86257BAA00635C21!OpenDocument>.

¹³⁷ *Id.*; Bell, *supra* note 17.

¹³⁸ Patrick Parenteau, *Anything Industry Wants: Environmental Policy Under Bush II*, 14 DUKE ENVTL. L. & POL'Y F. 363, 397 (2004).

consideration for the conservation values abandoned in the haste to strike a deal?¹³⁹ In discussing this settlement and others, critics opined “the Secretary’s willingness to enter into an agreement with such sweeping implications without any public involvement is outrageous.”¹⁴⁰

Criticism from the other side of the aisle recently escalated to the form of a lawsuit against the EPA.¹⁴¹ In 2013, Oklahoma Attorney General E. Scott Pruitt and eleven other attorneys general filed suit against the EPA in federal court seeking to compel the EPA to comply with a Freedom of Information Act request.¹⁴² The request pertained to the EPA’s negotiations with certain organizations that led to binding consent decrees regarding various states’ Regional Haze State Implementation Programs (“SIPs”).¹⁴³ Attorney General Pruitt and other critics allege “[t]he EPA is picking winners and losers, [and] exhibiting favoritism, at the expense of due process”¹⁴⁴

In *New York v. EPA*, the parties entered into an agreement with sweeping implications, but with a total lack of public participation in the agreement; participants in the settlement included representatives of the eleven states, the Natural Resources Defense Council, the Sierra Club, the Environmental Defense Fund, and the EPA.¹⁴⁵ The settlement agreement contains two parts. First, the EPA will sign and transmit to the Office of the Federal Register by July 26, 2011, a proposed rule under § 111(b) of the CAA, which includes standards of performance for greenhouse gas emissions for new and modified EGUs.¹⁴⁶ Second, the EPA will also sign and transmit a proposed rule under § 111(d) that includes emission guidelines for existing EGUs.¹⁴⁷ Like the 2003 Southern Utah Red Rock Canyon settlement, critics may ask similar key questions: Where was the communication with business owners?; where was the consultation with

¹³⁹ *Id.* at 398.

¹⁴⁰ *Id.* at 400.

¹⁴¹ See generally Complaint for Injunctive and Declaratory Relief at 3, *Oklahoma v. EPA*, 2013 U.S. Dist. LEXIS 177381 (W.D. Okla. Dec. 18, 2013); see also Stephen Moore, *Stephen Moore: Using ‘Sue and Settle’ to Thwart Oil and Gas Drillers*, WSJ.COM (Oct. 4, 2013, 6:44 PM), <http://online.wsj.com/news/articles/SB10001424052702304176904579115234181105684>.

¹⁴² Complaint for Injunctive and Declaratory Relief, *supra* note 141, at 2–3; see also MOORE, *supra* note 141.

¹⁴³ Complaint for Injunctive and Declaratory Relief, *supra* note 141, at 10–11.

¹⁴⁴ Oklahoma Office of the Attorney General E. Scott Pruitt, *supra* note 136. Due process implications of sue-and-settle are outside the scope of this comment. For a brief discussion on the extent to which consent decrees must comport with due process, and the permissibility of third parties to attack negotiated settlements via collateral attack see Webster, *supra* note 127, at 144–50.

¹⁴⁵ Modification to Settlement Agreement at 1, *New York v. EPA*, 2007 U.S. App. LEXIS 22688 (D.C. Cir. 2007) (No. 06-1322), available at <http://www2.epa.gov/sites/production/files/2013-09/documents/20110613ghgsettlementmod.pdf>.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* Under the terms of the settlement, the EPA would have six months to develop guidelines for greenhouse gas emissions from electronic generating units. Bill Wemhoff, *The National Rural Electric Cooperative Associations Comments on Proposed Settlement Agreement New York, et al. v. EPA, No 06-1322*, (Jan. 31, 2011), <http://www.ect.coop/wp-content/uploads/2011/02/NSPSsetCmts-2.pdf>.

Congress on its options to set emission guidelines for electric generating units?; where was the cooperation with other states that might have opposed setting the emission standards?; where was the consideration for the costs of compliance in the haste to strike a deal?¹⁴⁸

Noticeably absent from the 2006 lawsuit were the companies in the energy industry most affected by the new regulation.¹⁴⁹ Six years later, in 2012, several leading companies in the energy industry were afforded the opportunity to respond to the negotiated settlement.¹⁵⁰ Participants in response, collectively known as the “Associations,” included companies such as the National Association of Manufacturers, the American Chemistry Council, the American Iron and Steel Institute, the American Petroleum Institute, and the U.S. Chamber of Commerce, among others.¹⁵¹

In a letter added to the EPA’s docket concerning greenhouse gas emissions for new stationary sources, the Associations pointed out that with the new regulations, “the EPA is effectively dictating both fuel choice and design choice for new electric utility generating units (“EGUs”), contrary to Congressional intent and the EPA’s authority as a regulator of the environment, not energy.”¹⁵² The letter cited a cost analysis study conducted by the South Dakota Department of Environment and Natural Resources that estimated that in order to comply with the regulation, it would cost the Hyperion Energy Center, a facility located in South Dakota, \$1 billion or more.¹⁵³ The letter goes on to note that both Michigan and Illinois reached similar conclusions on the cost of the new regulation and the technical infeasibility of the EPA’s regulation.¹⁵⁴ Since the EPA was determined to affirm the terms of the settlement agreement, the Associations’ efforts to dissuade the EPA were futile.¹⁵⁵ The negotiated settlement in *New York v. EPA* undermines the very purpose for which the

¹⁴⁸ Parenteau, *supra* note 133, at 398; *see also* Mark Clayton, *EPA Issues New Rules on Greenhouse Gas Emissions: Where Does That Leave Coal?*, CHRISTIAN SCIENCE MONITOR (Mar. 27, 2012), <http://www.csmonitor.com/USA/Politics/2012/0327/EPA-issues-new-rule-on-greenhouse-gas-emissions-Where-does-that-leave-coal> (“Higher utility bills and fewer jobs are the only certain outcomes from this reckless attempt to override Congress’s repeated refusal to enact punitive caps on carbon dioxide emissions.”).

¹⁴⁹ *Coke Oven Env’tl Task Force v. EPA*, No. 06-1131, 2006 U.S. App. LEXIS 23499 (D.C. Cir. Sept. 13, 2006). Out of the numerous affected industries, only Utility Air Regulatory Group intervened in the lawsuit.

¹⁵⁰ Letter from Nat’l Assoc. of Mfrs. et al., to U.S. EPA, *Re: Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units*, Docket ID No. EPA-HG-OAR-2011-0660; FRL-9654, 77 *Fed. Ref.* 22392, 1 (Jun. 25, 2012), available at http://www.nam.org/~media/53E86E050C7A495A9CC84F9778BA1F10/Association_GHG_NSPPS_Comments_June_25_2012.pdf [hereinafter STANDARDS OF PERFORMANCE].

¹⁵¹ *Id.*

¹⁵² *Id.* at 4.

¹⁵³ *Id.* at 18.

¹⁵⁴ *Id.* *But see* JAMES E. MCCARTHY, CONG. RESEARCH SERV., R43127, EPA STANDARDS FOR GREENHOUSE GAS EMISSIONS FROM POWER PLANTS: MANY QUESTIONS, SOME ANSWERS 7 (2013) (In its own cost-benefit analysis, the EPA stated the “[T]he Agency does not anticipate any notable impacts on the price of electricity or energy supplies.”).

¹⁵⁵ *See infra* note 181.

APA was enacted; to increase public participation in rulemaking, and as a result, billions of dollars in compliance costs are now imposed upon businesses whom were never afforded an opportunity to *participate* in the negotiated settlement between the environmental groups and the EPA.¹⁵⁶

B. Lack of Transparency

In order to ensure the government is representative of the people's interests, certain mechanisms have been built into the system to hold politicians accountable to the people.¹⁵⁷ Political accountability is achieved through elections, separation of powers, and checks and balances.¹⁵⁸ Sue-and-settle undermines all these mechanisms. Sue-and-settle circumvents the procedural safeguards of two pieces of legislation enacted by Congress, the APA and the CAA.¹⁵⁹ Additionally, the EPA breeds mistrust from affected industry participants because sue-and-settle trumps fairness in sound environmental policy and lacks transparency.¹⁶⁰

The regulation of greenhouse gases began in accordance with the safeguards set forth in the APA. In 1999, the International Center for Technology Assessment ("ICTA") and eighteen other organizations filed a petition with the EPA requesting it begin regulating greenhouse gas emissions from new motor vehicle engines.¹⁶¹ On January 23, 2001, the EPA published a notice seeking comment on the petition.¹⁶² Following the comment period, on September 8, 2003, the EPA published a notice denying the petition for rulemaking stating it did not believe the CAA authorized regulations that dealt with global climate change.¹⁶³ In 2003, the ICTA, several states, and environmental organizations appealed to the D.C. Circuit

¹⁵⁶ Donaldson, *supra* note 133, at 24; Modification to Settlement Agreement, *supra* note 145, at 1.

¹⁵⁷ Alicia Adsera, *Are You Being Served? Political Accountability and Quality of Government*, 9 J.L. ECON & ORG. 445, 445–46 (2003), available at <http://jleo.oxfordjournals.org/content/19/2/445.full.pdf>

¹⁵⁸ Torsten Persson, Gerard Roland & Guido Tabellini, *Separation of Powers and Political Accountability*, Q.J. ECON. 1163, 1164–65 (Nov. 1997), available at <http://qje.oxfordjournals.org/content/112/4/1163.full.pdf+html>.

¹⁵⁹ Tom C. Clark, *1947 Attorney General's Manual on the Administrative Procedure Act*, ABA ADMINISTRATIVE PROCEDURE DATABASE 9 (2001), available at <http://www.law.fsu.edu/library/admin/1947cover.html> (The essential purpose of the APA is to require agencies to keep the public informed of their organization, procedures, and rules; to provide for public participation in the rulemaking process; to establish uniform standards for the conduct of formal rulemaking; and to define the scope of judicial review).

¹⁶⁰ Bell, *supra* note 17 (commenting on the August 2012 FOIA lawsuit filed against the EPA, and of EPA Administrator Lisa Jackson's resignation shortly thereafter, Senator David Vitter stated "[i]t's about a culture of hiding an extreme agenda from Americans because it can't be sustained in public debate."); see Donaldson, *supra* note 133, at 21. See generally Judith L. Mernit, *The Environmental Lawsuit Sue-and-Settle Spin Cycle*, HIGH COUNTRY NEWS (Aug. 19, 2013), <http://www.hcn.org/issues/45.14/the-environmental-lawsuit-sue-and-settle-spin-cycle>.

¹⁶¹ *Background and History of EPA Regulation of Greenhouse Gas (GHG) Emissions Under the Clean Air Act & National Association of Clean Air Agencies' Comments on GHG Regulatory and Policy Proposals*, NAT'L ASSOC. OF CLEAN AIR AGENCIES 2 (July 19, 2011), http://www.nwcleanair.org/pdf/ClimateChange/Misc/History_%20EPA_Regulation_GHG%20July2011-post.pdf [hereinafter NACAA].

¹⁶² *Id.* at 2.

¹⁶³ *Id.*

Court of Appeals, which issued a split decision denying the petition to review the EPA's decision.¹⁶⁴ An appeal was filed with the Supreme Court.¹⁶⁵ In the meantime, in 2005, the State of California submitted a request to the EPA that the agency waive CAA § 209(a)'s prohibition against states adopting their own emission standards.¹⁶⁶ The EPA responded that rather than issue the waiver request, it was awaiting the Supreme Court decision.¹⁶⁷ On April 2, 2007, the Supreme Court ruled 5-4 in *Massachusetts v. EPA* that the EPA had the authority to regulate greenhouse gas emissions from new motor vehicles.¹⁶⁸

In 2008, the EPA released an Advance Notice of Proposed Rulemaking on Regulating [Greenhouse Gas] Emissions under the CAA.¹⁶⁹ The purpose of the Advance Notice of Proposed Rulemaking on Regulating [Greenhouse Gas] Emissions was to review potential provisions under the CAA to regulate greenhouse gases, and the pros and cons of each potential regulatory approach and technology for reducing greenhouse gas emissions.¹⁷⁰ In 2009, following a change in administration, the EPA issued a final Endangerment Finding and moved forward with the regulation of greenhouse gases from new motor vehicles.¹⁷¹

With regards to greenhouse gas emissions from stationary sources, in 2009, the EPA published a proposal for the Tailoring Rule.¹⁷² The purpose of the rule was to ensure that those facilities that must already obtain certain permits for other pollutants would now be required to include greenhouse gases in their permits if their emissions crossed a certain threshold.¹⁷³ The final rule was issued on June 3, 2010.¹⁷⁴ Thereafter, the EPA issued a series of rules to adapt SIPs to the thresholds of the Tailoring Rule so that greenhouse gases were considered regulated pollutants in applicable states.¹⁷⁵

It was not until December 30, 2010, four years after the settlement in *New York v. EPA*, that the EPA published a notice seeking comment on finalizing the 2006 Final Rule regarding greenhouse gas emissions for

¹⁶⁴ *Massachusetts v. EPA*, 415 F.3d 50, 53 (D.C. Cir. 2005).

¹⁶⁵ *Id.* at 50.

¹⁶⁶ *California Greenhouse Gas Waiver Request*, TRANSPORTATION AND CLIMATE, U.S. EPA <http://www.epa.gov/otaq/climate/ca-waiver.htm> (last updated May 14, 2013).

¹⁶⁷ *Id.* See generally *Massachusetts v. EPA*, 549 U.S. 497 (2007).

¹⁶⁸ *Massachusetts*, 549 U.S. at 532.

¹⁶⁹ *Advance Notice of Proposed Rulemaking: Regulating Greenhouse Gas Emissions under the Clean Air Act*, U.S. EPA, <http://www.epa.gov/climatechange/anpr/> (last updated Sept. 9, 2014).

¹⁷⁰ NACCA, *supra* note 161, at 4.

¹⁷¹ *Id.* at 5.

¹⁷² *Id.* at 7.

¹⁷³ Robin Bravender, *EPA Issues Final 'Tailoring' Rule for Greenhouse Gas Emissions*, NY TIMES (May 13, 2010), <http://www.nytimes.com/gwire/2010/05/13/greenwire-epa-issues-final-tailoring-rule-for-greenhouse-32021.html>.

¹⁷⁴ NACCA, *supra* note 161, at 7.

¹⁷⁵ *Id.* at 7-8.

power plants and petroleum refineries.¹⁷⁶ The notice in the Federal Register stated that under the proposed settlement, non-parties to the suit have thirty days to comment on the rule, and that unless the EPA or the Department of Justice felt that consent to the proposed settlement should be withdrawn, “the terms of the agreement will be affirmed.”¹⁷⁷ Despite the rule technically being a proposal to a final rule, in its notice the EPA unequivocally makes clear that short of a non-party disclosing an earth-shattering fact regarding greenhouse gases in a mere thirty days, the EPA is resolved to affirm the settlement agreement and promulgate a final rule.¹⁷⁸ In contrast, when the EPA published notice of the Tailoring Rule in 2012, the comment period was extended to sixty days, and the EPA hosted two public hearings so that interested parties could present various data and arguments for or against the proposed rule.¹⁷⁹ Consistent with transparency and the essential purpose of the APA of keeping the public informed, in the latter case, the EPA afforded interested parties an opportunity to comment on the proposed rule the very same year it was proposed, doubled the length of the comment period, and held public hearings.¹⁸⁰ In the former case, an opportunity for interested parties to comment on the 2006 Final Rule did not come until years after the settlement was initially negotiated.¹⁸¹ Additionally, the comment period lasted for only thirty days, and resulted in the first-ever greenhouse gas regulation of its kind imposed upon the coal industry.¹⁸²

It is undeniable that the EPA has enormous power. What is especially problematic about sue-and-settle is the outside participation of environmentalists in forming the rule that is to be proposed and promulgated. As a result of the settlement in *New York v. EPA* and the subsequent rule, “the EPA is seeking to regulate U.S. manufacturing in a way that Congress never planned and never intended.”¹⁸³ Specifically, the CAA only requires permits for certain emissions that do not include greenhouse gases, and the “EPA is trying to fit a political agenda into a statute that was not designed for it.”¹⁸⁴

Rather than allowing environmentalist groups to petition the EPA to

¹⁷⁶ *Id.* at 8; Proposed Settlement Agreement, Clean Air Act Citizen Suit, 75 Fed. Reg. 82,392, 82,392 (proposed Dec. 30, 2010).

¹⁷⁷ Proposed Settlement Agreement, Clean Air Act Citizen Suit, 75 Fed. Reg. at 82,392.

¹⁷⁸ *Id.*

¹⁷⁹ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 57,126, 57,126 (proposed Nov. 4, 2009) (codified at 40 C.F.R. pts. 51, 52, 70, 71).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Proposed Settlement Agreement, Clean Air Act Citizen Suit, 75 Fed. Reg. at 82,392; *see also* Kovacs, *supra* note 2, at 34.

¹⁸³ Juliet Eilperin, *Supreme Court Lets EPA's Climate Authority Stand, Will Review Permitting Question*, THE WASH. POST (Oct. 15, 2013), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/10/15/supreme-court-affirms-epas-climate-authority-but-will-review-permitting-question/>.

¹⁸⁴ *Id.*; *see* OYEZ, *supra* note 43.

begin regulating greenhouse gases from stationary sources, the EPA entered into an agreement with environmentalists and allowed for only thirty days of comment before affirming the terms of the settlement.¹⁸⁵ A closed-door negotiation lacks transparency, and those responsible for the ultimate promulgation of the rule cannot be held accountable because the settlement is binding via the court. A lack of accountability encourages affected industries to mistrust the agency and the political administration.

C. Tension Is Created Among the Branches of Government

The sue-and-settle tactic results in a tension among the three branches of government. Sue-and-settle has the ability to create tensions between the current executive branch and future administrations, as well as tensions between the executive branch and the legislative branch, while simultaneously entangling the judicial branch.

Once an agency is bound by a consent decree, the agency and its future administrators are likewise bound by the decree.¹⁸⁶ In 1986, U.S. Attorney General Edwin Meese issued a report alleging that past executive departments and agencies misused sue-and-settle and ““forfeited the prerogatives of the executive branch in order to preempt the exercise of those prerogatives by a subsequent administration.””¹⁸⁷ This compromises the ability and duty of elected officials to serve the public’s interests.¹⁸⁸ New policies and laws are often the product of changing circumstances, and sue-and-settle deprives future administrations of discretion granted by the Constitution or Congress to respond to new circumstances.¹⁸⁹

Sue-and-settle additionally creates tension between the executive branch and Congress while entangling the judiciary. By engaging in sue-and-settle, agencies are able to expand their authority and simultaneously evade congressional oversight.¹⁹⁰ Congress controls the funds an agency requires to implement its regulations in the appropriation process, and these settlements reprioritize an agency’s budget.¹⁹¹ Once a court approves a

¹⁸⁵ Proposed Settlement Agreement, Clean Air Act Citizen Suit, 75 Fed. Reg. at 82,392.

¹⁸⁶ Tseming Yang, *Does EPA’s Sue-and-Settle Policy Circumvent the Legislative, and Regulatory Process?* THE CALIFORNIAN.COM (Dec. 21, 2013, 6:24 AM), <http://www.thecalifornian.com/article/20131221/OPINION05/312210028/Does-EPA-s-sue-settle-policy-circumvent-legislative-regulatory-process->.

¹⁸⁷ Robert V. Percival, *The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making*, 1987 U. CHI. LEGAL F. 327, 337 (1987).

¹⁸⁸ Andrew M. Grossman, *Regulation Through Sham Litigation: Sue and Settle Phenomenon*, THE HERITAGE FOUNDATION (Feb. 25, 2014), <http://www.heritage.org/research/reports/2014/02/regulation-through-sham-litigation-the-sue-and-settle-phenomenon>.

¹⁸⁹ Memorandum from Edwin Meese III, Attorney General, to All Assistant Attorneys General and All United States Attorneys on 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> [hereinafter MEMORANDUM].

¹⁹⁰ *Executive Summary*, U.S. CHAMBER OF COMMERCE, <https://www.uschamber.com/sue-and-settle-executive-summary> (last visited Feb. 9, 2015).

¹⁹¹ *Id.*

consent decree, an agency is permitted to tell Congress it is compelled to publish a new regulation.¹⁹² Equally troublesome is the commitment the agency has made in the settlement to obtain funding from the legislative branch, and the position in which it places the judicial branch in its enforcement of the consent decree, because obtaining funding for a regulation is a separate political act.¹⁹³ Additionally, when an agency becomes bound by a consent decree, the agency's power to exercise discretion in promulgating a regulation no longer lies with the agency administrator, but rather that discretion is now subject to the court's approval or disapproval.¹⁹⁴

In *New York v. EPA*, litigation against the federal government commenced as a direct result of the Bush Administration's unwillingness to regulate greenhouse gases.¹⁹⁵ In 2006, the EPA was operating under the premise that the CAA did not give them authority to regulate such emissions, and thus declined to do so.¹⁹⁶ Unsatisfied, a group of petitioners took the matter to the courts in order to obtain a binding consent decree to force the EPA into promulgating rules to regulate greenhouse gas emissions.¹⁹⁷ Petitioners were wholly successful, and the EPA is now able to regulate those emissions through the very same statute that the EPA claimed it lacked authority to regulate under less than a decade ago.¹⁹⁸ Moreover, future administrations are now bound by these regulations, irrespective of public opinion and the agendas of future-elected administrations.¹⁹⁹

IV. RECOMMENDATIONS

With a demonstrated abuse of sue-and-settle, it is necessary that Congress take action.²⁰⁰ The settlement agreements that result in a new regulation have a substantial impact on the affected industry. Additionally, there is no requirement that the public be given notices of settlements

¹⁹² *Id.*; Gray, *supra* note 36, at 3; MEMORANDUM, *supra* note 189.

¹⁹³ Grossman, *supra* note 188.

¹⁹⁴ *Id.*; see also MEMORANDUM, *supra* note 189, at 2.

¹⁹⁵ Robert B. Moreno & Peter Zalzal, *Greenhouse Gas Dissonance: The History of EPA's Regulations and the Incongruity of Recent Legal Challenges*, 30 UCLA J. ENVTL. L. & POL'Y 121, 133 (2012).

¹⁹⁶ Teal Jordan White, *Clean Air Act Mayhem: EPA's Tailoring Rule Stitches Greenhouse Gas Emissions into the Wrong Regulatory Fitting*, 18 TEX. WESLEYAN L. REV. 407, 410 (2011) (Prior to *Massachusetts v. EPA*, "the EPA concluded that it lacked the authority to regulate new vehicle emissions under the Clean Air Act because Congress did not intend for greenhouse gases to be regulated under the Act and that carbon dioxide was not an 'air pollutant' as defined by the Act.").

¹⁹⁷ *Id.* at 419.

¹⁹⁸ Settlement Agreement, *supra* note 10, at 3; White, *supra* note 196, at 410.

¹⁹⁹ Grossman, *supra* note 188.

²⁰⁰ "It is extraordinary for an administration already well into its second term to decry abuses by executive agencies, but the change in Justice Department policy does not stem from contemporary abuses. It apparently is a result of the Reagan Administration's frustration with its failure to overturn employment discrimination consent decrees entered during [the Carter Administration]." Percival, *supra* note 187, at 337.

between the government and private parties; rather, it is up to persons in the affected industries to closely monitor litigation that might have an effect.²⁰¹ This puts an unnecessary burden on industries, particularly those lacking the resources to adequately monitor such litigation. In order to curb this abuse, Congress has two options: amend the APA or pass the Sunshine for Regulatory Decrees and Settlements Act of 2013.

A. Amend the APA

Until a few decades ago, courts did not consider a settlement agreement by an agency as rulemaking.²⁰² As settlement agreements are regularly accepted by the EPA, “a consent decree should be no less susceptible to [public participation] than other rulemaking or adjudicatory proceedings.”²⁰³ However, courts have consistently held that proposed settlement agreements are exempt from the APA’s notice and comment requirements because the settlements are not rules within the meaning of the APA.²⁰⁴ Specifically, courts have deemed settlement agreements as “‘preliminary to the rulemaking process’ to constitute rulemaking.”²⁰⁵ Courts had begun to expand APA procedures for informal rulemaking, but the Supreme Court effectively put a halt to that process by declaring that only the minimal requirements of APA notice and comment requirements apply to informal rulemaking via negotiated settlements.²⁰⁶

Section 553 of the APA states, in part, “[g]eneral notice of proposed rule making shall be published in the Federal Register,” and “[a]fter notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.”²⁰⁷ Not contained within the APA is the requirement that notice be given to interested parties that litigation has commenced, and that the litigation is likely to result in a new proposed rule, and ultimately a final, promulgated rule.²⁰⁸ Sue-and-settle advocates point to the fact that even after a negotiated settlement, the public has an opportunity to comment on

²⁰¹ *Id.* at 349.

²⁰² Marina T. Larson, *Consent Decrees and the EPA: Are They Really Enforceable Against the Agency?*, 1 PACE ENVTL. L. R. 147, 149 (1983).

²⁰³ *Id.* at 157–58.

²⁰⁴ *Id.* at 159–60.

²⁰⁵ *Id.* at 159.

²⁰⁶ Jeffrey M. Gaba, *Informal Rulemaking by Settlement Agreement*, 73 GEO. L. J. 1241, 1255–56 (1985); *see also* *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 548–49 (1978).

²⁰⁷ 5 U.S.C. § 553(b)–(c) (2012).

²⁰⁸ *Id.*; *see also* *Daniel Int'l Corp. v. Occupational Safety & Health Review Comm'n*, 656 F.2d 925, 932 (4th Cir. 1981) (“[T]he [Administrative Procedure] Act ‘does not require an agency to publish in advance every precise proposal which it may ultimately adopt as a rule.’”) (quoting *Spartan Radiocasting Co. v. FCC* 619, F.2d 314, 321 (4th Cir. 1980)).

the agreement, consistent with the requirements of the APA.²⁰⁹ However, despite the limited window for public comment, most of the content of the settlement and proposed rule was already discussed during private negotiations, and no record exists of the discussion; thus an affected industry is at a disadvantage in attempting to influence the EPA's decision thereafter with their comments.²¹⁰

An amendment to the APA that gives third parties notice of the pending litigation against government agencies and subsequent settlements would help curb the abuses of sue-and-settle. First, third parties, regardless of their size, would no longer be burdened with monitoring all of the litigation within the federal court system. Second, affected industries could intervene in the lawsuit and be afforded the opportunity to participate in meaningful discussions regarding new potential regulations before the EPA is resolved to propose a new rule. As the procedural safeguards of the APA have since been sidestepped, both benefits of an amendment are consistent with Congress' initial purpose of enacting the APA, to give the public the opportunity to participate in the process and procedures of rulemaking.²¹¹

B. Pass the Sunshine for Regulatory Decrees and Settlements Act of 2013

In the alternative, to curb the abuses of sue-and-settle, Congress could pass the Sunshine for Regulatory Decrees and Settlements Act of 2013. The bill was introduced in April 2013, and is "strongly" supported by numerous organizations in the business industry.²¹² The bill requires an agency, against which a civil action is brought, to publish notice of the complaint no later than fifteen days after receiving service of such complaint.²¹³ The bill additionally requires that an agency seeking to enter into a settlement agreement must make the agreement available to the public by publishing it in the Federal Register no later than sixty days *before* the settlement is filed with the court.²¹⁴

Several industries support the passage of this bill as it "promote[s] principles of good government, including openness and transparency, in the regulatory process."²¹⁵ The bill does not prevent agencies from entering into

²⁰⁹ Gaba, *supra* note 206, at 1260.

²¹⁰ *Id.* at 1269.

²¹¹ KOCH, *supra* note 6, at 47; *see also* Donaldson, *supra* note 133.

²¹² *Multi-Industry Letter Supporting the "Sunshine for Regulatory Decrees and Settlements Act of 2013*, U.S. CHAMBER OF COMMERCE (Apr. 10, 2013, 8:00 PM), <http://www.uschamber.com/issues/letters/2013/letter-regarding-sunshine-regulatory-decrees-and-settlements-act>; *see also* James Valvo, *Letter of Support: Sunshine for Regulatory Decrees and Settlement Act of 2013 (H.R. 1493, S. 714)*, AMERICANS FOR PROSPERITY (May 23, 2013), <http://americansforprosperity.org/legislativealerts/letter-of-support-sunshine-for-regulatory-decrees-and-settlement-act-of-2013-h-r-1493-s-714>.

²¹³ *Sunshine for Regulatory Decrees and Settlements Act of 2013 (H.R. 1493)*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr1493#summary> (last visited Feb. 9, 2015).

²¹⁴ *Id.* (emphasis added).

²¹⁵ *Id.*

settlement agreements; however, the bill significantly increases the likelihood that affected industries will have an opportunity to participate in the rulemaking process. With notice at the outset of litigation, potentially affected industries will have the opportunity to intervene in the suit and participate in the negotiation process. Additionally, notice of a settlement prior to it being filed with the court will also afford the opportunity for public participation before the settlement becomes binding.

V. CONCLUSION

Over the last several decades, the utilization of sue-and-settle has become systematic. Sue-and-settle is a tactic consistently used to advance policy perspectives of certain administrations that would otherwise not be upheld by Congress. The utilization of this tactic shirks the safeguards put in place by the APA and undermines the principles of due process, separation of powers, transparency, and political accountability. Congress must act either by amending the APA or passing the Sunshine for Regulatory Decrees and Settlements Act of 2013 to ensure certain industries are not burdened by regulations they never had a say in to begin with. The EPA has tremendous power to affect industry, and it must be prevented from abusing sue-and-settle to enhance its regulatory power.

