

**SUE, SETTLE, AND SHUT OUT THE STATES:  
DESTROYING THE ENVIRONMENTAL BENEFITS OF  
COOPERATIVE FEDERALISM**

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## INTRODUCTION

Federal environmental policy has long relied on the States to assist in the development and implementation of environmental regulations.<sup>1</sup> Under this “cooperative federalism,” states administer federal rules but have flexibility in setting standards and enforcement priorities.<sup>2</sup> In recent years, environmental

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1. Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 623 (2006) (“[Congress] deliberately provid[ed] . . . for detailed implementation by state sovereign authorities . . .”).

2. *New York v. United States*, 505 U.S. 144, 167 (1992) (noting that, under cooperative federalism, Congress “offer[s] States the choice of regulating that activity according to federal standards or having state law pre-empted by federal

advocacy groups increasingly have succeeded in using a strategy of faux litigation to trample the statutory regulatory framework and to shut out the States from important policy decisions.<sup>3</sup> This policymaking process—called “sue-and-settle” or “suit-and-settlement”<sup>4</sup>—not only violates the statutory framework, but also leads to haphazard policymaking.

Environmental advocacy groups and federal regulators are using sue-and-settle to shut the States out of their statutorily created roles. The basic scenario of this so-called institutional reform litigation<sup>5</sup> is straightforward. An environmental advocacy group sues a federal agency, usually the Environmental Protection Agency (EPA), for failing to adequately police state action under federal environmental laws. Specifically, the advocacy group alleges that the EPA has a nondiscretionary duty to ensure that states establish certain standards and that the agency has failed to do so. In many

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regulation”); *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 11 (D.C. Cir. 2012), cert. granted in part, 133 S. Ct. 2857 (June 24, 2013) (No. 12-1182); Jonathan H. Adler, *When Is Two a Crowd? The Impact of Federal Action on State Environmental Regulation*, 31 HARV. ENVTL. L. REV. 67, 87–88 (2007).

3. U.S. CHAMBER OF COMMERCE, A REPORT ON SUE AND SETTLE: REGULATING BEHIND CLOSED DOORS 11 (2013), <http://www.uschamber.com/sites/default/files/reports/SUEANDSETTLEREPORT-Final.pdf>, [perma.cc/0Xkx1BWWpP1] [hereinafter CHAMBER 2013].

4. See *Federal Consent Decree Fairness Act, and the Sunshine for Regulatory Decrees and Settlements Act of 2012: Hearing on H.R. 3041 and H.R. 3862 Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 1 (2012) (statement of Rep. Howard Coble, North Carolina).

5. A. David Reynolds, *The Mechanics of Institutional Reform Litigation*, 8 FORDHAM URB. L.J. 695, 695 (1979) (“[I]nstitutional reform litigation [is] directed at state or local governmental bodies to insure their compliance with the growing number of constitutional and statutory rights every individual enjoys.”). Note that some scholars question the legitimacy of institutional reform litigation altogether. See, e.g., William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 696 (1982) (“Political bodies and courts respond to different institutional imperatives. They overlap in many ways, and may be equally capable of performing a number of functions, albeit in their characteristic institutional fashions. Devising remedies for constitutional violations in institutional suits, however, is not such a function. Legal standards for devising institutional remedies are absent because the problems they pose are, and inevitably must be, polycentric and non-legal in nature.”); Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1307 (“Whether the courts have done more good than harm [with institutional reform litigation] is a question begging an answer at the moment. That they mean to do good is beyond doubt. But, as Peter de Vries has observed, ‘The road to good intentions is paved with hell.’”).

circumstances, the EPA's alleged failure is a failure to act when states themselves miss deadlines imposed by environmental statutes.<sup>6</sup> After the state fails, various statutes require the EPA to impose a federal implementation plan (FIP) that the state must follow.<sup>7</sup> At other times though, and significantly for the purposes of this paper, it is the EPA's failings—completely independent of the States—that leads to a consent decree.<sup>8</sup> The EPA and the advocacy group then settle the lawsuit, without any input from the states that were responsible in the first place and are now responsible for implementing the terms of the settlement. In the settlement agreement, the EPA is required to implement its own standard if the affected states fail to develop a standard by a settlement-imposed deadline. The settlement agreement also frequently establishes the standard, or at least the nature of the standard. The settlement is then entered as a consent decree and the terms bind the EPA under court order.<sup>9</sup>

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6. However, see *Florida Wildlife Federation, Inc. v. Jackson* as an example of the EPA being sued when it is questionable whether the state had actually failed to meet the EPA's requirements. No. 4:08cv324-RH/WCS, 2009 WL 5217062 (N.D. Fla. Dec. 30, 2009). Also note that the EPA does not always wait until states have had their statutorily guaranteed opportunity to issue their own environmental programs. In *Homer City*—scheduled to be argued before the U.S. Supreme Court in this October's term—the EPA imposed a federal implementation plan before allowing the state to impose its own standard. 696 F.3d at 11–12.

7. *E.g.*, Clean Air Act § 110(c)(1), 42 U.S.C. § 7410(c)(1) (2006)); see also BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR, OR HOW THE CLEAN AIR ACT BECAME A MULTIBILLION-DOLLAR BAIL-OUT FOR HIGH-SULFUR COAL PRODUCERS AND WHAT SHOULD BE DONE ABOUT IT 104 (1981) (classifying these statutes as “agency-forcing statute[s]”).

8. See, e.g., *Natural Res. Def. Council, Inc. v. EPA*, 790 F.2d 289, 293 (3d Cir. 1986); *Am. Nurses Ass'n v. Jackson*, No. 08-2198 (RMC), 2010 WL 1506913 (D.D.C. Apr. 15, 2010); *Fla. Wildlife*, 2009 WL 5217062, at \*4; *Natural Res. Def. Council, Inc. v. Train* Nos. 2153-73, 75-172, 75-1698, 75-1287, 1976 U.S. Dist. Lexis 14700 (D.D.C. June 9, 1976). Other examples are the five Regional Haze consent decrees where states had not missed a deadline, but advocacy groups sued the EPA for failing to force the states to have stricter pollution standards: *Nat'l Parks Conservation Ass'n v. Jackson*, No. 11-cv-01548 (D.D.C. Mar. 30, 2012), *Sierra Club v. Jackson*, No. 1:10-cv-02112-JEB (D.D.C. Oct. 3, 2011), *WildEarth Guardians v. Jackson*, Nos. 11-CV-00001-CMA-MEH, 1:11-cv-00743-CMA-MEH, 2011 WL 4485964 (D. Col. Sept. 27, 2011), *WildEarth Guardians v. Jackson*, No. 1:10-cv-01218-REB-BNB (D. Col. Oct. 28, 2010), and *WildEarth Guardians v. Jackson*, No. 4:09-CV-02453-CW (N.D. Cal. Feb. 18, 2010).

9. A consent decree is a settlement entered by the court as a court order, which means it has the force of law. Instead of a breach of contract action to enforce agreements, as in a normal settlement, consent decrees are enforced by filing contempt of court charges. See *infra* Part I.

If the consent decree is entered and the states are unable to meet the settlement's deadlines, standards, or both, the EPA issues a FIP.<sup>10</sup> Just like that, the states—though statutorily charged with implementing pollution controls—are circumvented and the EPA takes over and imposes FIPs.

Paradoxically, the EPA's surrendering of its discretionary authority to work cooperatively with the States leads to more, not less, control at the federal level. Thus, as a result of being sued, the agency actually has more power relative to the States. Instead of allowing the States the flexibility to experiment continually with different approaches, standards, implementation plans, and so forth, the settlement agreements between the advocacy groups and the EPA increase direct EPA control over the States. Of course, the advocacy groups that bring these suits are generally pleased with the settlements to which they agree. That both parties get what they want as a result of the filing of the lawsuit should raise some suspicion about what is actually happening. Consider the case of *Defenders of Wildlife v. Perciasepe*.<sup>11</sup> On November 8, 2010, two events occurred: (1) Defenders of Wildlife filed its complaint against EPA and (2) EPA and Defenders of Wildlife filed a consent decree and a joint motion to enter the consent decree with the court.<sup>12</sup> Although simultaneously filing a lawsuit and a consent decree does not necessarily imply foul play, it does illustrate how little impact states may have in the consent decree process that may ultimately dictate what a state is required to do and when it must do it.

Sue-and-settle as a policymaking procedure is highly suspect for several reasons. First, as illustrated by *Perciasepe*, although a sue-and-settle consent decree appears to be the natural and perhaps most cost-effective end to an adversarial process, there is reason to suspect the absence of an adversarial relationship between the settling parties. As discussed below, the parties ultimately obligated to act under the settlement are systematically excluded from the litigation.

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10. See, e.g., *infra*, Part II.B.2 (discussing the Regional Haze consent decrees in which states were required to establish a plan to meet the terms of the consent decrees by a certain deadline or else the agency would issue its own plan).

11. 714 F.3d 1317 (D.C. Cir. 2013).

12. *Id.*

Second, sue-and-settle does not reflect a careful weighing of priorities by expert bureaucrats. Judges are not experts in environmental matters, but sue-and-settle uses court orders to develop policy. The courts are ill-equipped to provide the cost-benefit analyses necessary to make sound policy decisions. Yet, the advocacy group and the agency cooperate to use the court system to overturn agency policy and, in the process, reallocate the regulatory resources of the agency and of the States.

Third, defenders of the current statutory framework based on cooperative federalism should view sue-and-settle as a major assault on the administrative integrity of a cooperative system.<sup>13</sup> Sue-and-settle effectively shuts the States out of the decisionmaking process and forces them into a subservient role as enforcers of federal court orders. Normally, states have a statutory right to establish their own regulations and come up with their own solutions before the federal regulator heavily-handedly imposes standards for them to follow.<sup>14</sup> At a minimum, states should be able to participate in notice-and-comment rulemaking as federal regulators implement new standards.<sup>15</sup> The sue-and-settle procedure, however, circumvents this process by forcing states to implement federal regulations in place of their existing standards or before they are given a full opportunity to solve their own problems.<sup>16</sup>

Fourth, consent orders avoid the normal notice-and-comment rulemaking process.<sup>17</sup> Thus, the recent windfall of

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13. See, e.g., Bonner R. Cohen, *Attorneys General Warn EPA over "Sue and Settle" Fracking Regulations*, HEARTLANDER, June 11, 2013, <http://news.heartland.org/newspaper-article/2013/06/11/attorneys-general-warn-epa-over-sue-and-settle-fracking-regulations> [http://perma.cc/05qmNejAr1d]; Letter from E. Scott Pruitt, Oklahoma Attorney Gen., to Bob Perciasepe, Acting Adm'r, EPA, and Gina M. McCarthy, Assistant Adm'r, EPA, (May 2, 2013), available at [http://www.oag.ok.gov/oagweb.nsf/3e67f1cee13bc090862572b2005ad559/23b407a5f6b5131886257b600077acf1/\\$FILE/FINAL%20-%20EPAMethane050213.pdf](http://www.oag.ok.gov/oagweb.nsf/3e67f1cee13bc090862572b2005ad559/23b407a5f6b5131886257b600077acf1/$FILE/FINAL%20-%20EPAMethane050213.pdf), [http://perma.cc/0MEEAK88JAf].

14. See *infra* note 180 and accompanying text (citing several statutes as examples of states having an express statutory role in regulation).

15. See *infra* Part III.B. For agencies to adopt new rules, they must first publish a proposed rule in the Federal Register—the official journal of the federal government—and allow time for the public to review the rule and make suggestions.

16. See, e.g., *Fla. Wildlife Fed'n, Inc. v. Jackson*, No. 4:08CV324-RH/WCS, 2009 WL 5217062, at \*2 (N.D. Fla. Dec. 30, 2009).

17. See, e.g., *Am. Nurses Ass'n v. Jackson*, No. 08-2198 (RMC), 2010 WL 1506913 (D.D.C. Apr. 15, 2010) (allowing the EPA to expedite the rulemaking schedule to

sue-and-settle consent decrees has created a structure of environmental regulations that excludes essential participants. The most important excluded participants in the United States' supposed system of cooperative federalism are the States themselves. As explained in more detail below, since the seminal Toxics Consent Decree in 1976,<sup>18</sup> federal regulators and advocacy groups have often used consent decrees to impose standards on states that cost billions of dollars to implement, decrease jobs, and increase energy costs.<sup>19</sup> And all this is done without the States having any opportunity to interject or influence the decrees' terms,<sup>20</sup> effectively trading statutorily mandated federalism for perpetual regulation.

Fifth, proponents of greater reliance on individual state regulation—especially when the regulated activity has primarily local or state impacts—view some of the sue-and-settle cases as a dramatic expansion of federal regulation into areas that should be regulated by local or state governments. Removing states from their place as formulators of environmental regulation is problematic because it is inconsistent with a rational allocation of regulatory authority.<sup>21</sup> For example, the matching principle is “a guide to determining the most efficient governmental level for regulation of different types of environmental concerns” and suggests that “the size of the geographic area affected by a specific pollution source should determine the appropriate governmental

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such an extent that the intervenor was completely unable to participate in the notice-and-comment process).

18. *Natural Res. Def. Council, Inc. v. Train Nos. 2153-73, 75-172, 75-1698, 75-1287*, 1976 U.S. Dist. Lexis 14700 (D.D.C. June 9, 1976). This case is commonly known as the “Toxics Consent Decree.” *Toxic and Priority Pollutants*, EPA, <http://water.epa.gov/scitech/methods/cwa/pollutants-background.cfm>, [http://perma.cc/F3JY-H532].

19. *Federal Consent Decree Fairness Act, and the Sunshine for Regulatory Decrees and Settlements Act of 2012: Hearing on H.R. 3041 H.R. 3862 Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 96 (2012) (statement of Rep. Dennis Ross, Florida) [hereinafter Ross]; *id.* at 89 (statement of Rep. Ben Quayle, Arizona) [hereinafter Quayle].

20. *Infra* Part III.C.

21. See Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

level for responding to the pollution.”<sup>22</sup> U.S. environmental policy does not strictly observe the matching principle as the federal government is frequently involved in exclusively intrastate problems, but it does partially recognize the matching principle by granting states an express statutory role in federal policy and by allowing states to participate in notice-and-comment rulemaking. Unfortunately, consent decrees undermine and even eliminate both of these state roles, resulting in an irrational allocation of authority and making the system inefficient.

The purpose of this paper is, first, to elaborate on how the sue-and-settle process in environmental institutional reform litigation distorts the regulatory process and harms states, and, second, to propose solutions. Prior work has almost exclusively analyzed how consent decrees generally harm third parties,<sup>23</sup> but the issue of how consent decrees harm states in the environmental context has been underanalyzed. Also, with *EPA v. EME Homer City Generation, L.P.* before the Supreme Court this term, this paper briefly discusses the implications of that case’s disposition for consent decrees.

Part I discusses the legal background of sue-and-settle, including third-party rights to intervene in the initial suit and to challenge the consent decree after it is entered. Part I also includes a review of the difficult legal requirements placed on agencies seeking to modify their consent decrees, assuming they want to do so. Part II examines sue-and-settle’s impact on environmental law and policy, including specific examples of environmental consent decrees. Part III analyzes the matching principle, explains why it should be a benchmark for evaluating the appropriate level of government regulation, and argues that sue-and-settle is undermining the benefits of the matching principle. Part IV proposes two relatively minor changes that should alleviate some of the current problems caused by sue-and-settle. First, judges should be much more skeptical in reviewing cases such as *Defenders of Wildlife v. Perciasepe* in which it appears the parties colluded in filing the

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22. Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE L. & POL’Y REV. 23, 25 (1996).

23. See, e.g., Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 321 (1988).



suit. Second, the Federal Judicial Conference of the United States should consider modifying the requirements placed on states seeking to intervene under Rule 24 of the Federal Rules of Civil Procedure (F.R.C.P.) in environmental institutional reform litigation. Part V offers concluding comments.

I. THE BACKGROUND AND LEGAL STANDARD FOR SUE-AND-SETTLE CONSENT ORDERS

Sue-and-settle or suit-and-settlement normally begins when a private party, such as an environmental advocacy group, sues federal regulators, alleging failure to comply with nondiscretionary duties. These types of lawsuits are commonly called institutional reform litigation. Whether the duties are actually discretionary or not, the regulator settles the case and agrees to impose new standards on states and other parties.<sup>24</sup> A court enters settlement as a consent decree, and then the regulator proceeds to enforce the standard.<sup>25</sup> Frequently, both the advocacy groups and the regulators appear to seek a settlement without any intention of litigating the case.<sup>26</sup>

Sue-and-settle has played a major role in the relatively short history of federal environmental regulation. In 1976, the EPA entered into the Toxics Consent Decree and thereby revolutionized the way government agencies approach

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24. See Reynolds, *supra* note 5, at 695.

25. Robert V. Percival, *The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making*, 1987 U. CHI. LEGAL F. 327, 334.

26. See Horowitz, *supra* note 5, at 1294–95 (“There is an excellent possibility that some of the governmental defendants agree with the arguments advanced by the plaintiffs—or, more properly, since these are often lawyer-controlled cases with merely nominal plaintiffs, agree with the arguments advanced by the plaintiffs’ lawyers and their expert witnesses. Among lawyers and experts, there may well be elements of a professional consensus at work on both sides. There is commonly also a desire on the part of some officials to use a decree entered against them as a weapon in the political struggle to vindicate their view of the appropriate treatment, rehabilitation, or other policy goal for the institution. . . . This is one reason why so many consent decrees are entered in institutional reform cases. Nominal defendants are sometimes happy to be sued and happier still to lose.”); see also *Horne v. Flores*, 557 U.S. 433, 448 (2009) (“[T]he dynamics of institutional reform litigation differ from those of other cases. Scholars have noted that public officials sometimes consent to, or refrain from vigorously opposing, decrees that go well beyond what is required by federal law.”).

environmental problems.<sup>27</sup> The Clean Water Act of 1972 (CWA) required the EPA to regulate “toxic pollutants.”<sup>28</sup> These regulations had to “fully protect[] public health”—an onerous standard the EPA was unable to meet.<sup>29</sup> As a result, the EPA did not issue any regulations and “toxic pollutants” continued to be emitted. The Natural Resources Defense Council (NRDC) sued the EPA in 1976 for failing to issue standards the CWA required.<sup>30</sup> Rather than litigate a certain losing battle under a standard the EPA knew it could not meet, the EPA settled the case with the NRDC and had the settlement entered as a consent decree.<sup>31</sup> Under the terms of the decree, the EPA proposed regulations based on a feasibility standard instead of the much more stringent “fully protected public health” standard.<sup>32</sup> The NRDC and the EPA thus amended a congressionally created standard, without bicameralism and presentment.<sup>33</sup>

The consent decree is an essential component of the sue-and-settle process, transforming the negotiated settlement into an enforceable court order. To fully appreciate the power of consent decrees, it is necessary to delve into some of the general legal features of consent decrees and then consider how they are applied in the context of sue-and-settle.

#### A. General Consent Decree Doctrine

Consent decrees provide a means for litigants to settle disputes and enjoy the benefits of a court order or judgment. A

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27. *Natural Res. Def. Council, Inc. v. EPA*, 790 F.2d 289, 293 (3d Cir. 1986); *Natural Res. Def. Council, Inc. v. Train* Nos. 2153-73, 75-172, 75-1698, 75-1287, 1976 U.S. Dist. Lexis 14700 (D.D.C. June 9, 1976); *Federal Consent Decree Fairness Act, and the Sunshine for Regulatory Decrees and Settlements Act of 2012, Hearing on H.R. 3041 and H.R. 3862 Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 41 (2012) (statement of Professor David Schoenbrod, New York Law School) [hereinafter Schoenbrod].

28. Schoenbrod, *supra* note 27, at 41.

29. *Id.*

30. *Train*, 1976 U.S. Dist. LEXIS 14700; *Natural Res. Def. Council, Inc. v. EPA*, 790 F.2d at 293; Schoenbrod, *supra* note 27, at 41.

31. Schoenbrod, *supra* note 27, at 41.

32. *Id.*

33. Bicameralism and presentment is the process required by Article I of the U.S. Constitution for a law to be created or amended. U.S. CONST. art. I, §7, cl. 2. Bicameralism means that laws must be approved by a majority of both the Senate and the House, and presentment means the law is sent to and signed by the President. *Id.*

normal settlement agreement is essentially a contract and is enforceable under normal contract procedures, while a consent decree is a hybrid of a contract and a court judgment.<sup>34</sup> Edwin Meese III, then Attorney General under President Reagan, described consent decrees as negotiated agreements that are given judicial imprimatur when entered as an order of the court. Because of their unique status as both contract and judicial act, consent decrees serve as a useful device for ending litigation without trial, providing the plaintiff with an enforceable order, and insulating the defendant from the ramifications of an adverse judgment.<sup>35</sup>

Settling parties can file a motion asking a court to enter their settlement as a consent decree. The Supreme Court, however, has emphasized that courts are not just “a recorder of contracts” and has imposed legal standards stating when a court may grant the motion.<sup>36</sup> In *Local No. 93, International Association of Firefighters v. City of Cleveland*, the Court held that, to be issued, a consent decree must (1) “resolve a dispute within the court’s subject-matter jurisdiction,”<sup>37</sup> (2) be “within the general scope of the case made by the pleadings’,”<sup>38</sup> and (3) “further the objectives of the law upon which the complaint was based.”<sup>39</sup> Courts construe these three requirements quite liberally, and courts are free to enter decrees that bind the parties to actions that the courts could not have imposed if the case had been litigated.<sup>40</sup>

Consent decrees are preferred over normal settlement agreements because of the enforcement mechanisms available

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34. Pamela J. Stephens, *Manipulation of Procedural Rules in Pursuit of Substantive Goals: A Reconsideration of the Impermissible Collateral Attack Doctrine*, 24 ARIZ. ST. L.J. 1109, 1113 (1992) (“Consent decrees are hybrids, combining elements of both contract and judgment. This view derives from Supreme Court pronouncements such as that in *United States v. ITT Continental Baking Co.*” [420 U.S. 223 (1975)] . . .”).

35. Memorandum from Attorney Gen. Edwin Meese III to all Assistant Attorneys Gen. on Dept. Policy Regarding Consent Decrees and Settlement Agreements, C427 ALI-ABA 283, 377 (June 26, 1989).

36. *Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) (quoting 1B J. MOORE et al., *MOORE’S FEDERAL PRACTICE* ¶ 0.409[5] (1984)).

37. *Id.*

38. *Id.* (quoting *Pacific R.R. Co. v. Ketchum*, 101 U.S. 289, 297 (1879)).

39. *Id.*

40. *See id.* at 525–26.

for each.<sup>41</sup> If a party to an ordinary settlement fails to comply with the settlement agreement, then the other parties must bring an ordinary breach of contract case against the breaching party.<sup>42</sup> This is a costly and onerous process. If a party breaches a consent decree, however, then the other party may file contempt sanctions against the breaching party.<sup>43</sup> The parties are then able to resolve the dispute without the delays or costs of litigation.<sup>44</sup> Furthermore, “the court may provide additional assistance (like appointing a monitor to oversee implementation) and will interpret the decree to help the parties resolve disputes before they reach the point of formal litigation.”<sup>45</sup>

*B. Consent Decree Procedure for Government Entities*

Procedure changes when a government entity, such as a federal environmental agency, is a party to a proposed consent decree. The Code of Federal Regulations requires proposed settlements to be forwarded to the respective Deputy Attorney General or Associate Attorney General in the Department of Justice (DOJ) whenever a settlement converts discretionary authority into a mandatory duty, requires the government to spend funds Congress has not appropriated, or “limits the discretion” of an agency.<sup>46</sup> The general view is that the DOJ complies with this regulation.<sup>47</sup>

Under DOJ policy, if a consent decree results in “an action to enjoin discharges of pollutants,” then the DOJ must provide notice and an opportunity to comment.<sup>48</sup> The goal is for the

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41. See Kramer, *supra* note 23, at 325–26.

42. *Id.* at 325 (explaining that without a consent decree, parties are limited to normal contract law suits to enforce the agreement).

43. *Id.*

44. *Id.*

45. *Id.* at 325–26.

46. 28 C.F.R. § 0.160(d) (2012).

47. *Federal Consent Decree Fairness Act, and the Sunshine for Regulatory Decrees and Settlements Act of 2012: Hearing on H.R. 3041 and H.R. 3862 Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary, 112th Cong.* 111 (Feb. 3, 2012) (statement of John C. Cruden, President, Environmental Law Institute) [hereinafter Cruden] (stating that there are not any known examples of the DOJ ignoring these provisions).

48. 28 C.F.R. § 50.7(a) (2012).

DOJ to seek advice from the public about whether it should ask the court to enter the decree.<sup>49</sup> The DOJ must lodge the consent order with the court at least thirty days before the court enters judgment.<sup>50</sup> During this time period, the DOJ will receive and consider all comments and forward them on to the court.<sup>51</sup> The DOJ is free to amend—and sometimes does amend—the consent decree based on comments received.<sup>52</sup> The DOJ also reserves the right to oppose all attempts by third parties to intervene in the proposed consent decree to change its terms.<sup>53</sup> It is not explicit in the Code of Federal Regulations how the DOJ should give notice, but it appears that notice is published in the Federal Register.<sup>54</sup> “[E]njoin[ing] discharges of pollutants” seems to be interpreted broadly to include not just violations of the CWA and Clean Air Act (CAA), but also of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Resource Conservation and Recovery Act. This requirement does not apply to consent decrees unless they result in pollution enjoinderment.

Congress provided broader notice requirements for consent decrees relating to air pollution. Notice must be published in the Federal Register thirty days before a consent order “of any kind” that regards air pollution is finalized or filed with a court.<sup>55</sup> The agency or the Attorney General responsible for the consent decree must review all written comments and make changes if anything highlighted by the comments violates the federal air pollution statutes.<sup>56</sup> The language “of any kind” is important because notice must be provided even for

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49. *See id.*

50. 28 C.F.R. § 50.7(b).

51. *Id.*

52. *Id.*

53. *Id.*

54. A WestlawNext search shows that 28 C.F.R. § 50.7 is cited in the *Federal Register* over 3,800 times while granting notice to parties that the DOJ is about to enter a consent decree (search conducted Jan. 6, 2014). *See, e.g.*, Notice of Lodging Proposed Consent Decree, 78 Fed. Reg. 2283, 2283–84 (Jan. 10, 2013) (“In accordance with Departmental Policy, 28 CFR § 50.7, notice is hereby given that a proposed Consent Decree in *United States v. DMH Partners North, LLC, et al.*, Civil Action No. 12-cv-3203 (RHK/LIB), was lodged with the United States District Court for the District of Minnesota on January 2, 2013.”).

55. 42 U.S.C. § 7413(g) (2006).

56. *Id.*

institutional reform consent decrees, not just enjoinder actions. How this notice-and-comment rulemaking compares to traditional, informal rulemaking under the Administrative Procedure Act (APA) is discussed in Part III.

C. *Intervention Under Rule 24 and Joinder Under Rules 19 and 21*

Submitting comments is not the only means for third parties to affect consent decrees; they may also attempt to intervene. The right of third parties to intervene under Rule 24 of the Federal Rules of Civil Procedure includes the right to intervene in litigation and the right to intervene in motions for the court to enter a consent decree. The same legal standard applies in both circumstances.<sup>57</sup> There are two types of intervention: intervention of right and permissive intervention.

Under Rule 24(a), granted intervention of right has three requirements.<sup>58</sup> First, the party seeking to intervene must have “an interest relating to the property or transaction.”<sup>59</sup> Second, the party must be “so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest.”<sup>60</sup> Finally, the movant must show that his interest is otherwise not adequately represented.<sup>61</sup>

“[A] significantly protectable interest” satisfies the first requirement.<sup>62</sup> Miller and Wright’s treatise describes the interest requirement as broad and permissive.<sup>63</sup> The second requirement, that disposing of the action without the party would “as a practical matter impair or impede [the movant’s] ability to protect [his] interest,” allows for intervention even when the potential intervenor would not be legally bound by the decision.<sup>64</sup> In fact, the “stare decisis”<sup>65</sup> effect of rulings is

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57. See Kramer, *supra* note 23, at 322.

58. FED. R. CIV. P. 24(a).

59. *Id.*

60. *Id.*

61. *Id.*

62. Donaldson v. United States, 400 U.S. 517, 531 (1971).

63. 7C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1908.1 (3d. ed. 2012).

64. *Id.*

65. “The doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.” BLACK’S LAW DICTIONARY (9th ed. 2009).

sufficient to meet the second requirement.<sup>66</sup> Under the third requirement, the movant bears the burden of showing that “representation of his interest ‘may be’ inadequate.”<sup>67</sup> The burden for this requirement “should be treated as minimal.”<sup>68</sup> Essentially, the movant must establish that his rights are not fully represented unless he intervenes in the motion for a consent decree.<sup>69</sup> Intervention is required if the interests present are adverse to the party, or his interests are not represented at all, or his interests are inadequately represented.<sup>70</sup> If the movant’s interests are identical to those of a party, the presumption is toward adequacy of representation, and the movant bears the “minimal” burden of proof.<sup>71</sup>

There is also a timeliness requirement for intervention that is based on the circumstances. The court will consider:

[How long] the intervenor knew or reasonably should have known of his interest before he petitioned to intervene; prejudice to the existing parties due to failure to petition for intervention promptly; the prejudice the intervenor would suffer if not allowed to intervene; and the existence of unusual circumstances mitigating either for or against intervention.<sup>72</sup>

F.R.C.P. 24(b) establishes the standard for 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.

(2) *By a Government Officer or Agency*. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party’s claim or defense is based on: (A) a statute or executive order administered by the officer or

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66. See, e.g., *Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989); *United States v. Oregon*, 839 F.2d 635, 638 (9th Cir. 1988); *Oneida Indian Nation of Wis. v. New York*, 732 F.2d 261, 265 (2d Cir. 1984); *Corby Recreation, Inc. v. Gen. Elec. Co.*, 581 F.2d 175, 177 (8th Cir. 1978).

67. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972).

68. *Id.*

69. 7C WRIGHT & MILLER, *supra* note 63, § 1909 (“Adequacy of Representation”).

70. *Id.*

71. *Id.* (quoting *Trbovich*, 404 U.S. at 538 n.10).

72. 7C WRIGHT & MILLER, *supra* note 63, § 1916 n.11.

agency; or (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) *Delay or Prejudice*. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.<sup>73</sup>

The main difference between F.R.C.P. 24(a) and (b) is that (b) allows the court to deny a motion to intervene if it would "unduly delay or prejudice the adjudication of the original parties' rights." This means the court can consider that, whenever an intervention is granted, it will necessarily cause additional delays to the parties.<sup>74</sup> Thus, the court balances the requirement to provide a "just" and "speedy" determination against a proposed intervenor not being able to find adequate justice elsewhere.<sup>75</sup> For the most part, the "thrust of the [rule] is in the direction of allowing intervention liberally to governmental agencies and officers seeking to speak for the public interest . . ."<sup>76</sup>

F.R.C.P. 19 and 21 provide another way parties not included in a dispute may be granted the right to participate in the litigation. Rule 19 defines a required party as (A) a party that must be joined for the court to "accord complete relief among existing parties," or (B) a party whose ability to protect itself will be "impair[ed] or impede[d]" if not joined or who would be subject to multiple, inconsistent obligations.<sup>77</sup> If a party is a required party, the court must order that the party be joined to the suit.<sup>78</sup> Joinder may occur upon a party's motion or sua sponte by the court.<sup>79</sup>

The Supreme Court has provided guidance to joinder beyond that in the rules. The Court explained that "the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."<sup>80</sup> Furthermore, a goal of

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73. FED. R. CIV. P. 24(b).

74. 7C WRIGHT & MILLER, *supra* note 63, § 1913.

75. *Id.*

76. *Id.*

77. FED. R. CIV. P. 19(a)(1)(A)–(B).

78. FED. R. CIV. P. 19(a)(2).

79. FED. R. CIV. P. 21.

80. *United Mine Workers v. Gibbs*, 383 U.S. 715, 724 (1966).



the joinder rules is to aid in judicial administration and avoid duplicity of litigation.<sup>81</sup>

If a party does not intervene and is not joined until after the consent decree is entered, its options are severely limited.<sup>82</sup> Although a consent decree can substantially harm a third party by depriving it of property or liberty interests, and despite the likely associated due process and separation of powers concerns,<sup>83</sup> third parties harmed by consent decrees have very little, if any, redress if they fail to intervene or if their motion to intervene is denied.

All recommendations to provide third parties with broader rights to shape or block consent decrees—including lifting the collateral attack bar<sup>84</sup> and legislatively lowering the burden for

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81. 7 WRIGHT & MILLER, *supra* note 63, § 1602 (citing *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968)).

82. However, note that in at least one circumstance—hazard cleanup—states have the statutory right to intervene in consent decrees if they disagree with the remedial standard being imposed. 42 U.S.C. § 9621(f)(2)(3) (2006) (“If the State does not concur in such selection, and the State desires to have the remedial action conform to such standard, requirement, criteria, or limitation, the State shall intervene in the action under section 9606 of this title before entry of the consent decree, to seek to have the remedial action so conform. Such intervention shall be a matter of right.”).

83. There are valid arguments that suit-and-settlement violates a third party’s constitutional right to due process. See Charles J. Cooper, *The Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincer Movement on Due Process*, 1987 U. CHI. LEGAL F. 155; Douglas Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. CHI. LEGAL F. 103. But see Kramer, *supra* note 23, at 324. Furthermore, there are potentially valid separation of powers arguments that this sudden wave of consent decrees results in the judiciary entering a new role of policy making prohibited by the separation of powers. See *The Federal Consent Decree Fairness Act, and the Sunshine for Regulatory Decrees and Settlements Act of 2012: Hearing on H.R. 3041 and H.R. 3862 Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 47 (2012) (statement of Andrew M. Grossman, Visiting Legal Fellow, the Heritage Foundation) [hereinafter Grossman] (“It takes power from the people’s elected representatives and places it in the least accountable of the branches of government, the judiciary. Our federal courts are excellent at deciding the ‘cases and controversies’ to which their jurisdiction is limited under the Constitution. But the judiciary lacks the institutional competence, resources, and mandate to oversee institutions and make government policy.”); Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 STAN. L. REV. 203 (1987).

84. *Martin v. Wilks*, 490 U.S. 755 (1989) (holding that collateral attack of a consent decree is available to nonparties and nonprivies whose legal rights are affected thereby, reasoning that binding them to the decree was an impermissible exercise of

intervention of right<sup>85</sup>—have been brushed aside for three reasons. First, consent decrees substantially lower dispute resolution costs because they provide the same benefits as settlement with a much less costly enforcement mechanism (filing contempt charges instead of breach of contract litigation).<sup>86</sup> Second, if third parties are allowed to attack consent decrees after they have been entered, there will be no finality, and disputes could drag on indefinitely.<sup>87</sup> Third, a reason that relates specifically to institutional reform consent decrees, whatever harms are attributed to consent decrees are *allegedly* overcome by third parties being protected by and being able to challenge, under the Administrative Procedure Act, rulemakings that result from consent decrees.<sup>88</sup> The validity of this third reason will be discussed in Part III.

#### D. Modification

Despite limited opportunity for third parties to impact a consent decree, parties to the decree can modify it under F.R.C.P. 60.<sup>89</sup>

In *Rufo v. Inmates of Suffolk County Jail*,<sup>90</sup> the Supreme Court set forth a two-part test for modifying a consent decree stemming from institutional reform litigation.<sup>91</sup> First, modification requires

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personal jurisdiction); *Indiana Dep't of Env'tl. Mgmt. v. Conrad*, 614 N.E.2d 916, 922 n.2 (Ind. 1993) (“In this case, the [plaintiffs] did have adequate notice and knowledge of the environmental litigation which resulted in the Consent Decree. Moreover, we are not certain that the Supreme Court’s reasons for rejecting a collateral attack defense in the context of a civil rights consent decree would apply in the context of an environmental consent decree.” (internal citation omitted)).

85. See, e.g., *Sunshine for Regulatory Decrees and Settlements Act of 2012*, H.R. 3862, 112th Cong. § 2(b)(1)–(4) (2012); *Federal Consent Decree Fairness Act*, H.R. 3041, 112th Cong. § 3(a) (2011).

86. Cruden, *supra* note 47, at 110.

87. *Id.*

88. *Federal Consent Decree Fairness Act, and the Sunshine for Regulatory Decrees and Settlements Act of 2012: Hearing on H.R. 3041 and H.R. 3862 Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 105 (2012) (statement of Roger R. Martella, Jr., Sidley Austin LLP) [hereinafter Martella].

89. FED. R. CIV. P. 60; see also *United States v. Swift & Co.*, 286 U.S. 106, 114–15 (1932) (explaining that the consent decree is treated just like any other judgment for modification purposes).

90. 502 U.S. 367 (1992).

91. 11A WRIGHT & MILLER, *supra* note 63, § 2961. In addition to the two-part test in *Rufo*, it is important to note that judges entering consent decrees retain

a substantial change in either the law or factual circumstances that makes the modification necessary.<sup>92</sup> This is established when “the decree proves to be unworkable because of unforeseen obstacles, or when enforcement of the decree without modification would be detrimental to the public interest.”<sup>93</sup> A party, however, cannot rely on a change that was foreseeable when the consent decree was entered.<sup>94</sup> Second, the modification sought must be “suitably tailored” to resolve the new circumstances.<sup>95</sup> Primarily, courts modify consent decrees when there are changes in the operative facts or when there has been a change in law.<sup>96</sup> For example, in *Small v. Hunt*,<sup>97</sup> the original consent decree required a jail expansion to comply with the Constitution’s Eighth Amendment prohibition of cruel and unusual punishment.<sup>98</sup> While a new jail was being constructed, inmate population increased more quickly than the state had anticipated, causing the demand for prison space to outpace the agreement in the consent decree.<sup>99</sup> Given this change of fact and the suitably tailored nature of the proposed modification, the motion for modification was granted.<sup>100</sup>

More recently, in *Horne v. Flores*,<sup>101</sup> the Supreme Court again addressed the standard for modifying orders. The Court began its analysis of Rule 60 by highlighting some of the concerns with consent decrees, noting that public officials may not vigorously defend against institutional reform

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jurisdiction to modify the decrees under certain circumstances. *See* *Barcia v. Sitkin*, 367 F.3d 87, 94 (2d Cir. 2004) (“[T]he Consent Judgment stated that the District Court retained jurisdiction to, among other things, entertain any motion or application involving any alleged violation of the consent judgment’s terms, entertain any application involving the interpretation or implementation of any provision of the consent judgment, or entertain such other motions or applications that may be made regarding the consent judgment.” (internal quotation marks omitted)).

92. 11A WRIGHT & MILLER, *supra* note 63, § 2961.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. 98 F.3d 789 (4th Cir. 1996).

98. *Id.* at 792.

99. *Id.* at 792–93.

100. *Id.* at 799.

101. 557 U.S. 433 (2009).

litigation and may allow decrees to go beyond federal law.<sup>102</sup> The Court then emphasized that the modification standard should be flexible—a concern derived from the overbreadth of some consent decrees.<sup>103</sup>

## II. THE EFFECT OF SUE-AND-SETTLE ON ENVIRONMENTAL POLICY

Sue-and-settle arising from institutional reform litigation has become an important part of federal environmental policy. This Part discusses how sue-and-settle consent decrees generally function in the environmental context and how apathetic government regulators approach consent decrees. Then this Part provides five examples of the use of consent decrees in the environmental context.<sup>104</sup>

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102. *Id.* at 448 (citing Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295, 317 (1987); Horowitz, *supra* note 5, at 1294–95; ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* 170 (2003)).

103. *See id.* at 450.

104. Consent decrees also impact other aspects of natural resources law. For example, consent decrees have extended into the realm of the Endangered Species Act. Under the Act, the U.S. Fish and Wildlife Service (FWS) has specific listing requirements that it must meet whenever it receives a petition from citizens requesting that it add an animal to the list of endangered species. 16 U.S.C. § 1533 (2012). The Center for Biological Diversity and WildEarth Guardians sued the FWS for failing to meet requirements, and in May 2011, FWS entered into a consent decree with both. Press Release, U.S. Fish and Wildlife Serv., Fish and Wildlife Service Strengthens Work Plan to Restore Biological Priorities and Certainty to Endangered Species Listing Process (July 12, 2011), available at [http://www.fws.gov/endangered/improving\\_ESA/FWS%20Strengthens%20Work%20Plan%20Agreement%20NR%20Final%20July%202012,%202011.pdf](http://www.fws.gov/endangered/improving_ESA/FWS%20Strengthens%20Work%20Plan%20Agreement%20NR%20Final%20July%202012,%202011.pdf), [<http://perma.cc/0qmvkqyTasM>]. Under the consent decree, FWS is required to expedite its review process and make announcements on some 250 species. *Id.* The cost of listing these species can be astronomical on industry, agriculture, and recreation because of the significant restrictions placed on the habitats of endangered species. *See* Pat Parenteau & Dan Niedzwiecki, *Landmark Settlement Under the Endangered Species Act*, VERMONT LAW TOP 10 ENVTL. WATCH LIST 2013, <http://watchlist.vermontlaw.edu/esa-settlement/>, [<http://perma.cc/0n7hQm47V76>]. As with the other environmental law-specific consent decrees, states and third parties were excluded from the decisionmaking process.

A. *General Application to the Environmental Context and Regulator Incentives*

Congress and state legislatures pass environmental laws that include mandatory deadlines and quotas. Because of resource constraints, very few agencies are able to meet these standards by the dates imposed.<sup>105</sup> Thus, many agencies operate outside statutory limits by failing to meet deadlines.<sup>106</sup> In 1991, the EPA met only fourteen percent of the hundreds of deadlines imposed by Congress.<sup>107</sup> There is no evidence that these numbers have changed in recent years.<sup>108</sup> This exposes government agencies to legions of lawsuits by private parties seeking compliance.

In a typical case, an environmental advocacy group or other private entity sues a federal environmental agency, seeking an injunction to force the agency to comply with a specific interpretation of a statutory standard.<sup>109</sup> The government frequently agrees to settle the case to avoid litigation costs. The terms of the settlement usually include new dates and new deadlines by which the agency will comply with the statutory standard. The court enters a consent decree and the agency is bound to act to avoid contempt charges. The agency reallocates resources, making the terms of the consent decree its priority. This means that the new consent decree supersedes other priorities.<sup>110</sup> In some circumstances, the consent decree can

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105. Schoenbrod, *supra* note 27, at 42.

106. *Id.*

107. *Id.* (citing Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 *LAW & CONTEMP. PROBS.* 311, 324 (1991)). Basic principles of public choice explain why Congress bothers passing statutes without providing the resources necessary for them to be carried out. See, e.g., SANDLER & SCHOENBROD, *supra* note 102, at 20 ("I voted for that. You'd be crazy to be against that. When you are a member of Congress and you are voting a mandate and not providing the funds for it, the sky's the limit." (quoting former New York Mayor Edward I. Koch in Irvin Molotsky, *Koch Tells Fellow Mayors Reasons to Beware of Mandated Programs*, *N.Y. TIMES*, Jan. 25, 1980, at B3)).

108. See Schoenbrod, *supra* note 27, at 42.

109. Percival, *supra* note 25, at 327 ("These laws impose increasingly explicit duties on administrative agencies, and they authorize citizen suits against agency officials who fail to perform their statutory duties and against private parties who violate environmental regulations.").

110. Consent decrees fail to take account of the opportunity costs of alternative policies displaced by the consent decree. See *Endangered Species Act: Critical Habitat Issues: Hearing to Review Federal Regulations with Respect to Critical Habitat Designations Under the Endangered Species Act Before the Subcomm. On Fisheries,*

actually impose new substantive regulatory standards on an agency, not just the requirement to expedite.<sup>111</sup> And the compliance costs imposed on private businesses can differ greatly across states depending on the geographic locations and industry mix.

Government agencies have substantial incentives to embrace sue-and-settle consent decrees and liberally accept whatever terms environmental interest groups impose without objection.<sup>112</sup> These incentives derive from two sources. First, litigation is costly and time-consuming for government agencies, so any opportunity to settle a case and avoid litigation will decrease the workload and help the agency stay within its litigation budget.<sup>113</sup> Many times, “the hard work of manag[ing federal programs] often gets downstreamed to plaintiffs and federal district court judges who labor without advice from or the presence of the

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*Wildlife, and Water of the S. Comm. on on Env't & Pub. Works*, 108th Cong. 6–7 (2003), available at <http://www.fws.gov/laws/Testimony/displaytestimony.cfm?ID=150>, [<http://perma.cc/3VBS-ACD7>] (“Simply put, the listing and critical habitat program is now operated in a first to the courthouse mode, with each new court order taking its place at the end of an ever-lengthening line. We are no longer operating under a rational system that allows us to prioritize resources to address the most significant biological needs.”). The same text appears in the testimony of his successor, Julie MacDonald, eighteen months later. Field Oversight Hearing on Endangered Species Act: Hearing Before S. Comm. on Env't & Pub. Works, 108th Cong. (2004) (statement of Julie MacDonald, Deputy Assistant Sec'y for Fish and Wildlife and Parks, Dep't of Interior), [www.epw.senate.gov/hearing\\_statements.cfm?id=225434](http://www.epw.senate.gov/hearing_statements.cfm?id=225434), [<http://perma.cc/GY8B-N73J>]; see also *Illinois v. Costle*, 9 *Env'tl. L. Rep.* (Env'tl. Law Inst.) 20,243, 20,244 (D.D.C. January 3, 1979) (“The court cannot and should not ignore the fact that not only does EPA have other responsibilities in the regulatory area, but that it is presently under very exacting demands in other proceedings to accomplish its regulatory functions.”).

111. Martella, *supra* note 88, at 103 (explaining that consent decrees frequently include substantive provisions, such as the New Source Performance Standards consent decrees with the EPA).

112. Schoenbrod, *supra* note 27, at 41 (“At both the politically-appointed [sic] level and the career level, the agency welcomed the suit rather than [sic] fight it.”).

113. The opposite may be true for some of the lawyers working in a government agency under what public choice theory calls the “revolving door model.” See Lawrence G. Meyer, *Some Brief Reflections on Shadows, Mirrors and Revolving Doors: Case Selection at the Federal Trade Commission*, 46 *ANTITRUST L.J.* 575, 582 (1977). Under this model, lawyers want to litigate and bring big cases because experience translates into attractive compensation in the private sector after government service. See *id.*

expert federal agency.”<sup>114</sup> Agencies also avoid expending costly political capital when they enter consent decrees: traditional APA rulemaking results in publicity and public scrutiny, whereas consent decrees tend to receive much less attention, less public criticism, and less congressional oversight.

The second reason a government agency would accept sue-and-settle consent decrees is that it recognizes its tenure is limited and a subsequent administration can promptly overrule many policies or initiatives it worked to obtain. Thus, an agency has the incentive to enter sue-and-settle consent decrees that “dictate the policies of [its] successor.”<sup>115</sup> Professor (now Judge) Frank Easterbrook argues that liberal administrations will enter into consent decrees with litigants that want more stringent standards and conservatives will enter into consent decrees with the opposite.<sup>116</sup> To be clear, both environmental activists and business groups have used sue-and-settle in the past.<sup>117</sup> Regardless, political leaders of government agencies will use sue-and-settle to immortalize their mark on regulation—especially if their moment of direct influence is short lived.<sup>118</sup>

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114. ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* 135 (2003). For example, the Department of Education never made a court appearance regarding a consent decree litigation that “drove the special education programs in the largest school district in the country.” *Id.* at 135–36 (citing *Jose P. v. Ambach*, 557 F. Supp. 1230 (E.D.N.Y. 1983)). The Department of Education was not the defendant in the case; the litigation was between private litigants and a state agency that was implementing the Department of Education’s regulations. *Id.*

115. Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 34; see also Grossman, *supra* note 83, at 47 (“And as with consent decrees in institutional reform litigation, previous administrations have, in several instances, abused such consent decrees in an attempt to bind their successors and limit their policy discretion.”).

116. Easterbrook, *supra* note 115, at 33.

117. CHAMBER 2013, *supra* note 3, at 14 (“[O]ur research found that business groups have also taken advantage of the sue and settle approach to influence the outcome of EPA action. While advocacy groups have used sue and settle much more often in recent years, both interest groups and industry have taken advantage of the tactic.”).

118. An agency’s apathy may be inferred by its specific conduct in handling consent decrees, including the consent decrees discussed in Part III. The sheer number of consent decrees that agencies have entered into during the last three years alone implies some level of apathy. From 2009 to 2012, there have been 71 sue-and-settle lawsuits—a number that is higher than in any previous equivalent

B. *Specific Application to the Environmental Context*

This subsection provides specific examples of environmental consent decrees. These examples provide evidence that defendant agencies lack incentives to litigate as an adverse party against plaintiff environmental advocacy groups and opportunistically seek settlements instead.

1. *Toxics Consent Decree*

The classic example of an environmental sue-and-settle is the 1976 Toxics Consent Decree, the facts of which are highlighted in Part I.<sup>119</sup> The general point of this decree is that the EPA and the NRDC were able to change a legislative standard through a consent decree, but this decree also provides an example of a case where the agency was not actually adverse to the plaintiffs' suit.

It is possible to infer that the EPA welcomed or even encouraged the suit-and-settlement regarding the standards for toxic pollutants because the alternative was litigation and an easy victory for the plaintiffs given the statutory requirements. Professor Schoenbrod goes so far as to describe the agreement as "[t]he plaintiffs and EPA [coming] up with a solution."<sup>120</sup> The consent decree significantly broadened the EPA's authority and power. Twenty-eight of thirty former EPA lawyers asked said that the decision to approve the Toxics Consent Decree was the court decision that had the greatest impact on environmental regulation.<sup>121</sup> This sue-and-settle strategy continued to shape the EPA's water policy under the CWA for many years.<sup>122</sup> The EPA threw aside an existing federal statute and created new substantive standards without any congressional involvement.

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time period. CHAMBER 2013, *supra* note 3, at 12, 14. *Defenders of Wildlife v. Perciasepe* provides further potential evidence of agency apathy. 714 F.3d 1317, 1319–20 (D.C. Cir. 2013). In this case, the agency and environmental advocacy group filed and moved for a consent decree on the same day the suit was filed. *Id.*

119. *Natural Res. Def. Council, Inc. v. Train Nos. 2153-73, 75-172, 75-1698, 75-1287*, 1976 U.S. Dist. Lexis 14700 (D.D.C. June 9, 1976); *Natural Res. Def. Council, Inc. v. EPA*, 790 F.2d 289, 293 (3d Cir. 1986); Schoenbrod, *supra* note 27, at 41.

120. Schoenbrod, *supra* note 27, at 41.

121. Rosemary O'Leary, *The Courts and the EPA: The Amazing "Flannery Decision,"* 5 NAT. RESOURCES & ENV'T 18, 18 (1990).

122. *See Id.*



## 2. Regional Haze Consent Decrees

The CAA contains provisions that are designed to improve visibility in national parks and wilderness areas by decreasing pollution—a purely aesthetic goal unrelated to health.<sup>123</sup> These provisions are called the Regional Haze provisions.<sup>124</sup> One unique aspect of the Regional Haze requirements is that states are responsible for establishing and setting the standards.<sup>125</sup> Both the EPA and the courts have recognized that the States are the primary decisionmakers under these provisions.<sup>126</sup> The EPA retains the authority to veto a state plan for emission controls that was derived from a faulty process. This does not mean that the EPA is free to impose its own emissions standards to benefit visibility.<sup>127</sup>

In 2009, several environmental advocacy groups, including the Sierra Club and National Parks Conservation Association, sued the EPA for failing to effectively govern the States' emissions standards under the Regional Haze provisions.<sup>128</sup> Rather than litigate, the EPA settled and entered into five consent decrees for different national parks. The decrees required the EPA to review the state emissions standards by a certain date and, if a state's process for determining its own standards was inadequate, to implement its own emissions standards for the state.<sup>129</sup> Each of these decrees was entered without providing notice to the state.<sup>130</sup>

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123. *Mandate Madness: When Sue-and-Settle Just Isn't Enough: Hearing Before the Subcomm. on Tech., Info. Policy, Intergovernmental Relations and Procurement Reform of the H. Comm. on Oversight and Gov't Reform*, 112th Cong. 78 (2012) (statement of William Yeatman, Assistant Director of the Center for Energy and Environment, Competitive Enterprise Institute) [hereinafter Yeatman].

124. *Id.*

125. 42 U.S.C. § 7491(b)(2)(A) (2006) (requiring that all standards are to be “determined by the State”). The statutory history and floor statements further establish that it is the state that is the primary actor under the Regional Haze provisions of the CAA. Yeatman, *supra* note 123, at 78 n.6.

126. Yeatman, *supra* note 123, at 78.

127. *See id.*

128. *Id.* at 79.

129. *Id.*

130. *Id.* The five settlements are: Nat'l Parks Conservation Ass'n v. Jackson, No. 11-cv-01548 (D.D.C. Mar. 30, 2012), Sierra Club v. Jackson, No. 1:10-cv-02112-JEB (D.D.C. Oct. 3, 2011), WildEarth Guardians v. Jackson, Nos. 11-CV-00001-CMA-MEH, 1:11-cv-00743-CMA-MEH, 2011 WL 4485964 (D. Col. Sept. 27, 2011),

After entering the consent decrees, the EPA found very creative ways to reject the state implementation plans and then concluded that it was legally required by court order (the consent decrees) to establish its own federally implemented emissions standards. For example, the EPA rejected New Mexico's plan because New Mexico submitted its plan to the EPA only one month before the EPA had to either approve the state plan or impose its own standards under the consent decree.<sup>131</sup> Thus, the consent decree imposed a deadline on the EPA, which it in turn used to reject a state plan for procedural reasons even though the state was not a party to the consent decree and was not bound to act under it.

In North Dakota, the EPA was even more inventive. The EPA also rejected North Dakota's proposal, again claiming that it had inadequate time to review it.<sup>132</sup> This time, the EPA reasoned that it needed twelve months to determine whether a state plan was adequate under the CAA and that by the time the EPA would be able to make this determination, the deadline would have passed.<sup>133</sup> The EPA thus rejected the state plan and imposed its own standards instead.<sup>134</sup>

### 3. Florida Water Pollution Consent Decree

The goal of the Clean Water Act was to eliminate "the discharge of pollutants into the navigable waters" by 1985.<sup>135</sup> The States held the primary responsibility for meeting these standards. If a state failed to meet the standards, the EPA could step in and establish new standards for the state.<sup>136</sup> In 1998, after years of alleged failure, the EPA made a determination that Florida's standards—non-numeric standards, called

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WildEarth Guardians v. Jackson, No. 1:10-cv-01218-REB-BNB (D. Col. Oct. 28, 2010), and WildEarth Guardians v. Jackson, No. 4:09-CV-02453-CW (N.D. Cal. Feb. 18, 2010). Yeatman, *supra* note 123, at 83 n.16.

131. See WILLIAM YEATMAN, U.S. CHAMBER OF COMMERCE, EPA'S NEW REGULATORY FRONT: REGIONAL HAZE AND THE TAKEOVER OF STATE PROGRAMS 10 n.14 (2012), available at [http://www.uschamber.com/sites/default/files/reports/1207\\_ETRA\\_HazeReport\\_lr.pdf](http://www.uschamber.com/sites/default/files/reports/1207_ETRA_HazeReport_lr.pdf), [<http://perma.cc/EQ4E-H9E3>].

132. See *id.* at 6.

133. See *id.* at 10 n.14.

134. *Id.*

135. 33 U.S.C. § 1251(a)(1) (2006).

136. See *id.* § 1313(c)(4).

narrative standards—were inadequate and encouraged Florida to implement numeric standards by the end of 2003. Florida did not do this, and the Florida Wildlife Federation, the Sierra Club, and other plaintiffs sued the EPA administrator for failing to ensure that Florida imposed numeric standards.<sup>137</sup> The authority to sue derived from the citizen suit provisions of the CWA.<sup>138</sup> The plaintiffs argued that the 1998 determination imposed a nondiscretionary duty on the EPA.<sup>139</sup> The EPA alleged, in its motion for summary judgment, that the 1998 statement did not give rise to a nondiscretionary duty, consequently preventing the court's jurisdiction.<sup>140</sup> Thus, the principal issue of the litigation was whether the 1998 EPA statement imposed a nondiscretionary duty on the EPA.

The litigation, however, took an interesting turn. In early 2009, the EPA issued a new and explicit determination that Florida's pollution standards were deficient and had to be remedied through numeric standards (2009 Determination)—a determination that the EPA classified as creating a nondiscretionary duty to create particular Florida-imposed numeric standards.<sup>141</sup> Shortly thereafter, the EPA abandoned its argument that it was not bound by the 1998 statement, settled with the plaintiffs under the 2009 Determination in August, and moved for the entry of a consent decree.<sup>142</sup> The terms of the consent decree required the EPA to propose and adopt new standards within ten months after the decree was entered.<sup>143</sup> The consent decree did allow the state to create the standards so long as the state proposed standards within the consent decree's strict deadline and met the 2009 Determination's numeric requirement.<sup>144</sup> The consent order was entered absent state involvement and without regard to the intervenors'

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137. See Complaint for Declaratory & Injunctive Relief at paras. 1–2, Fla. Wildlife Fed'n, Inc. v. Johnson, No. 4:08CV00324 (N.D. Fla. 2008), 2008 WL 4076436.

138. See 33 U.S.C. § 1365(a)(2).

139. See Complaint for Declaratory & Injunctive Relief, *supra* note 137, para. 2.

140. EPA's Motion for Summary Judgment and Incorporated Memorandum of Law at \*7, Fla. Wildlife Fed'n, No. 4:08CV00324 (N.D. Fla. Feb. 27, 2009), 2009 WL 1248302.

141. See Fla. Wildlife Fed'n, 2009 WL 5217062 at \*2 (N.D. Fla. Dec. 30, 2009).

142. *Id.* at \*3.

143. See *id.*

144. See *id.*

attempts to object<sup>145</sup>—a topic discussed at greater length in Part III. This agreement again shows that the EPA does not necessarily strongly oppose these institutional reform suits, and may even welcome them.

#### 4. Greenhouse Gas Consent Decree

In 2008, several advocacy groups (including the American Nurses Association and the Chesapeake Bay Foundation, Inc.) sued the EPA for failing to set greenhouse gas emissions standards for power plants as allegedly required by the CAA.<sup>146</sup> Once again, the question was whether the EPA had a nondiscretionary duty to set the standards.<sup>147</sup>

The Federal District Court for the District of Columbia granted one industry group (Utility Air Regulatory Group) leave to intervene in the litigation, but the EPA and the plaintiffs settled the suit and moved for the entry of a consent decree without consulting the intervenor.<sup>148</sup> The proposed consent decree required the EPA to propose a rule setting emissions standards for power plants in less than a year and then to enter the final rule eight months after that.<sup>149</sup> The intervenor objected to the proposed decree because it was not consulted and because the proposed timeframes were too short for the EPA to issue quality regulations.<sup>150</sup> The court rejected both of these contentions and entered the consent decree.<sup>151</sup> After the proposed rule was issued, the intervenor filed a motion to modify the consent decree pursuant to Rule 60(b)(5).<sup>152</sup> Twenty-five states and the territory of Guam filed a brief supporting the intervenor's motion to modify the decree.<sup>153</sup> The court has still not ruled on

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145. See *id.* at \*6; Ross, *supra* note 19, at 96.

146. Grossman, *supra* note 83, at 56.

147. See *Am. Nurses Ass'n v. Jackson*, No. 08-2198 (RMC), 2010 WL 1506913, at \*1 (D.D.C. Apr. 15, 2010).

148. *Id.*

149. Grossman, *supra* note 83, at 56.

150. See *Am. Nurses Ass'n*, 2010 WL 1506913, at \*1.

151. *Id.* at \*2.

152. See Grossman, *supra* note 83, at 58.

153. Brief of the states of Michigan et al. as Amici Curiae in Support of Defendant-Intervenor Utility Air Regulatory Group's Motion for Equitable Relief from Judgment or Order Pursuant to Fed. R. Civ. P. 60(b)(5), *Am. Nurses Ass'n*,

the motion, but the EPA proceeded anyway and issued a final rule in December 2011.<sup>154</sup>

Throughout the litigation, the EPA's position seemed to be aligned with the plaintiffs' and completely opposed to the intervenor's. The EPA's stance is evident from the parties' refusal to include the intervenor in the settlement discussion—in fact, there was no consultation with the intervenor until the parties had filed their motion to enter the settlement as a consent decree.<sup>155</sup> The plaintiffs and the EPA went to great lengths to argue that the intervenor had no right to participate in the consent decree, an argument that was ultimately successful before the D.C. District Court.<sup>156</sup> Furthermore, the EPA entered into an agreement that imposed an onerous burden on itself to propose and finalize rules at a rapid pace, regardless of the likelihood of error<sup>157</sup> and the costs required to complete the action.<sup>158</sup>

#### 5. EME Homer City Generation, L.P. v. EPA

*EME Homer City Generation, L.P. v. EPA*<sup>159</sup> highlights a recent EPA action that may substantially change the landscape of cooperative federalism. This case stems from the “good neighbor” provision of the CAA.<sup>160</sup> Under the good neighbor provision, states are required to implement their own plans to prevent excessive pollution from crossing state lines.<sup>161</sup> In this circumstance, the EPA issued a new emission standard under the provision and simultaneously issued its FIP without providing the States their statutory right to first attempt to implement their own plans to meet the new

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No. 08-2198 (RMC) (D.D.C. Oct 10, 2011) [hereinafter States Brief to Modify *Am. Nurses Ass'n v. Jackson*].

154. Grossman, *supra* note 83, at 58.

155. *Am. Nurses Ass'n*, 2010 WL 1506913, at \*1.

156. *See id.* at \*2.

157. As will be discussed in the next Part, when agencies hastily enter consent decrees imposing onerous time restraints, the outcome is typically low-quality regulations. *See infra* Part III.F.

158. *See* Easterbrook, *supra* note 115, at 33–34.

159. 696 F.3d 7 (D.C. Cir. 2012), *cert. granted in part*, 133 S. Ct. 2857 (2013).

160. *See id.* at 11.

161. *Id.*; *see also* 42 U.S.C. §§ 7407(a), 7410(a)(1) (2006).

standards.<sup>162</sup> The D.C. Circuit found that this was contrary to statute, vacated the FIPs, and vacated the new standards on other grounds.<sup>163</sup> The EPA appealed, and the case will be argued during the Supreme Court's October term.<sup>164</sup> Although potentially drastic, the full impact of the EPA's actions is not the purpose of this paper; thus, this Part only discusses how the disposition of this case may impact consent decrees. That impact may be substantial. If the Supreme Court agrees with the D.C. Circuit that the EPA may not issue a FIP before providing the States the opportunity to implement a plan, then the impact will be minimal. If, however, the Supreme Court allows the EPA to issue FIPs before giving States their own opportunity to come up with a plan, there will be a substantial change in the consent decree landscape.

Allowing FIPs before the States have the opportunity to implement their own plans broadens the scope of permissible consent decrees and increases the likelihood of abuse. Suppose an advocacy group is displeased with permissible levels of pollution. The advocacy group then sues the EPA for failing to meet some statutory standard. Under the current law, the advocacy group could get the EPA to agree to set new standards on a truncated timeframe or even set new standards in the consent decree. Then the States would be charged with entering the standards derived from the decree.<sup>165</sup> Currently, if a state fails to implement the plan, the advocacy group cannot sue the EPA to enter a FIP until the state has had adequate time under the relevant statute (usually three years)<sup>166</sup> to implement its own plan.

Contrast this timeline with what would occur if the D.C. Circuit is reversed in *Homer City*. The terms of a consent decree could require the EPA to enter a new standard and simultaneously establish a FIP—never giving the States an opportunity to implement the new standard. Consent decrees

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162. *EME Homer City Generation, L.P.*, 696 F.3d at 11–12. There were other issues decided by the D.C. Circuit that are also being reviewed by the Supreme Court, but the other issues are not important to consent decrees.

163. *Id.* at 28, 38.

164. See Order Granting Motion for Divided Argument, *EPA v. EME Homer City Generation*, No. 12-1187 (2013), available at [www.supremecourt.gov/qp/12-01182qp.pdf](http://www.supremecourt.gov/qp/12-01182qp.pdf), [<http://perma.cc/UWP5-8D3Q>].

165. See, e.g., 42 U.S.C. § 7410(c).

166. See *id.* § 7410(a)(1).

already diminish a state's ability to impact standards. A reversal of the D.C. Circuit's decision would entirely shut out the States from their statutory right to implement standards. This scenario does rely on the assumption that the EPA would enter a decree that eliminates the opportunity for states to implement standards. But this assumption is certainly plausible, given that the EPA has already done so in *Homer City* without the added incentive of ending litigation and appeasing an advocacy group.

The cases discussed in this Part illustrate the potential sea change in administrative law and environmental policy should the trend of sue-and-settle be allowed to continue. Indeed, it is possible that all cooperation could be removed from the concept of cooperative federalism.

### III. THE NEGATIVE IMPACT OF SUE-AND-SETTLE ON COOPERATIVE FEDERALISM

As discussed above, there are many readily apparent problems with suit-and-settlement—including its constitutional implications.<sup>167</sup> Within the environmental context, however, the question remains: What are consent decrees doing to principles of federalism? First, this Part briefly summarizes the arguments of Professors Jonathan H. Adler, Henry N. Butler, and Jonathan R. Macey<sup>168</sup> that strong principles of federalism improve the quality and efficiency of environmental policy. Second, this Part discusses how consent decrees diminish state involvement in environmental policy. Finally, this Part provides anecdotal evidence of how consent decrees have led to inefficient and low-quality environmental policy.

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167. See *supra* note 83.

168. The reason for brevity here is that others have fully elaborated and argued this issue. See HENRY N. BUTLER & JONATHAN R. MACEY, *USING FEDERALISM TO IMPROVE ENVIRONMENTAL POLICY* (1996); Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377 (2005); Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130 (2005); Adler, *supra* note 2, Butler & Macey, *supra* note 22, at 25; see also Henry N. Butler, *A Defense of Common Law Environmentalism: The Discovery of Better Environmental Policy*, 58 CASE W. RES. L. REV. 705 (2008).

A. *Federalism Can Improve Environmental Policy*

Many environmentalists in the early years of the federal environmental law favored a centralized approach to environmental policy. One reason was a concern that the states would engage in a “race to the bottom” of environmental quality. Growing dissatisfaction with the centralized command-and-control policies, however, eventually led some scholars to question the reliance on top-down regulation.<sup>169</sup> Scholars began to recognize that federalism could be used to improve the environmental policy.<sup>170</sup> Strong federalism in the environmental context promotes superior environmental policy because it makes possible compliance with what economists call the matching principle. The matching principle states that “the size of the geographic area affected by a specific pollution source should determine the appropriate governmental level for responding to the pollution.”<sup>171</sup> The principle implies that whenever pollution, or the effects of pollution, is limited to a single state, there is little—if any—justification for federal regulation.<sup>172</sup> This also implies that the more authority states are given to determine environmental policy when the pollution is solely intrastate, the better the environmental policy.

Applying the matching principle can improve environmental policy in three ways. First, it allows each state to experiment with different ways of regulating pollution.<sup>173</sup> This dynamic process allows the States to adopt effective policies and quickly amend or reverse ineffective policies. Second, decentralized decisionmaking can be more efficient than a centralized environmental policy, which prompts lobbying and allows environmental advocacy groups to dominate policymaking, ignoring economic consequences at the state and local levels.<sup>174</sup> Third, application of the matching principle can create jurisdictional competition, resulting in higher-quality regulation.<sup>175</sup>

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169. See, e.g., Richard B. Stewart, *Models for Environmental Regulation: Central Planning Versus Market-Based Approaches*, 19 B.C. ENVTL. AFF. L. REV. 547 (1992).

170. See, e.g., Butler & Macey, *supra* note 22; Revesz, *supra* note 21.

171. Butler & Macey, *supra* note 22, at 25.

172. *Id.*

173. *Id.* at 28.

174. *Id.*

175. *Id.* at 31.



The current structure of environmental law in the United States does not follow the matching principle.<sup>176</sup> Many federal programs are contrary to these principles, including the CAA, CWA, and CERCLA.<sup>177</sup> This aside, the U.S. framework for environmental regulation does exhibit some matching principle elements. In particular, the statutory schemes for the various environmental laws frequently give states authority for regulation ranging from “primary enforcement responsibility” to authority with federal approval.<sup>178</sup> Regardless of the level of authority, federal review is usually required before federal funding is provided.<sup>179</sup> The CWA, CAA, CERCLA, and others expressly require that states be involved in formulating regulatory policy.<sup>180</sup> For example, the CAA requires the state to establish a state implementation plan to address air pollution and limits the EPA’s enforcement authority to circumstances when the state has violated the CAA and has not remedied the violation in an adequate timeframe with a new state plan.<sup>181</sup> Furthermore, states enjoy an indirect role in federal notice-and-comment rulemakings, where they can provide influential guidance for regulators. This guidance is given when a state

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176. *See id.* at 27 (“We conclude that, in every area of pollution, environmental regulation has been centralized beyond any possible justification, resulting in tremendous costs.”).

177. *Id.* at 54–65 (explaining that the matching principle and principles of federalism are violated by the federal government’s approach to air, water, and land pollution).

178. Hubert H. Humphrey III & LeRoy C. Paddock, *The Federal and State Roles in Environmental Enforcement: A Proposal for a More Effective and More Efficient Relationship*, 14 HARV. ENVTL. L. REV. 7, 13 (1990).

179. *Id.*

180. *See, e.g.*, 33 U.S.C. § 1296 (2006) (Under the CWA, “the determination of the priority to be given each category of projects . . . within each State shall be made solely by that State, except that if the Administrator, after a public hearing, determines that a specific project will not result in compliance with the enforceable requirements of this chapter, such project shall be removed from the State’s priority list and such State shall submit a revised priority list.”); 42 U.S.C. § 9621(f) (2006) (providing an entire section on the lengths and means of state involvement); 42 U.S.C. § 9628 (2006) (providing that under CERCLA, state response programs are entitled to federal funding and support so long as they meet certain requirements set forth in the statute).

181. 42 U.S.C. § 7401(b)(3) (“The purpose[] of [the CAA is] . . . to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs . . . .”); 42 U.S.C. § 7410(a)(1).

submits comments to federal regulators regarding rules that will impact the state.

1. *Sue-and-Settle Undermines the Principles of Federalism That Currently Exist in the United States*

A major problem with the current use of sue-and-settle in the environmental context is that consent decrees undermine those aspects of U.S. environmental law that support federalism and the rational allocation of regulatory authority consistent with the matching principle. First, sue-and-settle consent decrees are used to circumvent statutorily created state roles in federal environmental policy. Second, and more central, sue-and-settle consent decrees eliminate state involvement in the normal regulatory notice-and-comment process. Supporters of sue-and-settle contend that the doctrines of intervenor and modification, and the APA's procedures permitting challenges to final rules, serve as sufficient substitutes to ordinary notice-and-comment rulemaking.<sup>182</sup> This is not true in practice.

2. *Sue-and-Settle Diminishes the States' Granted Role in Setting Environmental Standards and Regulations*

The Introduction described the procedure by which FIPs, resulting from sue-and-settle consent decrees, supplement state implementation plans. Recall that advocacy groups sue the EPA or other agencies when the state misses statutory deadlines *or* when the EPA itself allegedly fails to meet statutory requirements.<sup>183</sup> The resulting settlements and consent decrees require the agency to enter FIPs if a state fails to meet the timeframe or the standards set in the consent decree. This occurred in each of the consent decrees discussed in Part II; however, it was especially troubling in the Regional Haze consent decrees.

In the five Regional Haze consent decrees, the EPA settled suits with environmental advocacy groups that imposed new deadlines for the states to present their new emissions standards. The Regional Haze provisions of the CAA, however, give states primary authority over setting standards with the

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182. See Cruden, *supra* note 47, at 69–72.

183. See *supra* notes 5, 6, and accompanying text.

sole goal of improving aesthetics. The EPA was allowed to implement a FIP only if the state implementation plan failed to “satisfy minimum criteria,” which were set by the EPA Administrator and essentially required a demonstration of adequate process in the state’s proposal.<sup>184</sup> After the consent decrees, the EPA reasoned that failure to provide the EPA adequate time to review the state plans before the deadlines constituted insufficient process; then the EPA issued FIPs, contravening section 7491 of the CAA.<sup>185</sup>

3. *Sue-and-Settle Consent Decrees Usurp the States’ Role in Federal Rulemaking*

Sue-and-settle is also used to prevent states from participating in the rulemaking process established by the APA.<sup>186</sup> Normally, whenever the EPA chooses to implement a new or amended standard, rule, or deadline, it must proceed through notice-and-comment rulemaking.<sup>187</sup> Yet, through sue-and-settle consent decrees, the EPA is able to implement new, legally binding rules and deadlines with the force of law. Sometimes, consent decrees impose new deadlines that force the EPA to issue new rules on a truncated timeframe that it otherwise would not have issued so quickly, if at all. The States benefit from normal notice-and-comment rulemaking because they may submit comments, and the EPA must address the States’ concerns by either implementing the proposed changes or explaining why it is not using them.<sup>188</sup> If the EPA proceeds without adequately addressing the comments, a state may sue the EPA under section 706 of the APA because the EPA acted arbitrarily and capriciously.<sup>189</sup>

The Toxics Consent Decree provides an excellent example of how sue-and-settle has removed the States’ right to participate in standard-setting under the APA. Recall that in the original sue-and-settle consent decree, the environmental advocacy

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184. 42 U.S.C. §§ 7410(c)(1)(A), (k)(1)(A) (2006).

185. *Id.* § 7491.

186. 5 U.S.C. § 553 (2012).

187. *Id.*

188. *Id.*

189. 5 U.S.C. § 706. *See also* *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (1997).

groups and the EPA agreed to set standards for toxic pollutants based on “feasibility” instead of “fully protected public health,” a standard that the EPA found too onerous to meet.<sup>190</sup> Not only did the consent decree change the statute, it also changed the standard on which the States could have commented if they had proceeded to rulemaking.<sup>191</sup> The decree also limited the grounds on which the States could challenge a final rule in court. Challengers now had to show that the EPA’s actions were arbitrary and capricious in meeting the “feasibility” standard instead of arbitrary and capricious in meeting the “fully protected public health” standard.

The *American Nurses* settlement provides an example where a sue-and-settle consent decree was used to impose unrealistic deadlines that indirectly harmed the States’ interest in participating in federal rulemaking.<sup>192</sup> There, the consent decree required the EPA to propose new rules for greenhouse gas emissions in less than a year and then to finalize the rule less than eight months after that. States were not directly cut out of the notice-and-comment rulemaking because the EPA still went through the rulemaking process. Yet, the truncated timeframe resulted in each comment receiving less consideration than it normally would. The EPA received over 20,000 comments for the rulemaking, 500 of which were technical in nature. It was impossible for the EPA to get through all the comments, give the state comments appropriate weight, and implement a high-quality rule.<sup>193</sup> In fact, the

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190. Schoenbrod, *supra* note 27, at 41.

191. A similar situation occurred in the Greenhouse Gases Performance Standards consent decree that derived from *Massachusetts v. EPA*, 549 U.S. 497 (2007), which held that an agency’s refusal to institute a rulemaking proceeding regarding tailpipe emissions was reviewable and remanding to the EPA to reconsider standards. The resulting consent decree imposed a schedule for creating new regulations and imposed a requirement for the EPA to enter into its “first ever New Source Performance Standards for greenhouse gases.” Martella, *supra* note 88, at 28. See generally EPA’s & Sierra Club’s Lodging of Settlement & Motion to Sever & Hold Case in Abeyance, *Sierra Club v. EPA*, No. 09-1041 (D.C. Cir. Sept. 10, 2010), available at <http://www.epa.gov/airquality/cps/pdfs/boilerghgsettlement.pdf>, [<http://perma.cc/0znZiNsPqqn>]. The decision to impose the standards on both new and existing greenhouse gas emitters constitutes a substantive decision that normally could not have been made absent notice-and-comment rulemaking. See Martella, *supra* note 88, at 28.

192. See *supra* Part II.B.4.

193. Grossman, *supra* note 83, at 56–58.

proposed and final rules were so full of serious errors that the Federal Energy Regulatory Commission and twenty-five states sought to intervene in the case to correct the errors after the final rule was imposed.<sup>194</sup>

Proponents of sue-and-settle consent decrees and the resulting administrative efficiencies argue that harms to states from missing certain rulemaking opportunities are nullified by four procedural remedies. Specifically, (a) the federal government announces and receives comments on a proposed settlement before the consent decree is finalized; (b) states can intervene under F.R.C.P. 24 and assert their interest in the underlying consent decree litigation; (c) consent decrees can be modified to remedy problems under F.R.C.P. 60(b); and (d) states can sue the agency in federal court and challenge the final rule under the APA.<sup>195</sup> But none of these substitutes remedy the concern that consent decrees remove states and others with substantial interests in federal regulations from essential determinations.

#### *B. Allowing Comments Is Ineffective*

Allowing comments on a sue-and-settle consent decree is not an adequate substitute for normal notice-and-comment rulemaking. First and foremost, when the EPA receives public comments on proposed decrees, the EPA “rarely alters the consent agreement—even after it receives adverse comments.”<sup>196</sup> A big difference between commenting on a consent decree and commenting on a proposed rule is that courts entertain suits from interested parties when an agency disregards significant comments on a final rulemaking under the APA, but there is no indication that courts entertain similar suits when an agency ignores comments on a proposed consent decree.<sup>197</sup> Thus, there is little or no check on an agency that disregards comments on a proposed consent decree.

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194. *Id.* at 57–58.

195. See Cruden, *supra* note 47, at 69–72.

196. CHAMBER 2013, *supra* note 3, at 24.

197. Under § 553(c) of the APA, agencies “must respond to those ‘comments which, if true, . . . would require a change in the proposed rule.’” *La. Fed. Land Bank Ass’n, FLCA v. Farm Credit Admin.*, 336 F.3d 1075, 1080 (D.C. Cir. 2003) (quoting *Am. Mining Cong. v. EPA*, 907 F.2d 1179, 1188 (D.C. Cir. 1990)). In

It is especially troubling if, by some rare chance, the consent decree usurps the rulemaking altogether,<sup>198</sup> because the procedures required for an agency to enter into a consent decree are different from the procedures to issue a final agency rule. As elaborated in Part I, the comment period is only thirty days, and it follows an agency's decision to enter the settlement as a decree—after which the court is free to enter a decree.<sup>199</sup> In contrast, agency rulemaking is a very onerous process.<sup>200</sup> The comment period is sixty days, but this is step six of nine complicated steps.<sup>201</sup> After the comment period, the agency assesses all the comments, makes necessary changes, and may even resubmit a new proposal for public comment.<sup>202</sup>

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*Federal Land Bank Ass'n*, the D.C. Circuit remanded the administrative rule back to the agency for further proceedings. *Id.* In contrast, 28 C.F.R. §§ 0.160 and 50.7(b), which require comments for proposed consent decrees, do not expressly require the agency to consider all significant comments and the authors are unaware of a court ever entertaining a suit where a party alleges that an agency ignored comments before entering a consent decree. *See United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 841 (8th Cir. 2009) (explaining that under 28 C.F.R. 50.7(b) the DOJ only needs to forward the comments to the court and the court “can consider these comments” in determining if the consent decree is fair, reasonable, and adequate).

198. A potential example of this would be the Toxics Consent Decree, where the terms of the decree itself set new standards. *Natural Res. Def. Council, Inc. v. Train Nos. 2153-73, 75-172, 75-1698, 75-1287*, 1976 U.S. Dist. Lexis 14700 (D.D.C. June 9, 1976). Although this was actually usurping statutory language and not just the rulemaking process, it is feasible that the same could be done to eliminate the rulemaking process. At a minimum, some of the consent decrees can truncate rulemaking to the extent that it is ineffective. *See Defendant-Intervenor Utility Air Regulatory Group's Motion for Equitable Relief from Judgment or Order Pursuant to Fed. R. Civ. P. 60(b)(5) at 11–12, Am. Nurses Ass'n v. Jackson*, No. 08-2198 (RMC) (D.D.C. Oct. 7, 2011) [hereinafter *UARG's Motion for Equitable Relief*], available at [http://op.bna.com/env.nsf/id/jsml-8mjnu9/\\$File/utilmact.uarg.pdf](http://op.bna.com/env.nsf/id/jsml-8mjnu9/$File/utilmact.uarg.pdf), [<http://perma.cc/NY3B-BR56>].

199. 28 C.F.R. § 50.7(b).

200. *See, e.g., The Reg Map: Informal Rulemaking*, OFFICE OF INFORMATION AND REGULATORY AFFAIRS (2003), <http://www.reginfo.gov/public/reginfo/Regmap/regmap.pdf>, [<http://perma.cc/MB99-U643>].

201. The nine steps are initiating events, determining whether a rule is needed, preparing the proposed rule, obtaining Office of Management and Budget (OMB) approval, publishing the proposal, receiving public comments, preparing the final rule, receiving OMB review of the final rule, and publishing the rule. *Id.*

202. *Id.*; *see also Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 533 (D.C. Cir. 1982) (“An agency adopting final rules that differ from its proposed rules is required to renounce when the changes are so major that the original notice did not adequately frame the subjects for discussion.”).

Afterward, the Office of Management and Budget must approve the rule before it is published.<sup>203</sup> Consequently, the thought and effort an agency puts into comments received for a rulemaking are not even remotely comparable to the thought and effort it puts into comments received for proposed consent decrees. It is no wonder that agencies prefer a regime where they can simply ignore comments.

### C. *State Intervention Is Thwarted*

Intervening under Rule 24 is *not* an adequate substitute for states seeking to regain rights lost by consent decrees. Sandler and Schoenbrod explain the likely fate of intervenors:

People . . . who learn that they may be hurt by a decree often find that the courthouse door is shut in their faces. Intervenors threaten the power of the controlling group and make it less likely that controversies can be settled by consent. The antipathy of those already in the case means that trying to intervene can be expensive. Many of those harmed by the decree do not even try. Those that do try often find that their request is denied, typically on the ground that they should have sought admission earlier.<sup>204</sup>

Furthermore, judges and existing parties have an interest in preventing intervenors from joining the suit.<sup>205</sup> Judges are likely to deny motions to intervene because an intervenor threatens to impose a large obstacle to a case that was about to settle and be removed from the judge's already overcrowded docket.<sup>206</sup> Although parties attempting to intervene and block consent decrees are likely able to satisfy the three elements imposed by Rule 24,<sup>207</sup> the overarching requirement of timeliness is a difficult obstacle for these intervenors to overcome, especially for skeptical judges. For suits between federal agencies and environmental advocacy groups, the federal government does not publish notice of the suit in the Federal Register until the government has already settled the

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203. *The Reg Map: Informal Rulemaking*, *supra* note 200.

204. SANDLER & SCHOENBROD, *supra* note 102, at 133 (citing Cooper, *supra* note 83, at 156 n.4; Harris v. Reeves, 946 F.2d 214 (3d Cir. 1991)).

205. SANDLER & SCHOENBROD, *supra* note 102, at 133.

206. *See id.* at 134.

207. *See supra* Part I.C.

case and is moving to have the settlement entered as a consent decree.<sup>208</sup> At this point, the case is likely very mature, having gone through discovery and other onerous litigation processes,<sup>209</sup> and a court is likely to deny the motion to intervene because granting the motion would prejudice those other parties that had already undertaken costly tasks.<sup>210</sup>

Even when the right to intervene is granted, a court is unlikely to be sympathetic to a state intervenor seeking to block a consent decree. Recall that, in *American Nurses Association v. Jackson*, the court allowed one party to intervene in the action but then rejected all its attempts to modify the settlement and entered the consent decree.<sup>211</sup> The court dismissed the intervenor's motion without really considering the validity of the argument, citing the Supreme Court's holding that "an intervenor is entitled to . . . have its objections heard at the hearings on whether to approve a consent decree, [but] it does not have power to block the decree merely by withholding its consent."<sup>212</sup>

#### D. Modification Is Not a Serious Option

States seeking to modify a consent decree under Rule 60(b) face severe obstacles. First, a state must be a party to the suit in order to move to modify a consent decree.<sup>213</sup> This will only

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208. See *supra* Part I.B.

209. SANDLER & SCHOENBROD, *supra* note 102, at 134.

210. WRIGHT & MILLER, *supra* note 63, at § 1916; see also, e.g., *Culbreath v. Dukakis*, 630 F.2d 15, 20 (1st Cir. 1980); *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264–66 (5th Cir. 1977). Also note that for many of these same reasons, the existing parties to the suit will be as adamantly opposed to allowing a party to intervene. Existing parties have borne the costs of litigation and settlement and are ready to conclude the case; an intervenor is an obstacle to that goal.

211. No. 08-2198 (RMC), 2010 WL 1506913, (D.D.C. Apr. 15, 2010).

212. *Id.* at \*2 (quoting *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986)); see also *Fla. Wildlife Fed'n, Inc. v. Johnson*, No. 4:08CV00324-RH/WCS, 2009 WL 248078 (N.D. Fla. Feb. 2, 2009) (granting permissive intervention in an action between an environmental interest group and the EPA only to completely disregard the intervenors in the order that entered the consent decree).

213. Grossman, *supra* note 83, at 49 ("Based on this assumption, courts typically require a strong showing of changed circumstances to justify revision of a consent decree. They also typically disfavor challenges by third parties. The result is that the public's rights and interests may go unrepresented in legal proceedings that incorrectly assume an adversarial posture and only minor externalities.").



occur if the party is granted the right to intervene, which, as mentioned, is difficult and unlikely. As an alternative, some states have tried to file amicus briefs supporting modification of an institutional reform consent decree, as in *American Nurses Association v. Jackson*.<sup>214</sup> Although the court has not ruled on this motion in the eighteen months since its filing,<sup>215</sup> the challenge is still seen as unsuccessful because the EPA's final rules deriving from the consent decree have been in place and affecting these states for nearly fifteen months.

Second, even if a state is granted the right to intervene, it will be unable to modify a consent decree unless the decree is unworkable due to unforeseen circumstances and the modification sought is "suitably tailored" to resolve the new circumstances.<sup>216</sup> Showing that a consent decree is unworkable is possible, but demonstrating that it is unworkable due to unforeseen circumstances is a difficult obstacle to overcome. Claiming that the timeframes are burdensome is unlikely to meet this requirement because an agency entering into an agreement should know whether the terms are too onerous, thus defeating the foreseeability prong. Furthermore, merely alleging that a new policy is superior is unlikely to work.<sup>217</sup> Thus, modification of a consent decree cannot be seen as a substitute for what normally occurs under notice-and-comment rulemaking when there has not been a consent decree. This leaves challenging the final rulemaking as the only viable option for third parties seeking to protect their interests, a problematic outcome.

#### E. State Challenges in Federal Court Are Not Adequate

The ability to challenge a final rulemaking that resulted from a consent decree under the APA does not adequately compensate for the defects of consent decrees. First, sometimes

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214. See States Brief to Modify *Am. Nurses Ass'n v. Jackson*, *supra* note 153.

215. See Schoenbrod, *supra* note 27, at 38 (explaining that a motion to modify "is a time consuming process").

216. 11A WRIGHT & MILLER, *supra* note 63, § 2961 (citing *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 383 (1992)).

217. Schoenbrod, *supra* note 27, at 37 (explaining that, under *Rufo*, modification is unlikely on the theory that "new policy is thought to be better policy").

consent decrees themselves impose new standards,<sup>218</sup> and these standards are completely unalterable under the APA. Second, a burdensome arbitrary-and-capricious standard coupled with *Chevron* deference for rulemaking blocks any reasonable expectation that a state will be able to successfully challenge a regulation after it has been implemented.<sup>219</sup> As a rationale or justification for any agency action, the agency can always allege that it was merely acting under court order.<sup>220</sup> Furthermore, engaging in full litigation is much more costly than participating in normal notice-and-comment rulemaking. A more costly and likely ineffective suit under the APA is not an adequate substitute for notice-and-comment rulemaking.

Third, subsequent challenges of rules after a consent decree contravene the purposes and benefits of the APA. A consent decree sets the limits and bounds of permissible rules and thereby limits the field of possibilities for final rules to something much narrower than Congress intended.<sup>221</sup> In other words, even though the APA provides a way to challenge the result of a consent decree, the challenge is limited by the confines of the decree.<sup>222</sup> This is problematic because consent decrees are essentially secret rulemakings, contrary to the APA's goal of creating transparent agency action.<sup>223</sup> Instead of crafting a rule based on communications with many stakeholders, agencies craft rules based on the needs and

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218. The Toxics Consent Decree provides one example. See *Natural Res. Def. Council, Inc. v. EPA*, 790 F.2d 289, 293 (3d Cir. 1986); *Natural Res. Def. Council, Inc. v. Train Nos. 2153-73, 75-172, 75-1698, 75-1287*, 1976 U.S. Dist. Lexis 14700 (D.D.C. June 9, 1976).

219. William L. Kovacs, *Introduction* to WILLIAM YEATMAN, U.S. CHAMBER OF COMMERCE, TITLE 2 (2012), [http://www.uschamber.com/sites/default/files/reports/1207\\_ETRA\\_HazeReport\\_lr.pdf](http://www.uschamber.com/sites/default/files/reports/1207_ETRA_HazeReport_lr.pdf), [http://perma.cc/KBA3-A4L7] (“[Challenging a rulemaking in court] is of little value, though, since the court typically gives great deference to the agency’s decision and upholds it unless the party challenging can establish that the agency’s action was arbitrary and capricious, a very difficult standard to meet.”).

220. *Id.*

221. CHAMBER 2013, *supra* note 3, at 25 (“In effect, the ‘cement’ of the agency action is set and has already hardened by the time the rule is proposed, and it is very difficult to change it. Once an agency proposes a regulation, the agency is restricted in how much it can change the rule before it becomes final.”).

222. *Id.*

223. *Id.* at 6.

requests of a single party.<sup>224</sup> Substituting the APA's procedures for something done behind closed doors cannot be justified merely because an APA review can be conducted later for the byproduct of a secretive action that contravenes the APA.<sup>225</sup>

F. *Direct Impact of Leaving States Out: Low-Quality and Harmful Regulations*

As discussed above, the matching principle identifies circumstances where strong state or local involvement is likely to improve environmental policy. Even though U.S. environmental policy is not a model of the matching principle, it still provides for state involvement in a number of regulatory schemes, most of which are consistent with the matching principle. Unfortunately, the use of sue-and-settle has diminished both the States' involvement in statutorily-created roles and the States' right to participate in notice-and-comment rulemaking. These consent decrees have not just caused intangible harm to state involvement; they have actually resulted in real harm to society. The vitality of the matching principle is demonstrated by the harms caused to society when it is not followed. Three sue-and-settle consent decrees illustrate this actual societal harm: the Florida water pollution consent decree, the *American Nurses* consent decree, and the Regional Haze consent decree as applied in Arizona.

The Florida water pollution decree required the state to implement numerically quantified standards in an extremely short time period or else be forced to accept federal regulations. The new consent decree's requirements will cost the state an estimated 14,000 jobs.<sup>226</sup> It is also estimated that the decree will

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224. *Id.* at 25.

225. *Id.* Furthermore, note that final agency rulemakings are entitled to *Chevron* deference. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, if Congress has not "directly addressed the precise question at issue," then the agency's definition is granted deference and the reviewing court only determines whether the agency's interpretation is a permissible one, even if the court disagrees with that interpretation. *Id.* at 843–44. A final rulemaking—even one derived from a consent decree—regarding an ambiguous statutory term likely will receive *Chevron* deference. An agency will not, however, be entitled to this deference in court when an intervenor disputes a proposed consent decree.

226. Ross, *supra* note 19, at 96.

cost municipal wastewater plants twenty-one billion dollars—an onerous burden for a state to bear.<sup>227</sup> Furthermore, it is estimated that compliance over the next thirty years will cost somewhere between \$3.1 billion and \$8.4 billion.<sup>228</sup> These costs are substantial—particularly given that Florida had already implemented its own plan that was arguably resolving the problem before the consent decree.<sup>229</sup>

The *American Nurses* consent decree also resulted in flawed regulation.<sup>230</sup> More specifically, the court ignored evidence that an emissions standard was off by a factor of 1000—setting the pollution limit so low that monitoring equipment did not detect it.<sup>231</sup> When this error was pointed out to the EPA, it admitted the mistake but refused to propose a new rule to correct the error.<sup>232</sup> The intervenor also explained that the EPA had failed to disclose what it relied on to create its standards.<sup>233</sup> Furthermore, the EPA failed to consider the impact on “electric reliability” as the Federal Power Act requires.<sup>234</sup> It was estimated that this failure would result in power plant shutdowns that would threaten electric reliability.<sup>235</sup> All of these harms are the likely byproduct of the overly restrictive timeframe the consent decree imposed.

More specific harm resulted from the Regional Haze consent decrees as implemented in Arizona. Under the EPA’s consent decree with the National Parks Conservation Association,<sup>236</sup> the Navajo Generating Station is required to invest \$1.1 billion in emissions control equipment.<sup>237</sup> This investment is estimated to cost hundreds of jobs for Navajos and members of other tribes.<sup>238</sup>

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227. *Id.*

228. *Id.*

229. *See id.* at 96–97.

230. Grossman, *supra* note 83, at 57.

231. *Id.*; UARG’s Motion for Equitable Relief, *supra* note 198, at 11–12.

232. UARG’s Motion for Equitable Relief, *supra* note 198, at 12.

233. *Id.* at 14.

234. *Id.* at 18.

235. *Id.* at 19–24.

236. Partial Consent Decree, Nat’l Parks Conservation Ass’n v. Jackson, No. 1:11-cv-01548 (ABJ) (D.D.C. Mar. 30, 2012).

237. Quayle, *supra* note 19, at 89.

238. *Id.* Ironically, Cruden argues that consent decrees protect Native Americans. *See* Cruden, *supra* note 47, at 77.

These new regulations also are likely to increase energy prices in Arizona by twenty percent.<sup>239</sup> Unfortunately, the harms that resulted in Arizona are similar to the harms that other states suffer under the other Regional Haze consent decrees.<sup>240</sup>

The societal harms from each of these consent decrees indicate that harm derived from consent decrees goes beyond a mere decrease in state involvement in environmental policy. It shows that any action that moves environmental policy further from the ideals of the matching principle will harm society—which is exactly what has happened because of these consent decrees.

#### IV. PROPOSED SOLUTIONS

The solution to the sue-and-settle consent decree problem must involve policy trade-offs because consent decrees are generally “valuable settlement tools that promote expeditious resolution of cases, save transaction costs for all parties and for the court, and achieve finality while protecting the parties to the agreement.”<sup>241</sup> The policy challenge arises in those circumstances where third parties, including states, are harmed. The goal is to keep the benefits of consent decrees while decreasing the costs imposed on other parties. Two relatively minor changes in the current approach could help to achieve this goal. First, judges need to be more diligent in monitoring sue-and-settle consent decrees. Second, the Federal Judicial Conference should make recommendations to the Supreme Court to modify the intervention standards to make it significantly easier for states to intervene.

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239. Quayle, *supra* note 19, at 89.

240. YEATMAN, *supra* note 131, at 4 (“Already, EPA has used [the five consent decrees] to impose almost \$375 million in annual costs on six coal-fired power plants in New Mexico, Oklahoma, and North Dakota. It has similarly proposed \$24 million in annual costs on a coal-fired power plant in Nebraska. Unfortunately, the agency is only getting started. In the near term, EPA is poised to act in Wyoming, Minnesota, Arizona, Utah, and Arkansas. Its real goal is to impose another costly regulation on electric utilities and force them to shut down their coal-fired generating units. Ultimately, all states could be subject to EPA’s Regional Haze power grab.”).

241. Cruden, *supra* note 47, at 79.

A. *Enhanced Judicial Monitoring of Sue-and-Settle Consent Decrees*

Judges must refrain from adopting a blind presumption that consent decrees result in efficient dispute resolutions when it comes to institutional reform litigation. Rather, judges, when faced with one of the consent decrees in this rather narrow subset, should pause for a moment to determine whether the decree truly comports with their views about how an adversarial process is supposed to function. In cases such as *Defenders of Wildlife v. Perciasepe*,<sup>242</sup> where the parties to the suit moved for the consent decree to be entered the same day as the suit was filed, and in the 2009 EPA settlement regarding Florida water pollution, a diligent judge should at least consider that something may be awry.

Judges can and should rely on an existing standard that has been ignored in the consent decree context—the case or controversy requirement. For a court to act, at least at the federal level, the court must be acting within its Article III powers.<sup>243</sup> This includes meeting the justiciability requirement that there be an actual case or controversy.<sup>244</sup> To meet this requirement, “The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests.”<sup>245</sup> Furthermore, courts must be hesitant to take cases “that are ill-suited to judicial resolution.”<sup>246</sup>

A judge who diligently applies the case or controversy requirement to institutional reform consent decrees may remedy a substantial amount of the problems discussed in this Article. If the case or controversy standard had been applied to the *Perciasepe* case, a judge could have found the dispute nonjusticiable. When two parties come before a court to file a suit and move for a consent decree on the same day, it is questionable whether the parties have “adverse legal interests.”<sup>247</sup> Judges should be particularly wary when the

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242. 714 F.3d 1317 (D.C. Cir. 2013).

243. See, e.g., 13 WRIGHT & MILLER, *supra* note 63, § 3529.

244. *Id.*

245. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937).

246. 13 WRIGHT & MILLER, *supra* note 63, § 3529 (quoting *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1378 (D.C. Cir. 1981)).

247. *Aetna*, 300 U.S. at 241.

effect of the prepackaged deal is to shut out states and other potential interested parties.

Furthermore, in the 2009 EPA settlement regarding Florida water pollution, a court similarly should have been able to determine that the EPA was not adverse to the plaintiffs. After defending the case on lack of jurisdiction, the EPA issued a new policy that undercut its jurisdiction defense and settled the case. Conduct such as this should alert a judge to the possibility that the parties are not adverse and, perhaps, lead the judge to deny a motion to enter the settlement as a decree. A court could also reasonably conclude that a sue-and-settle consent decree that usurps traditional state authority is ill-suited for judicial ratification. Of course, it is unlikely that every sue-and-settle consent decree resulting in problematic outcomes can be summarily dismissed on case or controversy grounds.

#### *B. Modification of F.R.C.P. 24*

A second and complementary approach to addressing the sue-and-settle problems identified in this article would be to modify F.R.C.P. 24 to grant a rebuttable presumption of a right to states, allowing them to intervene in institutional reform suits against federal environmental enforcers.<sup>248</sup> The primary method of changing a federal rule is for the Federal Judicial Conference to make recommendations to the Supreme Court. Occasionally, however, federal rules are altered by legislative action. Indeed, the U.S. House of Representatives recently attempted to resolve some of the problems of sue-and-settle.<sup>249</sup>

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248. Additional research is required before this solution can be definitively supported as the way to proceed. It is clear that states are shut out in important ways, and it is evident that bad outcomes are occurring. It is also clear that scholars are skeptical of intervention as an adequate substitute. SANDLER & SCHOENBROD, *supra* note 102, at 133 (citing Cooper, *supra* note 83, at 156 n.4; Harris v. Reeves, 946 F.2d 214 (3d Cir. 1991)). Additional evidence is, however, needed to show why intervention currently fails to protect the States' interest. The intervention standard may not be the sole problem; the methods of notice or the methods of receiving the notice may be deficient as well.

249. See the Federal Consent Decree Fairness Act, H.R. 3041 (2012) and the Sunshine for Regulatory Decrees and Settlements Act of 2012, H.R. 3862. These two bills would have implemented sweeping changes in the notice, intervenor, and modification standards relating to consent decrees. In regard to notice, the bills proposed that for any consent decree that compels agency action the parties must publish the settlement, the consent decree, the fee and cost arrangements, and the complaint. The agency also

Regardless of the means of doing so, granting states a presumptive right to intervene in institutional reform suits against federal environmental enforcers is appropriate because, procedurally, the problems with sue-and-settle consent decrees are relatively narrow. The States' right to intervene could be rebutted by showing that the proposed settlement in no way diminishes the States' right to participate in notice-and-comment rulemaking and in no way diminishes any statutorily granted authority to regulate an aspect of environmental policy. This rule should include the requirement that the federal agencies provide notice to a state as soon as it is sued for institutional reform, an easy task for the regulators.

Consider a hypothetical scenario where an environmental advocacy group sues the EPA for failing to ensure that State X is meeting provisions of the CWA. As soon as the EPA is sued, the modified rule would require the EPA to notify the state about the merits of the suit. The state may then intervene from the beginning to insure its interests are protected. This way, states avoid being blindsided by new standards when it is too late to prevent any potential harm.

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must publish notice of a settlement before it is lodged with the court for entry as a consent decree; further, the agency must respond to all the comments and provide an administrative record to the court. For the intervenors, the bills created a rebuttable presumption that any party seeking to intervene does not have its interests adequately represented by the existing parties. The bills changed the modification standard by putting the burden on the party that is opposed to the modification instead of on the party seeking modification and set the standard of review for the court as de novo. As expansive as these highlighted changes appear to be, they are only a small portion of what the bills would have required. Without surprise, these bills faced substantial opposition, especially from the political left, because it limited the government's ability to use consent decrees to expansively solve problems. *See, e.g.,* Cruden, *supra* note 47; *Federal Consent Decree Fairness Act, and the Sunshine for Regulatory Decrees and Settlements Act of 2012: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 91–92 (2012) (statement of Representative Henry Johnson, Georgia); *see also* John Walke, *Republican Bills Would Obstruct Enforcement of Environmental Laws*, REGBLOG (May 20, 2013), [https://www.law.upenn.edu/blogs/regblog/2013/05/20-walke-republican-bills.html?utm\\_source=RegBlog+Subscribers&utm\\_campaign=47956bc678-RegBlog\\_Weekly\\_Email\\_May28\\_2013&utm\\_medium=email&utm\\_term=0\\_0a497f5a7e-47956bc678-288740341](https://www.law.upenn.edu/blogs/regblog/2013/05/20-walke-republican-bills.html?utm_source=RegBlog+Subscribers&utm_campaign=47956bc678-RegBlog_Weekly_Email_May28_2013&utm_medium=email&utm_term=0_0a497f5a7e-47956bc678-288740341), [<http://perma.law.harvard.edu/0ukC6ViLKG4>]. The essential concern was that these bills would deter parties, especially on the margin, from settling cases and entering consent decrees. As a result, there would be more litigation than the government's limited resources could handle. This would also discourage citizen suits and citizen-initiated enforcement actions, a beneficial way to detect misconduct.



The immediate benefit of this change would be the States' ability to assert and defend their interests, ensuring the preservation of any cooperative federalism that exists in current U.S. policy. States would no longer be limited to participating in consent decrees by filing comments after the settlement is already entered. They could act as a party to any suit where the States' voices must be heard, and if the States' interests were ignored and a decree were entered anyway, the States would have the right to appeal the court's decision to enter a decree.

Furthermore, this solution is narrow enough that it is unlikely to significantly hamper the incentives for litigants to settle cases and avoid litigation costs. This feature of the amended rule would only apply in the narrow context of institutional reform litigation, and it would allow only states—not just any party claiming an interest—to intervene in the consent decree. Because states face resource constraints, it is unlikely that they would actually exercise the right to intervene in many cases; they are likely to intervene only when harms are apparent or when costs are especially high.<sup>250</sup> Most importantly, the decision to intervene would be made by the state, the party that should be making these decisions under cooperative federalism.

## V. CONCLUSION

Sue-and-settle consent decrees are being used in institutional reform cases to drastically modify the environmental policy landscape. Although many parties may be negatively affected by this trend, the harms to states and state authority are the most problematic. Environmental policy is most efficient and effective when it is governed by the matching principle, that is, when the authority for environmental regulation is matched to the party that is harmed. Even though the United States does not strictly adhere to the matching principle, it recognizes the importance of state involvement in environmental regulatory policy. This includes granting both decisionmaking and

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250. *E.g.*, Grossman, *supra* note 83, at 57–58 (explaining that after the decree was entered, twenty-five states sought to modify it, given the harms they were likely to bear if the decree proceeded as entered).

enforcement authority to the States under key environmental statutes such as the CAA and CWA. The structure of federal regulatory law also includes notice-and-comment procedures for federal rulemaking, where the state is allowed to participate in the federal agencies' decisions. Unfortunately, institutional reform consent decrees have severely limited the States' roles in environmental policy. Sue-and-settle erodes both states' statutory enforcement authority and their ability to participate in notice-and-comment rulemaking.

To remedy this problem, the judiciary should provide additional scrutiny before perfunctorily entering consent decrees between federal agencies and environmental advocacy groups. This additional scrutiny should be based on the case or controversy standard. If parties do not have adverse legal interests, then a judge lacks the Article III power to act and should not enter the decree. Judicial adjustment is not, however, sufficient to remedy the problem on its own; a legislative remedy must also be included.

The standard for intervening under Rule 24 of the Federal Rules of Civil Procedure could be modified to provide states a rebuttable right to intervene in all institutional reform suits with environmental agencies. Incumbent parties in the suit can rebut this right to intervene by showing that the states' rights will not be impacted by the suit—regardless of the outcome. This modification would increase states' involvement in consent decrees and provide them with the opportunity to defend their rights as environmental regulators—an outcome supported by traditional uses of cooperative federalism that should result in societal benefits.

These modest, judicially created solutions would be substantial steps toward improving what is rapidly becoming a dysfunctional area of federal regulatory law and policy.