Environmental Law & Property Rights

Do Sue and Settle Practices Undermine Congressional Intent for Cooperative Federalism on Environmental Matters?

By David B. Rivkin, Jr. & Adam Doverspike***

Note from the Editor:

This article is about whether sue and settle practices undermine congressional intent for cooperative federalism on environmental matters. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the authors. The Federalist Society seeks to further discussion about sue and settle, federalism, and the Environmental Protection Agency. To this end, we offer links below to other perspectives on the issue, and we invite responses from our audience. To join this debate, please email us at info@fed-soc.org.

Related Links:

- Avi Bargow, *Setting the Record Straight*, EPA Connect: The Official Blog of EPA's Leadership (Feb. 12, 2014, 1:35 PM): http://blog.epa.gov/epaconnect/2014/02/setting-the-record-straight/
- Stephen M. Johnson, *Sue and Settle: Demonizing the Environmental Citizen Suit*, 37 Seattle U. L. Rev. 891 (2014): http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2478866
- Ann Alexander, *Sue and settle legislation: a cure in search of a disease*, Switchboard: Natural Resources Defense Council Staff Blog (Jul. 16, 2012): http://switchboard.nrdc.org/blogs/aalexander/sue_and_settle_legislation_a_c.html
- John Walke, *Cantor Report Attacks Environmental Law Enforcement, Falls Flat With Baseless Conspiracy Theory*, Switchboard: Natural Resources Defense Council Staff Blog (Oct. 25, 2012): http://switchboard.nrdc.org/blogs/jwalke/the_office_of_house_majority.html

I. Environmental Statutes Embrace Cooperative Federalism

Environmental statutes give states primary responsibility for regulatory rules. The Environmental Protection Agency reviews state programs and, in certain cases, may supplant the state program. This model has become known as cooperative federalism.[1]

Cooperative federalism encourages state regulation rather than compelling or commandeering it. Such restraint permits state officials to remain accountable to their citizens.[2] Congress embraced cooperative federalism in the Clean Air Act and Clean Water Act—the major environmental statutes that invite sue and settle arrangements.[3] The Endangered Species Act did not explicitly adopt cooperative federalism; however, in practice, a "partnership federalism" has emerged.[4]

The environmental statutes do not require the EPA to work with environmental groups; rather, they mandate the EPA to work cooperatively with the states. Yet the increasingly common sue and settle tactic permits the EPA to collude with environmental activists to keep states from having a say in important procedural and substantive decision-making.

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II. Sue and Settle—Illustrative Examples

Certain environmental statutes mandate agency action by non-discretionary deadlines.[5] The EPA chronically misses mandatory deadlines because congressional allocations and agency staffing cannot meet the sheer number of congressionally-required regulations. Citizen suit provisions entice environmental activists to sue the EPA for missing those mandatory deadlines.[6] And attorney fee provisions allow activists to profit from the lawsuits.[7]

The EPA often admits fault and settles with activists, agreeing to an expedited timetable to issue regulations. The EPA rarely informs other stakeholders, including states, regulated entities, and industry groups, about the settlement. The EPA sometimes settles the same day the suit is filed, suggesting collusion between the nominally adverse parties.[8] The EPA and the activists enter a draft consent decree with the court. Under most environmental statutes, the EPA need not even receive public comment on the consent decree, much less heed the advice of anyone other than the activists that sued.[9]

Even if third parties hear about a sue and settle case, courts generally deny intervention.[10] The court enters the consent decree, which cannot be modified without the activist group's agreement or a court order. The EPA then relies upon the consent decree deadlines to cut off stakeholders and to adopt activist-friendly regulations. The practice predates the current administration, but has exploded since President Obama took office.[11]

In practice, sue and settle shuts out all stakeholders other than the agency and the activist groups that filed a given suit. Two recent cases illustrate common problems with the sue and

settle tactic.

A. The Regional Haze Cases

The EPA prevents Oklahoma and other affected states from pursuing state plans to regulate regional haze under the Clean Air Act by relying on deadlines set through a sue and settle agreement.

The 2007 regional haze rule required states to submit State Implementation Plans by 2009. In 2009, the EPA found more than 30 states, including Oklahoma, had not submitted a State Plan. The Clean Air Act requires the EPA to create Federal Implementation Plans within 2 years after finding no State Plan was filed. By 2011, the EPA had not promulgated Federal Plans and some states, including Oklahoma, had submitted belated State Plans.

Environmental activists sued the EPA for not promulgating Federal Plans.[12] Neither the activists, nor the EPA, nor the court notified the states about the lawsuit. Plaintiffs and the EPA entered a partial consent decree that created a table of deadlines for each of the 30+ states involved.[13]

Plaintiffs and the EPA permitted one state, Arizona, to intervene solely to argue that the EPA ought to act on Arizona's February 2011 State Plan and provide time for the state to correct any deficiencies before promulgating a Federal Plan.[14] The court ultimately overruled Arizona's objection to the consent decree because Arizona had missed the State Plan deadline.[15]

While enforcing hard deadlines against the states, plaintiffs and the EPA agreed repeatedly to extend deadlines for the EPA to promulgate Federal Plans.[16] Indeed, even when the EPA missed a court-ordered deadline, the parties agreed to retroactively adjust it.[17]

Despite the EPA's freedom to miss deadlines, it relied upon the consent decree deadlines to undermine the cooperative federalism principle that the agency should consider State Plans before imposing a Federal Plan:

- New Mexico: "It would not have been possible to review the July 5, 2011 [State Plan] submission, propose a rulemaking, and promulgate a final action by the dates required by the consent decree."[18]

- North Dakota: "Given our September 1, 2011 deadline to sign this notice of proposed rulemaking under the consent decree discussed in section III.C, we lack sufficient time to act on or consider this aspect of Amendment No. 1."[19]

- Oklahoma: "We also are required by the terms of a consent decree with WildEarth Guardians, lodged with the U.S. District Court for the Northern District of California to ensure that Oklahoma's CAA requirements for 110(a)(2)(D)(i)(II) are finalized by December 13, 2011. Because we have found the state's [State Plan] submissions do not adequately satisfy either requirement in full and because we have previously found that Oklahoma failed to timely submit these [State Plan] submissions, we have not only the authority but a duty to promulgate a [Federal Plan] that meets those requirements."[20]

The EPA abandoned a cooperative federalism approach that permits states to remedy issues in the State Plans solely to meet the sue and settle deadlines that the EPA and activists set without input from the states.

B. The Lesser Prairie-Chicken Endangered Species Act Listing

Fish and Wildlife Services (FWS) abdicated its authority to prioritize which species need be considered for listing as endangered or threatened to an activist group that required unrealistic deadlines and excluded all other stakeholders. Additionally, the agency inserted a substantive rulemaking into the consent decree. While the settlement covered over 250 species, we focus here on the lesser prairie-chicken (LPC), fully cognizant that similar stories exist for other species.

FWS found the LPC warranted listing under the Act in June 1998, but that the listing was precluded by higher priority actions.[21] From 1998-2009, FWS annually found that listing was "warranted but precluded" by pending proposals in each annual Candidate Notice of Review.[22] In 2008, FWS elevated the LPC's numeric threat level from 8 to 2.[23]

Then the EPA's sue and settle practices ensnared the entire endangered species Listing Program. An environmentalist group filed suit in Colorado, alleging FWS's "warranted but precluded" finding for the LPC was arbitrary and capricious.[24] The LPC case was rolled into a multi-district litigation encompassing over 250 species in the DC federal court.[25]

The DC federal court approved a settlement requiring FWS to publish proposed rules or not warranted findings for 251 species by September 2016.[26] FWS acknowledged that meeting the settlement demands will "require substantially all of the resources in the Listing Program."[27] The Agreement set a FY 2012 deadline for FWS to submit a work-plan on the lesser prairie-chicken.[28]

The settlement also substantively restricted FWS from listing a species as warranted but precluded. Congress permits FWS to deem a species listing as warranted, not warranted, or warranted but precluded.[29] The settlement agreement, however, requires each species listing be deemed warranted or not warranted, precluding a statutorily available option.[30]

Environmentalists and agencies successfully precluded all interested parties from participating in the regulatory process that eliminated the warranted but precluded option and tied up most of the agency's listing program funds. The DC court denied stakeholders' attempts to intervene.[31] And after the Colorado court permitted industry stakeholders to intervene,[32] the parties settled the DC action without including the intervenors.[33] The settlement resolved the Colorado case as well, but sidestepped meaningful participation by the intervenors.

Before the sue and settle mandated deadline, FWS proposed a rule listing the LPC as threatened.[34] FWS delayed the LPC listing several times while repeatedly invoking the settlement as requiring quick resolution.[35] And FWS repeatedly found that Oklahoma had taken great steps in conservation:

- "The Oklahoma PFW program has implemented 154 private lands agreements on about 38,954 ha (96,258 ac) of private lands for the benefit of the lesser prairie-chicken in the State." Listing the Lesser Prairie-Chicken as a Threatened Species, 77 Fed. Reg. at 73835.

- "The [Oklahoma Department of Wildlife

Conservation] has shown the ability to administer the CCAA and work effectively with participating landowners to implement conservation commitments in the CCAA." Final Candidate Conservation Agreement With Assurances, Final Environmental Assessment, and Finding of No Significant Impact; Lesser Prairie Chicken, Oklahoma, 78 Fed. Reg. 14111, 14113 (Mar. 4, 2013).

Nonetheless, FWS pushed forward with asserting federal control due to the sue and settle deadline, ultimately issuing a final rule declaring the LPC as threatened on April 10, 2014.[36]

III. Sue And Settle Undermines Cooperative Federalism

A. Sue And Settle Excludes States From The Rulemaking Process

Sue and settle excludes states from participating in the rulemaking process. While courts have resisted most agency efforts to change substantive law without notice and comment procedures,[37] some agencies continue to circumvent proper rulemaking by removing substantive choices in settlements. And even settlements restricted to setting deadlines affect the substantive outcome when agencies claim an inability to consider all evidence, comments, or state efforts because a deadline looms.[38]

Agencies move their own deadlines, but forbid states to do so. The EPA relies on "court-ordered" deadlines to curtail stakeholder input.[39] When the agencies cannot meet a consent decree deadline, the colluding activists agree to extend it. Thus, states must comply with deadlines they had no input on, but the EPA and activist groups can extend their self-imposed deadlines.

B. Activists Rather Than Congress or Agencies Set Agency Priorities

When agencies embrace a consent decree without stakeholder input, it permits activists to dictate agency priorities. Activists decide when and where the EPA and FWS develop onerous regulations.

FWS functionally ceded all agency prioritization to activists without consulting with the states or considering state conservation efforts.[40] FWS Director Dan Ashe admits that the "torrent of deadline-related cases over the past decade has had the unfortunate effect of distorting and delaying our biological priorities."[41] In FY 2011, the agency spent $15.8 million of its $20.9 million Listing Program budget on taking "substantive actions required by court orders or settlement agreements resulting from litigation."[42]

Activists not only set agency priorities, they get paid by the government to do so. Activists often receive attorney fee awards for winning the lawsuits against agencies that did not even fight back. From 2003-2010, activists received millions in federal dollars for suing the EPA.[43] FWS Director Ashe testified that activists obtained "$134,156 paid out of Service funds for attorneys' fees in FY 2010."[44] With sue and settle practices increasing in recent years, the total government funding to activist groups is likely growing as well.

C. Agencies and the Courts Should Respect Congressional Intent To Bolster Cooperative Federalism

Agencies and courts can fix the major problems of sue and settle tactics. First, courts should permit intervention more freely to ensure settlements between colluding entities receive needed scrutiny.[45] Second, agencies should welcome states and other stakeholders participating fully in all sue and settle processes. Stakeholders can ensure deadlines are feasible and will not create rushed, inaccurate rulemaking processes. Third, agencies should treat states as cooperative allies rather than uninterested outsiders. If the EPA extends its own deadlines repeatedly, it should offer similar grace periods for State Plans. The agencies undermine congressional intent for them to work with states when the agencies repeatedly argue that states have no role in the activist-generated settlement process.

IV. Conclusion

Activists and federal agencies are implementing federal programs over the objections of states by relying on sue and settle tactics that make state participation in the substantive rulemaking difficult or impossible. The consent decree deadlines do not provide states sufficient time to provide state-based programs, or sufficient time to rectify minor issues in state-based programs before agencies impose federal programs.

The agencies have thwarted Congressional intent that they work with states in a cooperative manner respecting federalist principles. If the agencies and courts do not reign in this ongoing power grab, Congress should revise the environmental statutes to withdraw the citizens suit provisions or otherwise limit the collusive settlements that undermine cooperative federalism today.

Endnotes

1 *See* American Corn Growers v. EPA, 291 F.3d 1 (D.C. Cir. 2002).

2 New York v. United States, 505 U.S. 144, 168 (1992) ("By contrast, where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.").

3 The Clean Air Act "'uses a cooperative-federalism approach to regulate air quality.'" Oklahoma v. EPA, 723 F.3d 1201, 1204 (10th Cir. 2013) (quoting U.S. Magnesium, LLC v. EPA, 690 F.3d 1157, 1159 (10th Cir. 2012)); *see also* Friends of the Earth v. Carey, 552 F.2d 25, 29-30 (2d Cir. 1997) ("Under the [Clean Air] Act, state and local governments assume the primary responsibility for establishing and implementing air quality control programs"). And the "Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' 33 U. S. C. § 1251(a)." Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992).

4 Jean O. Melious, Enforcing the Endangered Species Act Against The States, 25 Wm. & Mary Envtl. L. & Pol'y Rev. 605, 609 (2001) ("The ESA has not adopted this cooperative federalism model, however, in which the federal government dictates the content of programs and state governments carry out the programs. Because all biodiversity issues, like all politics, are local, and because states have traditionally exercised primary authority over wildlife and natural resource regulation, a model is emerging that 'allows state and local governments to define the content of federal mandates.' This model has been referred to as 'partnership federalism.'"); *see also generally* Kaush Arha & Barton H. Thompson Jr., The Endangered Species Act And Federalism: Effective Conservation Through Greater State Commitment (2012).

5 *See, e.g.*, Clean Air Act, 42 U.S.C. § 7401 *et seq.*; Clean Water Act, 33 U.S.C. § 1251 *et seq.*

6 *See* 42 U.S.C. § 7604(a)(2) (CAA); 33 U.S.C. § 1365(a)(2) (CWA).

7 U.S. Government Accountability Office, Cases Against EPA and Associated Costs over Time, GAO-11-650 at 40-48 (Aug. 2011); *see also* U.S. Chamber of Commerce, *A Report on Sue and Settle: Regulating Behind*

Closed Doors at 12-13 n.14 (May 2013) (hereinafter "Chamber Report") ("In effect, advocacy groups are incentivized by federal funding to bring sue and settle lawsuits and exert direct influence over agency agendas…"), *available at* https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf.

8 *See, e.g.*, William S. Jordan, III, *News from the Circuits*, 38 Admin. & Reg. L. News 28, 29 (Summer 2013) (describing *Defenders of Wildlife v. Perciasepe*, 2013 WL 1729598 (D.C. Cir. 2013) where "Defenders and EPA apparently negotiated a settlement, Defenders sued EPA on November 8, 2010, and on the same day the parties filed a joint motion to enter a proposed consent decree.").

9 *But see* 42 U.S.C. § 7413(g) (for Clean Air Act cases, "[a]t least 30 days before a consent order or settlement agreement of any kind," the "Administrator shall provide a reasonable opportunity by notice in the Federal Register to persons who are not named as parties or intervenors to the action or matter to comment in writing.").

10 *E.g.,* Defenders of Wildlife v. Perciasepe, 714 F.3d 1317 (D.C. Cir. 2013) (denying Utility Water Act Group petition to intervene); *but see* Order Granting State of Oklahoma's Motion to Intervene (Doc. No. 16), WildEarth Guardians v. McCarthy, 13-cv-2748 (D. Colo. Feb. 11, 2014) (unopposed motion).

11 *See* Chamber Report, *supra* note 7, at 13-14.

12 *See* National Parks Conservation Ass'n v. Jackson, Case No. 11-cv-1548 (D.D.C.).

13 Partial Consent Decree (Doc. No. 21 in *National Parks Conservation Ass'n*) (D.D.C. March 30, 2012).

14 Stipulated Order (Doc. No. 12 in *National Parks Conservation Ass'n*) (D.D.C. Jan. 20, 2012).

15 Memorandum Opinion and Order (Doc. No. 35 in *National Parks Conservation Ass'n*) (D.D.C. May 25, 2012).

16 Orders and Stipulation re Consent Decree (Doc. Nos. 71, 75, 78, 80 in *National Parks Conservation Ass'n*) (orders granting extensions).

17 *See* Unopposed Mot. to Amend/Correct Consent Decree (Doc. No. 70 in *National Parks Conservation Ass'n*) (D.D.C. May 24, 2013) (Oklahoma State Plan).

18 Approval and Promulgation of Implementation Plans; New Mexico; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determination,76 Fed. Reg. 52388, 52390 (Aug. 22, 2011).

19 Approval and Promulgation of Implementation Plans; North Dakota; Regional Haze State Implementation Plan; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Regional Haze,76 Fed. Reg. 58,570, 58,579 (Sept. 21, 2011).

20 Approval and Promulgation of Implementation Plans; Oklahoma; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determinations, 76 Fed. Reg. 81728, 81732 (Dec. 28, 2011).

21 Endangered and Threatened Wildlife and Plants; 12-Month Finding for a Petition To List he Lesser Prairie-Chicken as Threatened and Designate Critical Habitat, 63 Fed. Reg. 31400, 31406 (June 9, 1998) ("A listing priority of 8 has consequently been assigned for the lesser prairie-chicken"); 16 U.S.C. §1533(b)(3)(B)(iii)(I).

22 16 U.S.C. §1533(b)(3)(B)(iii)(I).

23 Listing Priority Numbers range from 1 to 12 with 1 the most urgent. *See* Endangered and Threatened Wildlife and Plants; Review of Native Species That Are Candidates for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions, 73 Fed. Reg. 75,176, 75,179-80 (Dec. 10, 2008).

24 Petition (Doc. No. 1), Wildearth Guardians v. Salazar, 10-cv-2129 (D. Colo. Aug. 31, 2010); *see also* In re Endangered Species Act Section 4 Deadline Litigation, MDL No. 2165 (D.D.C.) (other species).

25 In re Endangered Species Act Section 4 Deadline Litigation, MDL No. 2165 (D.D.C.).

26 Orders (Doc. Nos. 55, 56), In re Endangered Species Act Section 4 Deadline Litigation (D.D.C. Sept. 9, 2011); Agreements (Doc. Nos. 31-1, 32-1).

27 Proposed Settlement Agreement (Doc. No. 31-1 at 10), In re Endangered Species Act Section 4 Deadline Litigation (D.D.C. May 10, 2011).

28 *Id.* at 6, 26.

29 16 U.S.C. § 1533(b)(3)(B).

30 Proposed Settlement Agreement (Doc. No. 31-1 at 7), In re Endangered Species Act Section 4 Deadline Litigation (D.D.C. May 10, 2011) ("The Defendants shall, for all 251 species that were designated as 'candidates' in the 2010 CNOR, submit to the Federal Register for publication either a Proposed Rule or a not-warranted finding no later than September 30, 2016.").

31 Memorandum Opinion (Doc. No. 16) In re Endangered Species Act Section 4 Deadline Litigation (D.D.C. Aug. 27, 2010) ("allowing TRC to intervene could lead to undue delay and would potentially prejudice the adjudication of the original parties' rights"); Memorandum Opinion (Doc. #54) (D.D.C. Sept. 9, 2011) ("the Court finds that allowing SCI to intervene could lead to undue delay").

32 Order Granting Intervention (Doc. No. 18) Wildearth Guardians v. Salazar (D. Colo. Jan. 3, 2011).

33 Notice of Approval of Related Settlement Agreements (Doc. No. 31) Wildearth Guardians v. Salazar (D. Colo Sept. 23, 2011).

34 Endangered and Threatened Wildlife and Plants; Listing the Lesser Prairie-Chicken as a Threatened Species, 77 Fed. Reg. 73,827, 73,830 (Dec. 11, 2012) (describing sue and settle agreement mandating "a proposed listing rule for the lesser prairie-chicken" by September 30, 2012).

35 Endangered and Threatened Wildlife and Plants; Listing the Lesser Prairie-Chicken as a Threatened Species With a Special Rule, 78 Fed. Reg. 26,302, 26,304 (May 6, 2013) ("On September 27, 2012, the settlement agreement was modified to require that the proposed listing rule be submitted to the Federal Register on or before November 29, 2012. On December 11, 2012, we published in the Federal Register a proposed rule to list the lesser prairie-chicken as a threatened species under the Act (77 FR 73,828)."); Endangered and Threatened Wildlife and Plants; 6-Month Extension of Final Determination for the Proposed Listing of the Lesser Prairie-Chicken as a Threatened Species, 78 Fed. Reg. 41,022 (July 9, 2013) ("As noted in the proposed listing rule (77 FR 73828), we were previously required by the terms of judicially approved settlement agreement to make a final determination on the lesser prairie-chicken proposed listing rule no later than September 30, 2013. Therefore, with this 6-month extension, we will make a final determination on the proposed rule no later than March 30, 2014."); Endangered and Threatened Wildlife and Plants; Listing the Lesser Prairie-Chicken as a Threatened Species With a Special Rule, 78 Fed. Reg. 75,306, 73,508 (Dec. 11, 2013) ("As noted in the proposed listing rule (77 FR 73,828), we were previously required by the terms of judicially approved settlement agreement to make a final determination on the lesser prairie-chicken proposed listing rule no later than September 30, 2013. With the 6-month extension, we will make a final determination on the proposed rule no later than March 31, 2014.").

36 Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Lesser Prairie-Chicken, 79 FR 20,074 (Apr. 10, 2014).

37 *See* Conservation N.W. v. Sherman, 715 F.3d 1181, 1187 (9th Cir. 2013) ("…a district court abuses its discretion when it enters a consent decree that permanently and substantially amends an agency rule that would have otherwise been subject to statutory rulemaking procedures."); *id.* ("Because the consent decree allows for substantial, permanent amendments to Survey and Manage, it impermissibly conflicts with laws governing the process for such amendments. It was therefore an abuse of discretion for the district court to approve it in its current form.").

38 *See* Defenders of Wildlife v. Perciasepe, 714 F.3d 1317, 1323 (D.C. Cir. 2013) ("UWAG first argues that its members have standing because the consent decree imposes too strict a timeline for EPA to decide whether and when to engage in rulemaking. According to UWAG, the timeline provides too little time for notice and comment such that its members will not have an adequate opportunity to participate in the rulemaking, making it more likely

that EPA will promulgate a rule economically harmful to its members."); *but see* Nat. Resources Def. Council v. Costle, 561 F.2d 904, 910 (D.C. Cir. 1977) ("Another impairment of the appellants' interest in valid regulations arises from their exclusion from possible proceedings about modifications in the timetable.").

39 *See, e.g.*, 76 Fed. Reg. 52,390 (EPA found the "court-supervised consent decree deadline" made review of New Mexico's State Plan impossible, requiring an EPA-written Federal Plan); 76 Fed. Reg. 58,579 (EPA "lack[ed] sufficient time to act on or consider" North Dakota Department of Environmental Protection's determination due to consent decree deadline); 76 Fed. Reg. 81,732 (finding Oklahoma's State Plan did not meet certain requirements, EPA claimed a "duty to promulgate" a Federal Plan due to a consent decree that required finalization by December 13, 2011).

40 Testimony of Hon. Dan Ashe, Director, U.S. Fish and Wildlife Service before House Natural Resources Committee (December 6, 2011).

41 *Id.*

42 *Id.* Until recently, the agencies did not holistically track sue and settle agreements, rendering research about how much activists set agency priorities difficult. *See* http://www.epa.gov/ogc/noi.html (listing Notices of Intent to Sue since Jan. 1, 2013).

43 U.S. Government Accountability Office, Cases Against EPA and Associated Costs over Time, GAO-11-650 at 40-48 (Aug. 2011); *see also* Chamber Report, *supra* note 7, at 12-13 n.14 ("In effect, advocacy groups are incentivized by federal funding to bring sue and settle lawsuits and exert direct influence over agency agendas").

44 Testimony of Hon. Dan Ashe, Director, U.S. Fish and Wildlife Service before House Natural Resources Committee (December 6, 2011).

45 *E.g.*, Order Granting State of Oklahoma's Motion to Intervene (Doc. No. 16), WildEarth Guardians v. McCarthy (D. Colo. Feb. 11, 2014) (unopposed motion).