

Addressing Off Ramp Settlements:  
How Legislation Can Ensure Transparency, Public Participation, and Judicial Review  
in Rulemaking Activity

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Chairman Coble, Ranking Member Cohen, and Members of the Subcommittee:

Thank you for providing me the opportunity and the honor to appear before you today.

The subject of today's hearing on the Sunshine for Regulatory Decrees and Settlement Act and the Federal Consent Decree Fairness Act is critically important because it raises issues about fairness, transparency, and public participation in administrative rulemakings while providing a mechanism for the Executive Branch to ensure sound and principled environmental decision making in this very litigious environment we all inhabit. I commend the Subcommittee for addressing this issue at a critical time, and look forward to assisting your efforts.

It may not be a mandatory subject in law school, but America's successful use of administrative law and rulemaking is critical to implementing the laws that you enact. We should agree that essential hallmarks of administrative law have always included the bedrock principles of: (1) transparency in government action; (2) the solicitation of public and stakeholder input prior to final government action; and (3) opportunities to ensure equal access to judicial review by all parties impacted by government action. But the Administrative Procedure Act originally adopted by Congress in 1948 is confronting new challenges in this era where every significant administrative law initiative seems to be comprised of three inexorable components: the agency's proposed rule, the final rule, and the litigation by the loser in the rulemaking. I do not think we can or should endeavor to change those components of modern life in Washington, but it is appropriate and timely that this Subcommittee is focusing on the growing problems regarding settlements of administrative law litigation that bring a new layer of complexity to the ability of the public to participate in the rulemaking process. Key elements of the proposed legislation subject to this Hearing today are critical to ensuring that our democratic rulemaking processes maintain the principles associated with enactment of the APA in 1948. Today, I want to share with you my concern about recent efforts to circumvent such protections in an emerging phenomenon that I call "off ramp settlements."

By way of background, I am both a lifelong environmentalist and a career environmental lawyer. I am very proud to have spent the majority of my career in public service, as a trial attorney in the Justice Department's Environment Division, as the General Counsel of the United States Environmental Protection Agency, and as a judicial law clerk on the Tenth

Circuit Court of Appeals. In my current capacity as a private practitioner, I am privileged to work with a plethora of stakeholders including private companies and trade associations, environmental organizations, and the government, to develop creative solutions that advance environmental protection while also enabling the United States to retain economic competitiveness in a trade sensitive, global environment where very few economies provide even the faintest glimmer of our own environmental controls and public process protections. In both my government and private careers, I am very proud of the opportunities I have had to participate in and advance international rule of law initiatives, working to help develop the enactment of environmental and public participation laws in growing economies. But now it is time to turn to our own laws, and to discuss your efforts to address the recent threats to their effectiveness.

In my opportunities to explain and teach the American environmental protection regime in China and elsewhere, I always begin with the simple proposition that substantive environmental law is inextricably intertwined with the core process concepts of transparency, public participation, and judicial review. Although it was Congress that took the initiative in the 1970s to enact the suite of environmental laws that continue to provide Americans with the cleanest environment in the world, the success of environmental protection is ultimately attributable to a wide range of actors, including the implementation of the Executive Branch through rulemakings and the rigorous scrutiny of the Judicial Branch. Again, the APA is our benchmark and its preservation is our goal.

But especially in environmental matters, we must look beyond the government and recognize that just as key to the success of our environmental regime has been the role of a myriad of stakeholders and public citizens who have taken part in advancing environmental protection. This includes multinational companies developing novel environmental solutions and technologies, and also encompasses local and national environmental organizations that participate in rulemakings impacting public health. Ultimately, when a rulemaking is concluded with full public input and participation and any of these parties, including private citizens, invoke the courts to address environmental concerns, the success of environmental protection in the United States is ensured because of the broad roles played by actors outside the government as much as the role played by the government itself.

Key among the parties contributing to the success of environmental laws are environmental nongovernmental organizations, or NGOs. Decades prior to the enactment of environmental laws, these groups drove the environmental movement in the United States in response to issues such as protecting wilderness areas and addressing Love Canal, the Cuyahoga River, and smog in our nation's urban areas. In my experience, the advancement of environmental protection frequently has been synonymous with efforts by such NGOs. I am personally proud of the opportunities I have had to serve with several NGOs and my experiences with NGOs in various capacities reinforces the strong role they play in

advancing environmental protection.

At the same time I believe that a subset of NGOs recently has added a new and unanticipated weapon in an unfortunate effort to conflate the respective roles and boundaries of governmental and nongovernmental organizations. This approach, if not carefully considered, can risk the core principles of transparency, public participation, and judicial review. Specifically, certain groups increasingly are employing a “sue and settle” approach to interactions with the government on regulatory issues. Before going further, let me be perfectly clear about my views: while the general notion of settling disputes with the government is noncontroversial and properly serves as a key component of promoting judicial efficiency and reasonable outcomes to disputes, such an approach takes on new concerns in a regulatory context when such settlements effectively provide an off ramp that ignores these various protections, procedures, and boundaries Congress has established. Specifically, such off ramp settlements implicate the following issues:

- **The opportunities for non governmental actors to engage in a quasi-governmental role:** Frequently, when NGOs engage in settlements with administrative agencies over rulemaking schedules, the outcome is a reallocation of government priorities, resources, and deadlines. Effectively, in such settlements the NGO plaintiffs and petitioners, and not the government officials entrusted to the effective implementation of the laws, can set the priorities and timelines for how the government enacts certain rulemakings over other competing concerns and resources. A well established line of case law makes it clear that ultimately the government has wide deference and discretion in setting its own regulatory schedule, particularly when Congress has not mandated a given deadline. However, in these off-ramp settlements, the NGOs typically gain agreements instead of allowing a Court to address the merits of such arguments. In those circumstances, such settlements can impose obligations on the government that the Court unlikely would have compelled. Such a quasi-governmental role is not only inconsistent with the respective dividing lines between governmental and nongovernmental functions, but, critically, also threatens to distract the government's limited resources away from other important priorities, contributing to a cycle of the government unable to meet other obligations and priorities. Further, as described below, experience has shown that such settlements have resulted in unrealistic commitments of government resources that the government is not capable of meeting. These missed deadlines in turn lead to litigation to enforce such deadlines, thus entailing the further engagement of the Court in a cycle that violates every notion of why judicial settlements make sense..
- **Lack of transparency:** A core element of American environmental rulemaking that is distinguishable from almost every other system in the world is the promise and guarantee of transparency. The Administrative Procedure Act, the Clean Air

Act, and many other laws mandate notification to the public and stakeholders of rules and decisions impacted by such governmental actions. Such affected and interested stakeholders, along with other members of the public, have an opportunity and a right for adequate notice and comment. Not only must this opportunity precede any final agency action, but also the government is compelled by the APA to publically respond to and take into account comments and defend its final rule from issues raised that are not substantively addressed. These laws permit only the narrowest of exceptions to waive such processes, and the agencies appropriately have exercised restraint in invoking such exceptions. Similarly, on the rare occasions when the government takes action without providing adequate transparency, notice, and public participation, Courts have been rigorous in their enforcement. Sue and settle consent decrees, however, effectively provide an off ramp to these critical procedural protections. Such discussions and agreements typically are reached with a subset of interested parties without full and broad stakeholder input, and in many instances take place outside the boundaries of the public process.

- **Lack of effective public participation:** In most off ramp settlements, even when the government provides some opportunity for comment after an agreement is reached, experience has shown that in many instances such process is pro forma, with at most minor changes to deals made in rare circumstances. In addition, the negotiated deadlines for final rules are frequently so quick and ambitious that the public's comments might receive little weight in the actual subsequent rulemaking due to artificially imposed time constraints. Thus, public participation is foreclosed essentially twice—at the settlement and the rulemaking stages—leading to final agency action that circumvents the intended role of stakeholder input and fails to account for broader views.
- **Lack of judicial review:** Another core tenet of environmental rulemaking in the United States is the ability both to challenge rulemaking decisions adversely impacting stakeholders and to participate as intervenors—frequently, in defense of the government's decisions in priorities—in the litigation of rule challenges brought by other parties. Congress guaranteed such protections both by affirmatively waiving the government's sovereign immunity to rulemaking challenges in laws like the Administrative Procedure Act and by providing explicit causes of action under the APA or, for example, the Clean Air Act. However, in off ramp settlements, NGOs and the government may reach an agreement before a lawsuit is even filed, thus depriving interested parties and potential intervenors from participating in the negotiations or intervening in the litigation to defend their interests. Even where settlement occurs later, after parties may have been granted intervention by demonstrating they may be adversely impacted by the outcome of a lawsuit and may not be adequately represented by the government, such parties have little to no opportunity to participate in settlement discussions to which they are not invited by

the government and NGOs. Thus, settlements in a regulatory context can adversely impact the interests of interested parties while depriving them of meaningful judicial review.

These concerns regarding off ramp settlements are not theoretical or abstract, but have been rising with increasing frequency in the last several years. In fact, they have become so common that some groups have labeled the phenomenon of reaching an enforceable agreement with the government on regulatory commitments and shifting of resources as “mega settlements.” Some recent examples include:

- **Endangered Species Consultations:** In May and June 2011, the Fish and Wildlife Service and certain NGOs filed joint settlement agreements in U.S. District Court to resolve claims that sought to mandate listing decisions on more than 600 species. The settlements specified certain actions the Service is to take regarding 600 species during FY 2011 and FY 2012, including the commencement of a review of 251 candidate species in a five year period, resulting in 130 decisions by September 30, 2013 alone. The Court approved and enforceable settlements, which were negotiated absent participation from stakeholders who ultimately will be impacted by the listing decisions, are raising significant questions about the Agency’s resources and ability to meet the deadlines and commitments in a manner that entails adequate public participation and promotes sound decision making.
- **Greenhouse Gases Performance Standards:** On December 23, 2010, EPA announced a consent decree with several NGOs committing the agency to propose and finalize the first ever New Source Performance Standards for greenhouse gases. EPA agreed to promulgate such standards for utilities and refineries without any prior input from stakeholders in those industries. Specifically, EPA committed to propose the first-ever GHG NSPS for these sectors in July and December of 2011, which is an unprecedented quick schedule. In fact, the schedule was so ambitious that six months after the July deadline, the Agency has yet to propose the standards for either sector. Beyond the mere commitment of schedules and timelines, EPA also made various substantive commitments in the agreement that would ordinarily be open for public comment in a rulemaking process, such as a decision to regulate both new and existing sources in these categories, without prior industry input on the feasibility of such controls, the ability to implement in a timely manner, and the lack of adequate data to create such standards. Although the Agency ultimately held listening sessions and took comment on the agreements after finalizing them, the agreements did not materially change before being lodged with the Court.
- **Water:** Recently, Chairman John L. Mica, Chairman Bob Gibbs, and Ranking Members James. M Inhofe and Jeff Sessions raised similar concerns regarding two off ramp settlements in the water context. In a January 29, 2012 letter to the

Environmental Protection Agency, they pointed to examples of Clean Water Act settlements as demonstrating a “trend recently, whereby EPA has been entering into settlement agreements that purport to expand Federal regulatory authority far beyond the reach of the Clean Water Act and has then been citing these settlement agreements as a source of regulatory authority in other matters of a similar nature.”

While the long history of NGO achievements has been essential to the success of environmental protection, there is significant doubt about whether recent off ramp settlements have truly realized better environmental outcomes. From an outsider’s perspective, it certainly appears that these agreements have both disrupted and displaced the government’s authority to prioritize its resource and rulemaking agendas. In many if not most instances, the government deadlines and commitments are unrealistic and not realistically capable of being met, as demonstrated by the missed NSPS deadlines above and the unprecedented scope of the endangered species consultation commitments. Meanwhile, the reallocation of resources to the agenda set by outside parties comes at a cost of other priorities, deadlines, and goals for the environment. This unfortunately is a pattern capable of repetition, as groups then initiate litigation to challenge missed deadlines in the settlement agreements all while bringing new actions to create new enforceable deadlines, further constraining the ability and discretion of the Agency to advance its own agenda.

Beyond these substantive concerns, the off ramp settlement approach in the rulemaking context potentially risks greater consequences to the protections Congress established for all stakeholders in environmental rulemaking. Transparency, public participation, and judicial review are the bedrock principles in our rulemaking system that should be provided equally for all parties. Congress should guarantee these protections remain not only to ensure the strongest possible environmental rulemakings, but to uphold the essential democratic process for providing public input and participation into such rulemakings.

Elements of the proposed Bills that are the subject of this hearing could help ensure that these public protections remain in effect in rulemaking challenges while preserving the government’s broad discretion to enter into settlement agreements and consent decrees when agencies deem such agreements to be in the government’s best interest. Specifically, regarding the Sunshine for Regulatory Decrees and Settlements Act:

- **Requiring transparency:** The proposed Bill provides a process by which affected parties would be notified of proposed settlement agreements and consent decrees, so that such parties can assess whether to intervene in related litigation and participate in commenting on the agreement. I think most if not all would agree that in environmental decision-making, transparency is a good thing, not to be feared or avoided.

- **Providing public participation:** The proposal would memorialize a process where agencies would be required to publish any applicable proposed consent decree or settlement agreement for public comment, and allow comment on any issue related to the matters alleged in the complaint or addressed in the proposed agreement. Government agencies would be required to respond to comments as they do with other regulatory actions and provide a summary and record to the Court of the comments and concerns that have been raised by all affected parties, not just the parties to the agreement. If the initial rule is required by the APA to be surrounded by all this procedural panoply, a settlement agreement that could partially vitiate that rule should get the same procedural protections.
- **Enabling opportunities for judicial review:** The proposed Bill facilitates the participation of affected parties and stakeholders before the Court by providing an opportunity for intervention prior to the finalization of an agreement. In addition, the proposal provides the opportunity to bring intervenors—those parties whom the Court necessarily has deemed have an interest that could be adversely affected by the litigation—to the settlement table to contribute ideas, interests, and solutions through a mediated process.
- **Affirming the priority setting discretion of agencies:** Finally, the proposal has a number of provisions intended to ensure that the government, prior to the approval of an agreement or consent decree, can meet the commitments made in any agreement without disrupting other key priorities and allocations of resources. For example, the measure would enable courts to assess whether the agreement allows sufficient time and procedure for the agency to comply with procedural protections relating to public participation in related rulemakings. The provisions requiring certifications to the court on the creation of new mandatory duties through agreements, the expenditure of unappropriated funds, and the divestment of agency discretion may encourage more principled agreements with realistic expectations. And the modification provision would aid the government in seeking modifications to agreements whose implementation jeopardize the public interest when considered against changed facts or circumstances or other pressing mandatory duties.

These key principles promoted in the proposed Sunshine for Regulatory Decrees and Settlements Act will hopefully bring little controversy. The measure would preserve the ability of the government to seek efficient settlement agreements while assuring along the way that information is shared, the public has an ability to participate and be heard, and that the views of parties that could be adversely affected are considered by the Agency and the Court. Although some may find it inefficient to bring presumably adverse parties together in a mediation program, in my experience the opposite is true. The opportunity and ability to reach compromise prior to an agreement with all interested stakeholder input

only increases the likelihood of an agreement that is long lasting, effective at realizing its intended goals, and responsive to a wide range of issues and solutions.

Thank you for the opportunity to share my views in these important proposals. I would be happy to answer any questions.