

**TESTIMONY OF  
ROBERT V. PERCIVAL**

**BEFORE THE HOUSE COMMITTEE ON  
OVERSIGHT AND GOVERNMENT REFORM**

**HEARING ON  
“MANDATE MADNESS:  
WHEN SUE AND SETTLE JUST ISN'T ENOUGH”**

**June 28, 2012**

My name is Robert V. Percival. I am the Robert F. Stanton Professor of Law and the Director of the Environmental Law Program at the University of Maryland Francis King Carey School of Law. Thank you for inviting me to testify today. A copy of my c.v. is attached to this testimony as Appendix A. As indicated on the c.v., I have long taught Environmental Law, Constitutional Law, and Administrative Law. I also have written extensively in these areas, including research on the specific focus of this hearing, which is attached as Appendix C to this testimony (“The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making,” 1987 University of Chicago Legal Forum. 1987 U. Chi. Legal F. 327 (1987)).

#### I. U.S. ENVIRONMENTAL LAW IS THE ENVY OF THE WORLD

In recent years I have devoted much of my academic work to global environmental law. I have lectured in 26 countries on six continents and at more than 20 academic institutions in the People’s Republic of China. During the spring semester 2008 I taught as a J. William Fulbright Distinguished Lecturer at the China University of Political Science and Law in Beijing. Based on these experiences, I can testify that the U.S. legal system is the envy of the world. A major reason for this is because we authorize citizen suits, heard by an independent judiciary, that allow ordinary citizens and businesses to hold government agencies accountable.

U.S. environmental law generally authorizes two types of citizen suits against government agencies. First, the Administrative Procedure Act (5 U.S.C. §702), and the judicial review provisions of the federal environmental laws (see, e.g., §509 of the Clean Water Act, 33 U.S.C. §1369) authorize judicial review of agency action to assess its conformity to legal and procedural requirements. Second, the

environmental laws authorize citizen suits against agencies for failure to perform non-discretionary duties (see, e.g., §505(A)(2) of the Clean Water Act, 33 U.S.C. §1365). We enjoy much cleaner air and water today than countries like China because citizen groups were able to go to court to compel agencies to implement the ambitious promises Congress made in our environmental laws. These laws have produced enormous net benefits to society and the economy that make U.S. environmental law the envy of the world.

## II. SETTLEMENTS ARE DESIRABLE AND FAVORED BY PUBLIC POLICY

Settlements are a prominent feature of the U.S. legal system, both civil and criminal, because they provide important benefits to litigants and to society. They avoid the time and expense of protracted litigation, free up valuable judicial resources and enable both parties to reduce the risk of unfavorable litigation outcomes. Thus, as courts have recognized, there is a “broad public interest favoring” settlement. *Southern Union Gas Co. v. Fed. Energy Regulatory Comm’n*, 840 F.2d 964 (D.C. Cir. 1988). In most cases where agencies are sued for failing to perform a non-discretionary duty, such as missing a statutory deadline, liability is clear and the primary issue is when the violation will be cured by the agency performing its mandatory duty. An agency will only enter into a settlement when it believes that the settlement will leave it better off than it would have been had the litigation continued to judgment.

## III. EXISTING LEGAL SAFEGUARDS PRECLUDE COLLUSIVE LITIGATION

The characterization of settlements of environmental litigation against agencies as collusive “sue and settle” to bypass normal statutory and rulemaking

requirements is simply a fantasy. Such litigation does not exist because existing legal safeguards preclude it. Agencies must comply with the law as written by Congress, including the requirements for notice and comment rulemaking provided in the Administrative Procedure Act (APA) (5 U.S.C. §553). Courts must approve agency settlements and they are directed by the APA to reverse agency actions that are contrary to law or undertaken without observance of legally required procedures (§5 U.S.C. §706). While agencies can commit to a schedule for performing their mandatory duties, agencies cannot settle litigation by making commitments concerning the substance of final regulations they will issue.

To be sure, agencies policies may change, particularly when there is a change in presidential administrations. Agencies have inherent authority to reconsider prior regulatory decisions so long as they have a reasoned basis for doing so. *Motor Vehicle Mfrs. Ass'n v. State Farm Automobile In. Co.*, 463 U.S. 29, 56-57 (1983). Thus, it should surprise no one if the Obama administration's EPA finds it easier to reach settlement agreements with environmental groups than with industry. Nor should it surprise anyone if, for example, a future Romney administration's EPA found it easier to settle litigation with industry. This does not mean that collusion is occurring. Nor does it mean that statutory and rulemaking requirements are being bypassed. Settlements approved in cases such as *American Nurses Association v. Jackson* and *National Pork Producers v. EPA* commit EPA to propose regulations, but they make no commitments concerning the substance of any final rules the agency may adopt. These will be subject to notice and comment rulemaking in which all

members of the public can participate. Any regulations EPA ultimately adopts can be challenged in court to assess their legality.

There already are substantial safeguards built into the legal system to preclude collusive settlements. These safeguards include: (1) standing requirements that require concrete adverseness among litigants, (2) the need to obtain judicial approval of settlements, and (3) requirements of the Administrative Procedure Act (APA) that preclude agencies from making commitments concerning the substance of future rules. Moreover, the U.S. Department of Justice, whose Environment and Natural Resources Division (ENRD) has operated with the greatest integrity in a non-partisan fashion throughout Democratic and Republican administrations, has undertaken to provide its own additional safeguards. The ENRD now posts proposed consent decrees online and solicits public comment on them prior to their entry (see <http://www.justice.gov/enrd/Consent-Decrees.html>).

In March 1986 Attorney General Edwin Meese issued a memorandum restricting the scope of permissible settlement commitments by executive agencies and the circumstances under which consent decrees can be employed by them. Memorandum from Edwin Meese III to All Assistant Attorneys General and All United States Attorneys, Department Policy Regarding Consent Decrees and Settlement Agreements, March 13, 1986. Even this memorandum recognized that settlement is “a perfectly permissible device” that “should be strongly encouraged.” It noted that consent decrees are beneficial “for ending litigation without trial, providing the plaintiffs with an enforceable order, and insulating the defendant from the ramifications of an adverse judgment.”

In the article appended to this testimony, I concluded that the “Meese Memorandum” was unwise as a policy matter but clearly within the discretion of the Attorney General. Although the Meese Memorandum was premised on the notion that it was constitutionally mandated, I argued that it was not, a position that has withstood the test of time. See “Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion,” Memorandum from Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, for Raymond C. Fisher, Associate Attorney General (June 15, 1999) available online at: [http://www.justice.gov/olc/consent\\_decrees2.htm](http://www.justice.gov/olc/consent_decrees2.htm).

The Meese Memorandum was motivated largely by the Reagan administration’s efforts to persuade courts to vacate consent decrees entered into during previous administrations. The one environmental consent decree targeted by the Reagan administration was the “Flannery Decree,” which was upheld by the D.C. Circuit in *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117 (D.C. Cir. 1983). In that case the EPA had fallen hopelessly far behind statutory deadlines for implementing a detailed regulatory program covering virtually all industrial sources of water pollution. Faced with multiple lawsuits, EPA agreed to a detailed timetable to carry out its nondiscretionary duties to promulgate effluent limits and performance standards under the Clean Water Act for sixty-five pollutants discharged by twenty-one industries. The settlement was largely ratified by Congress in the 1977 Amendments to the Clean Water Act. In a subsequent challenge to the consent decree, the D.C. Circuit upheld it, emphasizing that it was consistent with the purposes of the Act, fairly resolved the controversy, and did not

prescribe the content of the regulations that EPA would promulgate. *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117 (D.C. Cir. 1983). The decree has produced significant results.

Contemporary consent decrees in environmental cases again involve situations where EPA has clearly violated a statutory duty mandated by Congress. The consent decree approved in 2010 in *American Nurses Association v. Jackson* resolved litigation charging that EPA was more than a decade late in issuing standards to control hazardous air pollutants required by the 1990 Amendments to the Clean Air Act. EPA's failure to meet the statutory deadline was undisputed. The question addressed by the settlement agreement was how much time the agency should be allowed to cure this violation. While industry intervenors argued that the schedule EPA had agreed to for issuing the regulations was too rapid, the court approving it noted that "[s]hould haste make waste, the resulting regulations will be subjected to successful challenge. If EPA has correctly estimated the speed with which it can do the necessary data gathering and analyses, harmful emissions will be sooner reduced." *American Nurses Association v. Jackson*, Civil Action No. 08-2198 (D.D.C. April 15, 2010).

In fashioning relief courts generally have been deferential to agency representations concerning the amount of time needed to complete rulemakings. Yet given EPA's track record of repeatedly missing deadlines, occasionally a court will lose patience with the agency. In a very rare case where a court refused to give EPA more time to meet deadlines for performing long overdue mandatory duties, see *Sierra Club v. Jackson*, 2011 WL 181097 (D.D.C. Jan. 20, 2011), EPA issued the

regulations, 76 Fed. Reg. 15,608 (Mar. 21, 2011), while simultaneously publishing a notice of its intent to reconsider them. 76 Fed. Reg. 15,266 (Mar. 21, 2011).

#### IV. CONCLUSION

The ability of citizen groups and businesses to go to court to hold agencies accountable is one of the most important features of our legal system that makes it the envy of the world. It has been absolutely critical to ensuring that our federal environmental laws are implemented and enforced in a manner consistent with statutory directives. Settlement of litigation has long been a prominent feature of our legal system that is expressly encouraged by public policy because of the substantial benefits it provides. The notion that collusive settlements are being used by agencies to expand their powers beyond existing legal authorities or to bypass procedures for promulgating rules is a fantasy. Existing legal safeguards preclude collusive litigation and settlements cannot be used to make commitments concerning the substance of future regulations. Congress should not further burden federal courts and agencies with new obstacles to settlements that will result in more protracted litigation and less efficient implementation of the law.

## APPENDIX A

### C.V. for ROBERT V. PERCIVAL

University of Maryland Francis King Carey School of Law  
500 W. Baltimore Street  
Baltimore, Maryland 21201  
Phone: (410) 706-8030 Fax: (410) 706-2184  
rpercival@law.umaryland.edu

#### **UNIVERSITY OF MARYLAND SCHOOL OF LAW, Baltimore, Maryland 1987-present**

*Robert F. Stanton Professor of Law*

*Director, Environmental Law Program*

Developed and manage one of the nation's top-rated environmental law programs. Created the program's environmental law clinic in 1987. From 1987-89 served as director of the university-wide Coastal and Environmental Policy Program. Appointed full professor in 1994 and Robert F. Stanton Professor in 2004. Selected as "Teacher of the Year" for the University of Maryland Baltimore in 2007.

*Courses taught:* Environmental Law, Environmental Law Clinic, Torts, Constitutional Law, Administrative Law, Environmental/Administrative Law Workshop, Seminars in Toxic Torts, Risk Assessment and Regulation, Management of Global Fisheries, Transboundary Pollution & the Law, Tobacco Control and the Law, and interdisciplinary seminars on Lead Poisoning Control and Comparative Environmental Law and Politics (winner of the 2005 University of Maryland Board of Regents' Award for Collaboration in Teaching for course co-taught with the Department of Government and Politics).

*Summer teaching:* Comparative U.S./China Environmental Law at Vermont Law School, South Royalton, Vermont (Summer 2012), Principles of Environmental Law at Shandong University, Jinan, China (Summer 2012), Comparative Environmental Justice at University of British Columbia/Southwestern University School of Law, Vancouver, Canada (Summer 2006, Summer 2009), Environmental Law at Lewis & Clark College of Law in Portland, Oregon (Summer 1995), Comparative Environmental Law at the University of Aberdeen in Aberdeen, Scotland (Summer 1994, Summer 2000).

#### **GEORGETOWN UNIVERSITY LAW CENTER, Washington, D.C.**

*Visiting Professor of Law*

*Fall Semester 2011*

Taught Environmental Law

#### **HARVARD LAW SCHOOL, Cambridge, Massachusetts**

*Spring Semester 2009*

*Visiting Professor of Law*  
Taught Environmental Law

**CHINA UNIVERSITY OF POLITICAL SCIENCE & LAW** *Spring Semester 2008*

*J. William Fulbright Distinguished Lecturer*  
Taught Environmental Law and Comparative Law

**GEORGETOWN UNIVERSITY LAW CENTER**, Washington, D.C.

*Visiting Professor of Law* *Spring Semester 2005*  
Taught Administrative Law and a seminar on Transboundary Pollution and the Law

**HARVARD LAW SCHOOL**, Cambridge, Massachusetts *Fall Semester 2000*

*Visiting Professor of Law*  
Taught Environmental Law and a seminar on Transboundary Pollution and the Law.

**COMENIUS UNIVERSITY SCHOOL OF LAW**, Bratislava, Slovakia *Spring 1994*

*J. William Fulbright Scholar*  
Taught Environmental Law and Administrative Law as a Fulbright Scholar.

### **PREVIOUS EMPLOYMENT**

**ENVIRONMENTAL DEFENSE FUND**, Washington, D.C. *1981-1987*

*Senior Attorney*  
Served as chairman of Toxic Chemical Regulation Program. Responsible for policy development, advocacy and litigation on a broad variety of issues.

**U.S. DEPARTMENT OF EDUCATION**, Washington, D.C. *1980-1981*

*Special Assistant to Hon. Shirley M. Hufstедler, first U.S. Secretary of Education*  
Assisted Secretary with the establishment of new cabinet department.

**SUPREME COURT OF THE UNITED STATES**, Washington, D.C. *1979-1980*

*Law Clerk to Justice Byron R. White*

**U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT** *1978-1979*

*Law Clerk to Judge Shirley M. Hufstедler*

### **EDUCATION**

**STANFORD LAW SCHOOL**, J.D., 1978

Nathan Abbott Scholar (awarded for graduating with highest grade point average)  
Order of the Coif  
Second Year Honor for highest grade point average in second year law school class

First Year Honor for highest grade point average in first year law school class  
Managing Editor of Volume 28 of *Stanford Law Review*

Board of Editors' Award for outstanding editorial contributions to *Stanford Law Review*

Best Brief, Marion Rice Kirkwood Moot Court Competition

Runner-up Overall Advocate, Marion Rice Kirkwood Moot Court Competition

Hilmer Oehlman, Jr., Award for outstanding work in research and legal writing program

**STANFORD UNIVERSITY**, M.A. 1978 (Economics)

Danforth Foundation Fellowship

Passed all comprehensive examinations required for PhD. (Price & Allocation Theory, Theory of Income and Economic Fluctuations, Labor Economics, Structure of Industry, and Economic History).

**MACALESTER COLLEGE**, B.A. *summa cum laude* 1972 (Economics & Political Science)

National Merit Scholar

Phi Beta Kappa (junior year)

Elected to Omicron Delta Epsilon, national economics honor society

Numerous awards in intercollegiate debate team competition

#### **OTHER PROFESSIONAL ACTIVITIES**

Member, National Committee on United States-China Relations, *2012-present*

Member, Board of Advisors, Transnational Environmental Law Journal, *2011-present*

American Law Institute (elected member), *2006-present*

Member, Maryland Governor's Environmental Restoration and Development Task Force, *2004*

Special Master in *Sherwin-Williams Co. v. ARTRA Group*, #S-91-2744 (D. Md.), *2002-2003*

By appointment of federal judge, presided as special master over a three-week trial in federal district court of damages phase of a CERCLA §113 contribution action.

Visiting Professor, University of Chile School of Law, Santiago, Chile, *Oct./Nov. 2002*

Presented lectures and helped develop South America's first environmental law clinic.

Natural Resource Law Institute Distinguished Visitor, Lewis & Clark College of Law, Portland, Oregon, *September 2002*

Contributing Editor, Environment & Natural Resources, Federal Circuit Bar Journal, *1999-2007*

Editorial Board, International Journal of Environmental Research, *2005-present*

Member of Board of Directors, Environmental Law Institute, *1993-1999*

Member of Steering Committee, D.C. Bar Section on Environment, Energy and Natural Resources

*Law, 1992-1998 (co-chair from 1993-1996).*

Secretary-Treasurer, Environmental Law Institute, 1997-1999  
Member of the Commission on Environmental Law, International Union for the Conservation of Nature, Bonn, Germany, 1997-present

### **ADMITTED TO PRACTICE**

Supreme Court of the United States (1987)  
U.S. Court of Appeals for the D.C. Circuit (1982)  
U.S. Court of Appeals for the Fifth Circuit (1985)  
U.S. District Court for the District of Columbia (1984)  
District of Columbia Court of Appeals (1981)  
Supreme Court of California (1978)  
Court of Appeals of Maryland (1988)

### **SELECTED PUBLICATIONS**

#### ***Books and Book Chapters***

*Environmental Regulation: Law, Science & Policy* (Aspen Publishing) (with Schroeder, Miller & Leape) – most widely-used environmental casebook in the U.S. first published in 1992 and now in its 6<sup>th</sup> edition (2009).

*Environmental Law: Statutory and Case Supplement 2011-2012*, Aspen Publishing (2011) – published annually since 2002 (with Christopher Schroeder).

“Law, Society and the Environment,” in *Law, Society and History: Themes in the Legal Sociology and Legal History of Lawrence M. Friedman* (Robert W. Gordon & Morton J. Horowitz, eds., Cambridge University Press 2011).

“La Responsabilidad por Daño Ambiental Global y la Evolución en las Relaciones entre el Derecho Público y Privado (Liability for Global Environmental Damage and the Evolution in the Relationship Between Public and Private Law)”, in *Derecho Ambiental en Tiempos de Reformas* (Environmental Law in Times of Reform) 99 (V. Duran Medina, S. Montenegro Arriagada, Pilar Moraga Sariago, D. Ramirez Sfeir & A. Lya Uriarte Rodriguez, eds. AbeledoPerrot Publishing (Chile) 2010).

“Resolución de Conflictos Ambientales: Lecciones Aprendidas de la Historia de la Contaminación de las Fundiciones de Minerales (Resolution of Environmental Conflicts: Lessons from the History of Smelter Pollution),” in *Prevención y Solución de Conflictos Ambientales: Vías Administrativas, Jurisdiccionales y Alternativas* 399 (Lexis Nexos 2004).

*Law and the Environment: A Multidisciplinary Reader* (Temple Univ. Press 1997) (with Dorothy C. Alevizatos).

“The Organometals: Impact of Accidental Exposure and Experimental Data on Regulatory Policy,” in Tilson & Sparber (eds.), *Neurotoxicants and Neurobiological Function: Effects of Organoheavy Metals* 328 (John Wiley & Sons, 1987) (with Ellen K. Silbergeld).

*The Roots of Justice* (Univ. of N.C. Press, 1981) (with Lawrence M. Friedman) - winner of the Law & Society Association's J. Willard Hurst Prize in American Legal History, 1982; winner of the Western History Association's Robert G. Athearn Award, 1984.

### ***Law Review Articles***

“Global Law and the Environment,” 86 Wash. L. Rev. 579 (2011).

“Who’s in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?” 79 Fordham L. Rev. 2487 (2011).

“Liability for Environmental Harm and Emerging Global Environmental Law,” 25 Maryland J. of International Law 37 (2010).

“The Emergence of Global Environmental Law,” 36 Ecology Law Quarterly 101 (2009) (with Tseming Yang).

“*Massachusetts v. EPA*: Escaping the Common Law’s Growing Shadow,” 2007 Supreme Court Review 111 (2008).

“Environmental Law in the Twenty-First Century,” 25 Va. Env’tl L. J. 1 (2007).

Translated into Mandarin and published as “21世纪环境法展望”, 2008 International Environmental Law and Comparative Environmental Law Review 204 (Wang Xi ed. 2008) (translation into Chinese by Professor Li Yanfang).

“Who Is Afraid of the Precautionary Principle?” 23 Pace Environmental Law Review 801 (2006).

“Environmental Law in the Supreme Court: Highlights from the Blackmun Papers,” 35 Env. L. Rep. 10637 (2005).

“The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance,” 55 Ala. L. Rev. 717 (2004).

“Skeptical Environmentalist or Statistical Spin-Doctor?: Bjørn Lomborg and the Relationship Between Environmental Law and Environmental Progress,” 53 Case W. L. Rev. 236 (2003).

“‘Greening’ the Constitution – Harmonizing Environmental and Constitutional Values,” 32 Env’tl L. 809 (2002).

“Presidential Management of the Administrative State: The Not-So-Unitary Executive,” 51 Duke L. J. 993 (2001).

“Escaping the Common Law’s Shadow: Standing in the Light of *Laidlaw*,” 9 Duke Env’t L. & Policy F. 119 (2001) (with Joanna B. Goger).

“Separation of Powers, the Presidency and the Environment,” 21 J. Land, Resources & Env’t L. 25 (2001).

“Responding to Environmental Risk: A Pluralistic Perspective,” 14 Pace Env. L. Rev. 513 (1997).

“Environmental Federalism: Historical Roots and Contemporary Models,” 54 Md. L. Rev. 1141 (1995).

“Environmental Law in the Supreme Court: Highlights from the Marshall Papers,” 13 Environmental Law Reporter 10606 (Oct. 1993).

“Overcoming Interpretive Formalism: Legislative Reversals of Judicial Constructions of Sovereign Immunity Waivers in the Environmental Statutes,” 43 J. Urban & Cont. L. 221 (1993).

“The Ecology of Environmental Conflict: Risk, Uncertainty and the Transformation of Environmental Policy Disputes,” 12 Studies in Law, Politics and Society 209 (1992).

“Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency,” 54 Law & Cont. Problems 127 (Winter 1991).

“Protecting Coastal and Estuarine Resources: Confronting the Gulf Between the Promise and Product of Environmental Regulation,” 47 Md. L. Rev. 341 (1988).

“Rediscovering the Limits of the Regulatory Review Authority of the Office of Management and Budget,” 17 Env. L. Rep. 10017 (1987).

“The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policymaking,” 1987 Univ. Chic. Leg. F. 327 (1987).

“The Role of Attorney Fee Shifting in Public Interest Litigation,” 47 Law & Cont. Problems 235 (1984) (with Geoffrey P. Miller).

“A Tale of Two Courts,” 10 Law & Society Rev. 267 (1976) (with Lawrence M. Friedman).

### ***Policy Reports***

"Strategies for Promoting Green Energy Innovation, Deployment & Technology Transfer," in American Institute for Contemporary German Studies, Intellectual Property Rights and Green Technology Transfer: German and U.S. Perspectives, Policy Report #45 at 7-59 (2010).

"Environmental Crisis Management -- A Comparative Analysis," in China Council for International Cooperation on Environment and Development, Report of the Task Force on Environmental Governance (2006) (translated into Chinese and reprinted in 19 Research in Environmental Sciences 133 (2006)) (with Miranda Schreurs).

### ***Book Reviews***

"Environmental Law Goes Global: *Taking Back Eden: Eight Environmental Cases that Changed the World*," 41 Environmental Law Reporter 10194 (March 2011).

"Chasing the Wind: Regulating Air Pollution in the Common Law State," 14 Law & Politics Book Review (2004).

APPENDIX B

Committee on Oversight and Government Reform  
Witness Disclosure Requirement – “Truth in Testimony”  
Required by House Rule XI, Clause 2(g)(5)

Name:

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1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2009. Include the source and amount of each grant or contract.

NONE

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2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

NONE

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3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2009, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

NONE

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I certify that the above information is true and correct.

Signature:

Robert V. Reuval

Date: JUNE 24, 2012

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APPENDIX C

Robert V. Percival, "The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making," 1987 Univ. Chi. Legal Forum 327 (1987)  
[sent as separate file]

## The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making

Robert V. Percival†

The development of the "interest representation" model of administrative law has reflected the growing role of private interests in the formation and implementation of public policy.<sup>1</sup> Nowhere is this transformation more evident than in the case of national environmental policy. The major federal environmental statutes encourage broad citizen participation in the policy-making process while providing for direct judicial review of administrative action.<sup>2</sup> 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.<sup>3</sup>

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† Assistant Professor of Law, University of Maryland School of Law; formerly Senior Attorney, Environmental Defense Fund.

<sup>1</sup> See generally Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *Harv. L. Rev.* 1669 (1975); Richard B. Stewart and Cass R. Sunstein, *Public Programs and Private Rights*, 95 *Harv. L. Rev.* 1195 (1982).

<sup>2</sup> See, for example, Superfund Amendments and Reauthorization Act of 1986 ("SARA"), 42 U.S.C.A. § 9601 et seq. (West Supp. 1987), amending Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9657 (1982 and Supp. 1985); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6974, 6976 (1982 and Supp. 1985); Toxic Substances Control Act, 15 U.S.C. §§ 2619, 2620 (1982 and Supp. 1985); Administrative Procedure Act, 5 U.S.C. § 553 (1982 and Supp. 1985).

<sup>3</sup> Citizen suit provisions originated in the Clean Air Act Amendments of 1970, 42 U.S.C. § 7604 (1982). The citizen suit provisions of other federal environmental legislation are virtually identical to those in the Clean Air Act. See Resource Conservation and Recovery Act, 42 U.S.C. § 6972; Toxic Substances Control Act, 15 U.S.C. § 2619; Federal Water Pollution Control Act, 33 U.S.C. § 1365 (1982 and Supp. 1985); Endangered Species Act, 16 U.S.C. § 1540(g) (1982 and Supp. 1985); Safe Drinking Water Act § 1449, 42 U.S.C. § 300j-9 (1982 and Supp. 1985); Noise Control Act, 42 U.S.C. § 4911 (1982 and Supp. 1985); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270 (1982 and Supp. 1985); SARA, 42 U.S.C.A. § 9659.

For example, the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a) (Supp. 1985), contains a typical citizen suit provision that authorizes suits against: (1) any person . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this [Act], or whose actions in managing solid waste "may present an imminent and substantial endangerment to health or the environment"; and (2) "the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this [Act] which is not discre-

# The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making

*Robert V. Percival*†

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† Assistant Professor of Law, University of Maryland School of Law; formerly Senior Attorney, Environmental Defense Fund.

<sup>1</sup> See generally Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669 (1975); Richard B. Stewart and Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1195 (1982).

<sup>2</sup> See, for example, Superfund Amendments and Reauthorization Act of 1986 (“SARA”), 42 U.S.C.A. § 9601 et seq. (West Supp. 1987), amending Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9657 (1982 and Supp. 1985); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6974, 6976 (1982 and Supp. 1985); Toxic Substances Control Act, 15 U.S.C. §§ 2619, 2620 (1982 and Supp. 1985); Administrative Procedure Act, 5 U.S.C. § 553 (1982 and Supp. 1985).

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For example, the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a) (Supp. 1985), contains a typical citizen suit provision that authorizes suits against: (1) any person . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this [Act],” or whose actions in managing solid waste “may present an imminent and substantial endangerment to health or the environment”; and (2) “the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this [Act] which is not discre-

The complexity of environmental regulations and the growing volume of environmental litigation have spurred increased interest in settlements and non-litigation alternatives for resolving environmental disputes.<sup>4</sup> As in other areas of civil and criminal law, settlements have become a frequent, if not the predominant, mode for disposing of environmental litigation.<sup>5</sup> Regulatory agencies frequently settle litigation challenging their behavior by agreeing to change their behavior in a certain way. When executive agencies enter into consent decrees, the settlement commitments they make acquire the force of law and are enforceable through a court's equitable powers.

Concern that such settlements have impermissibly infringed on executive discretion has been cited by the Justice Department to justify adoption of guidelines restricting the scope of permissible settlement commitments and the circumstances under which consent decrees can be employed by executive agencies.<sup>6</sup> These guide-

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tionary with the [EPA] Administrator."

<sup>4</sup> See, for example, Carol E. Dinkins, *Shall We Fight or Will We Finish: Environmental Dispute Resolution in a Litigious Society*, 14 *Envtl. L. Rep.* 10398 (*Envtl. L. Inst.* 1984); Gail Bingham, *Resolving Environmental Disputes, A Decade of Experience* (1986); Gail Bingham and Daniel S. Miller, *Prospects for Resolving Hazardous Waste Siting Disputes through Negotiation*, 17 *Nat. Resources Law.* 473, 485-89 (1984); Lawrence Susskind, Lawrence Bacow and Michael Wheeler, eds., *Resolving Environmental Regulatory Disputes* (1983).

<sup>5</sup> It is not possible to determine precisely how frequently environmental litigation is settled and the percentage of such settlements that are embodied in consent decrees. However, there is a widespread perception that a substantial number of cases are settled. See Jeffrey M. Gaba, *Informal Rulemaking by Settlement Agreement*, 73 *Geo. L.J.* 1241, 1247 n.26 (1985); Bob Rosin, *EPA Settlements of Administrative Litigation*, 12 *Ecol. L.Q.* 363, 364 (1985); Note, *Consent Decrees and the EPA: Are They Really Enforceable Against the Agency?*, 1 *Pace Env'tl. L. Rev.* 147 (1983). Settlements have always played a significant part in the resolution of civil litigation. See, for example, Lawrence M. Friedman and Robert V. Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 *L. & Soc'y Rev.* 267, 289 (1976). Nor is the settlement of criminal cases through plea bargaining a recent development. See Lawrence M. Friedman and Robert V. Percival, *The Roots of Justice 175-78* (1981); Lawrence M. Friedman and Robert V. Percival, *The Processing of Felonies*, 5 *L. & Hist. Rev.* 1, 17-18 (1987).

<sup>6</sup> Memorandum from the Attorney General, Department Policy Concerning Consent Decrees and Settlement Agreements (March 13, 1986) ("Department of Justice Guidelines Memorandum") (on file with the University of Chicago Legal Forum), reprinted in *Review of Nixon Presidential Material Access Regulations: Hearing Before the Subcomm. on Government Information, Justice and Agriculture of the House Comm. on Government Operations*, 99th Cong., 2d Sess. 182 (1986), reprinted in part in 54 *U.S.L.W.* 2492 (April 1, 1986). Other expressions of concern about the impact of settlements include Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 *Duke L.J.* 887; Owen M. Fiss, *Against Settlement*, 93 *Yale L.J.* 1073 (1984); Patricia M. Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?*, 10 *Colum. J. Env'tl. L.* 1 (1985); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 *Harv. L. Rev.* 668 (1986).

lines are founded on the premise that private plaintiffs, executive agencies and the courts have abused the settlement process and used consent decrees to usurp executive prerogatives. This article explores that premise and the legal bounds on settlement commitments by executive agencies in the context of federal environmental policy making.

## I. CONSENT DECREES AND THE BENEFITS OF SETTLING ENVIRONMENTAL LITIGATION

Before evaluating the Justice Department's settlement policy it is important to consider why settlements long have been favored by public policy,<sup>7</sup> and the value of consent decrees to the settlement process. Environmental litigation offers an excellent case study of the value of settlement agreements.

### A. The Value of Settlements in Environmental Litigation

The federal environmental statutes impose on executive agencies a wide range of obligations that often must be performed within specific deadlines.<sup>8</sup> These provisions, which reflect congressional frustration with the slow pace of executive implementation of congressional legislation, are enforceable by private action.<sup>9</sup> En-

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<sup>7</sup> See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *Autera v. Robinson*, 419 F.2d 1197, 1199 (D.C. Cir. 1969); Administrative Procedure Act, 5 U.S.C. § 554(c)(1); Fed. Rule Civil Proc. 68; Fed. Rule Evid. 408.

<sup>8</sup> For example, the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. §§ 6901-87 (1982 and Supp. 1985), impose literally dozens of new obligations on the Environmental Protection Agency ("EPA") and couple many of them with statutory deadlines extending over a period of six years. In some instances, Congress even specified the detailed content of regulations that will take effect automatically ("hammer provisions") if EPA fails to meet certain deadlines. Imposition of such detailed statutory obligations on an administrative agency reflects congressional frustration with EPA's failure to implement less prescriptive legislative schemes in a timely fashion in the past. James J. Florio, Congress as Reluctant Regulator: Hazardous Waste Policy in the 1980's, 3 *Yale J. on Reg.* 351 (1986). For an analysis of the impact of statutory deadlines on the Environmental Protection Agency, see Environmental & Energy Study Institute, *Statutory Deadlines in Environmental Legislation: Necessary But Need Improvement* (Sept. 1985).

<sup>9</sup> See Florio, 3 *Yale J. on Reg.* at 351. This trend of imposing specific deadlines shows no sign of abating. See SARA (cited in note 2); Asbestos Hazard Emergency Response Act of 1986, Pub. L. No. 99-519, 100 Stat. 4816 (amending the Toxic Substances Control Act, 15 U.S.C. §§ 2601-29). The asbestos legislation was an outgrowth of EPA's failure for nearly a decade to promulgate standards requiring abatement of asbestos hazards in schools, despite the agency's prior promises to develop such standards. See EPA, Toxic Substance Control Act: Grant of Petition to Initiate Rulemaking Proceeding to Regulate Sprayed Asbestos in Schools, 44 Fed. Reg. 40900 (1979) (granting Environmental Defense Fund ("EDF") petition pursuant to Section 21 of the Toxic Substances Control Act to commence a rule-making to require abatement of asbestos hazards in schools); EPA, Asbestos-Containing Materials in

vironmental officials are responsible for the development and enforcement of complex regulatory schemes. In light of the great demands placed on such agencies, it is not surprising that they have eagerly embraced settlements and alternative dispute resolution techniques.<sup>10</sup> The vast majority of environmental enforcement actions brought by the government is resolved by negotiated settlement.<sup>11</sup>

Settlements of private suits which challenge agency action or inaction also are common. Executive agencies are defendants in two principal types of environmental litigation: suits seeking judicial review of final agency action and suits alleging that an agency has failed to perform a mandatory duty.<sup>12</sup> Plaintiffs typically allege that the executive agency has failed to conform with procedural requirements or that it has acted in a manner inconsistent with the underlying regulatory statute. Because environmental plaintiffs usually seek only equitable relief, their concern is not the expected size of an award for damages, but rather the extent to which the lawsuit will change the behavior of the executive agency.

Litigation is settled by mutual consent of the parties only when each party believes that a settlement will leave it better off

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School Buildings: Advance Notice of Proposed Rule making, 44 Fed. Reg. 54676, 54679 (1979) (proposed rule stating that EPA goal "would be to have a complete regulatory program by the school summer vacation of 1980").

<sup>10</sup> EPA has estimated that as many as 80 percent of its regulations have been challenged in court and that approximately 30 percent of them have been changed significantly as a result of litigation, consuming enormous agency resources. Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 *Yale J. on Reg.* 133, 134 (1985). In 1983 EPA established a Regulatory Negotiation Project to investigate the value of developing regulations by negotiation among interested parties, an idea suggested in Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 *Geo. L.J.* 1, 115-18 (1982). To date, EPA has successfully completed three negotiations and currently has four more in progress. Participants in such negotiations are appointed to a Federal Advisory Committee pursuant to the Federal Advisory Committee Act, 5 U.S.C. App. § 1 et seq. (1982 and Supp. 1985). The most successful regulatory negotiation to date has been the negotiation of New Source Performance Standards under the Clean Air Act for residential woodstoves. Representatives of woodstove manufacturers, environmental groups, and state officials successfully reached consensus on proposed standards. Less successful has been EPA's attempt to negotiate standards to protect farmworkers from agricultural pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136a (1982), where it has not been possible to achieve consensus.

<sup>11</sup> Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws Part II*, 14 *Envtl. L. Rep.* 10063, 10080 (*Envtl. L. Inst.* 1984). For a description of regulatory settlements in cases in which the government is a defendant, see Alan S. Miller, *Steel Industry Effluent Limitations: Success at the Negotiating Table*, 13 *Envtl. L. Rep.* 10094 (*Envtl. L. Inst.* 1983); see also, Gaba, 73 *Geo. L.J.* 1241 (cited in note 5); Rosin, 12 *Ecol. L.Q.* at 363 (cited in note 5).

<sup>12</sup> See note 3.

than continuation of the litigation.<sup>13</sup> Joint gains from settlement are possible because settlements save the parties the expense of further litigation. They also derive from the ability of parties to fashion relief that they prefer over that expected after trial and from the elimination of uncertainty that relief will be obtained in timely fashion.

Executive agencies may benefit from the settlement of environmental litigation in a variety of ways. In some cases it is clear that an agency has failed to comply with a statutory obligation. The primary issue is not liability but relief—what action will be taken to bring the agency into compliance?<sup>14</sup> In such cases an agency may seek to negotiate a settlement in order to prevent judicial interference with the remedial plan that it prefers. In other cases, an agency may settle to avoid a judgment on the merits on a broad question of law that could be decided in a manner that would have an adverse impact on other agency programs. A settlement may be entered rather than risking a decision that may place further constraints on the scope of the agency's discretion. Agencies also have an interest in conserving litigation resources and preventing delays in the implementation of regulatory programs. Thus, an agency may agree to a settlement to preserve its resources and to ensure timely implementation of its program.

Settlements may be crafted with considerable flexibility but they must be consistent with statutory requirements. Thus, agencies will refuse to promulgate specific regulatory changes when such changes would be inconsistent with the rule-making requirements of the Administrative Procedure Act ("APA").<sup>15</sup> Agencies may agree to consider rule-making changes and to adopt regulations required by law, but they generally will not make substantive commitments concerning the content of regulations that are subject to APA requirements.

Settlements have included commitments to gather and to consider information or to use certain procedures that go beyond the minimum required by law.<sup>16</sup> Such settlements can benefit both

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<sup>13</sup> See William M. Landes, *An Economic Analysis of the Courts*, 14 *J.L. & Econ.* 61, 66-69 (1971); Anatol Rapoport, *Two-Person Game Theory: The Essential Ideas* 94 (1966) ("Game Theory").

<sup>14</sup> This is particularly true in "deadline suits" where the agency's failure to meet a statutory deadline for taking some regulatory action cannot be denied after the deadline has passed.

<sup>15</sup> See *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 548 (1978); Gaba, 73 *Geo. L.J.* at 1256 (cited in note 5).

<sup>16</sup> For example, settlements entered into by the EPA have included commitments for

parties by providing relief that is superior to that which a court might be expected to award.<sup>17</sup> For example, an agency that has failed to meet a statutory deadline for regulatory action may negotiate for more time to perform its duties than a court would be likely to allow; in return, it may make a commitment to gather additional information that will improve the quality of its ultimate regulatory decision.<sup>18</sup> To provide assurances that the action required by law will be performed in a timely fashion an agency may agree to meet interim deadlines and to provide plaintiffs with information on its progress, even though such commitments go beyond the minimum requirements of the agency's statutory obligations.

Environmental settlements are a product of compromise. Each party gives up something it might have won had the litigation continued. The resulting agreement "embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve."<sup>19</sup> Unless the agency simply makes a bad bargain, settlement can be expected to leave the agency better off than it would have been if the case had gone to trial. Otherwise the agency would not have found it attractive to enter into the settlement.<sup>20</sup>

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the following kinds of action: to propose regulations addressing a certain subject and to promulgate them by specific dates (see, for example, Settlement Agreement, Environmental Defense Fund v. EPA, No. 82-2234 and consolidated cases (D.C. Cir. 1984) (par. 7)); to propose specific changes in regulatory language and to take final action on the proposal by specific dates (see, for example, Joint Stipulation of Settlement, Environmental Defense Fund v. EPA, No. 86-1334 (D.C. Cir. 1986)); to gather certain information and to issue reports (see, for example, Settlement Agreement, State of New York v. Thomas, No. 84-1472 (D.C. Cir. 1986)); to issue guidance documents clarifying existing regulations (see, for example, Settlement Agreement, Mississippi Power Co. v. EPA, No. 85-4498 (5th Cir. 1986)); to entertain and to respond to petitions on a certain schedule (see, for example, Settlement Agreement, State of New York v. Thomas, No. 84-1472 (D.C. Cir. 1986) (par. 4)); to hold public hearings (see Consent Agreement Between the U.S. Environmental Protection Agency and the Environmental Defense Fund on Corrective Actions by the Virginia State Water Control Board, 1986); and to perform a range of other actions that are allegedly required by law (see Consent Decree, Environmental Defense Fund v. Heckler, No. 82-3514 (D.D.C. 1983)). For a discussion of EPA settlement agreements prior to 1985, see Gaba, 73 Geo. L.J. at 1241 (cited in note 5).

<sup>17</sup> See generally, Frank H. Easterbrook, Justice and Contract in Consent Judgments, 1987 U. Chi. Legal F. 19.

<sup>18</sup> This is similar to what occurred during the negotiation of the Flannery decree. See text at notes 48-55. For a discussion of the original provisions of this decree see Khristine L. Hall, Control of Toxic Pollutants Under the Federal Water Pollution Control Act Amendments of 1972, 63 Iowa L. Rev. 609 (1978).

<sup>19</sup> United States v. Armour & Co., 402 U.S. 673, 681-82 (1971) (footnote omitted).

<sup>20</sup> This discussion excludes situations where collusion or other improper agency behavior might result in the agency's deliberate acceptance of a bad bargain. The safeguards

Society benefits from settlement of environmental litigation because it reduces the demands placed on the judicial system and frees environmental agencies to concentrate on the performance of their statutory duties. Indeed, this is an important reason why public policy encourages settlements.<sup>21</sup> It does not follow, however, that settlements are necessarily the most efficient or the most "just" way to resolve disputes. In some cases settlement negotiations may be so protracted that settlement ultimately proves to be more costly than proceeding to trial.<sup>22</sup> Settlement terms also may reflect more closely the resources available to the parties than the relative merits of the parties' legal claims.<sup>23</sup>

A societal preference for settlements might be thought to flow from the assumption that settlements always leave the parties better off than would the expected outcome of litigation. However, *society* is not necessarily always better off simply because the individual parties perceive themselves to be better off. Settlements deprive society of the precedential value of an adjudicated judgment.<sup>24</sup> Defendants often agree to settle to avoid an adverse judgment that can be used against them by others.<sup>25</sup>

These are not grounds for disfavoring settlement *per se*; rather they caution against blanket endorsement of settlement as an unambiguous good. While a perfect legal system would reach results that are not affected by the relative resources available to the parties, ours does not. Yet resource disparities have consequences regardless of whether a case is settled.<sup>26</sup> While courts have an obliga-

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against such behavior are discussed generally in text at notes 79-105.

<sup>21</sup> Wald, 10 Colum. J. Envtl. L. at 8 (cited in note 6).

<sup>22</sup> See Rosin, 12 Ecol. L.Q. at 366 (cited in note 5). Litigation involving EPA's land disposal and phase I regulations implementing the Resource Conservation and Recovery Act, which were promulgated in 1980, still has not been resolved due to protracted settlement negotiations. *Shell Oil Co. v. Environmental Protection Agency*, No. 80-1532 and consolidated cases (D.C. Circuit).

<sup>23</sup> See Fiss, 93 Yale L.J. at 1076-78 (cited in note 6).

<sup>24</sup> *Id.* at 1085-87.

<sup>25</sup> This is particularly true in both environmental and antitrust cases, where defendants fear civil actions by private parties. An unusual provision in the new Superfund Amendments and Reauthorization Act of 1986 specifically provides that consent decrees entered in settlement of an "imminent and substantial endangerment" action pursuant to Section 106 of the Act "shall not be construed to be an acknowledgment by the parties that the release or threatened release concerned constitutes an imminent and substantial endangerment to the public health or welfare or the environment." SARA, 42 U.S.C.A. § 9622(d)(1) (cited in note 2).

<sup>26</sup> Moreover, because settlements conserve litigation resources and the availability of resources is an important factor considered in the decision whether or not to institute litigation, settlements actually may make it possible for groups with limited resources to initiate more lawsuits.

tion to ensure that settlement terms are consistent with applicable law, parties do not have an obligation to create precedents that benefit others (though they may do so in the process of creating precedents that benefit themselves).

#### B. The Value of Consent Decrees

Settlements are possible only if each party has confidence that the other will honor its settlement commitments. Indeed, game theory has demonstrated that in two-person bargaining situations, bargains that will leave both parties better off might not be adopted in the absence of a reliable enforcement mechanism. The classic "Prisoner's Dilemma" of two-person game theory illustrates why two parties may select options that leave each in a position inferior to that which an enforceable, negotiated settlement could achieve. In the "Prisoner's Dilemma," if two parties (who can implicate one another in a crime) each refuse to talk to the authorities, both go free. But if either party lacks confidence in the other, he will talk in hopes of obtaining a more lenient sentence. Thus, both parties talk even though each would be better off if a mutual agreement not to talk were carried out.<sup>27</sup>

As the "Prisoner's Dilemma" illustrates, if there is no mechanism for ensuring that another party will not cheat on a settlement, leaving the party that complies in an even worse position than before, both parties will cheat and be worse off. In some environmental cases the prospect that the litigation will be revived if one party reneges on its settlement commitments is sufficiently unattractive to both parties to ensure that settlement commitments will be honored by each party. But if there is a significant difference between the parties in the consequences of cheating, settlement will not be possible without further means of enforcement. Consent decrees enhance the prospect of settlement by providing an efficient mechanism for enforcement of settlement agreements.

A consent decree is contractual in nature because it reflects the agreement of the parties. Yet it also has the attributes of a judicial order because it is entered by a court, is enforceable by citation for contempt of court and may be modified in certain circumstances even over the objections of a party.<sup>28</sup> As a contract, its source of authority comes from the statute that it implements.

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<sup>27</sup> Morton D. Davis, *Game Theory: A Nontechnical Introduction* 93-103 (1970); Rapoport, *Game Theory* at 129-36 (cited in note 13).

<sup>28</sup> *Local Number 93 v. City of Cleveland*, 106 S. Ct. 3063, 3076 (1986).

This dual character has resulted in different treatment of consent decrees for different purposes, and will be relevant in exploring the bounds of executive authority in this area.<sup>29</sup>

As a means for enforcing settlement commitments, consent decrees have certain distinct advantages. Consent decrees streamline enforcement of settlement agreements because they are subject to continuing oversight and interpretation by a single court. Their enforcement does not require the filing of an additional lawsuit to establish the validity of the settlement contract, and they invoke "a flexible repertoire of enforcement measures."<sup>30</sup> In addition to lowering the cost of enforcement, consent decrees also provide a vehicle for resolving disputes concerning the interpretation of the agreement and for making adjustments due to changes in circumstances.<sup>31</sup>

The value of consent decrees as a means for enforcing settlements is reflected by the frequency with which they are used by the government in enforcement cases against private parties.<sup>32</sup> Most environmental enforcement actions against private parties are resolved by negotiated consent decree.<sup>33</sup> Private defendants usually agree, without admitting liability, to change their behavior in a particular way and they also agree to pay a civil penalty. Once the agreement is embodied in a consent decree, the government may seek relief for a breach of the agreement directly from the court without filing a new lawsuit. Consent decrees have proven to be such a useful tool in enforcement actions that the 1986 Amendments to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") expressly require that the government use them in all but de minimus settlements of "imminent and substantial endangerment" actions under Section 106 of that Act.<sup>34</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 3076 n.13 (quoting Brief for National League of Cities et al. as Amicus Curiae).

<sup>31</sup> Even though the parties' consent is essential to the court's ability to enter the decree, *Evans v. Jeff D.*, 106 S. Ct 1531, 1537 (1986), courts retain inherent power to modify decrees even over the objections of one of the parties. *System Federation v. Wright*, 364 U.S. 642, 651 (1961). Although continuing judicial oversight is handicapped by the absence of a trial record, see Fiss, 93 Yale L.J. at 1082-85 (cited in note 6), it is surely more efficient to postpone creation of a "trial record" until such time as it is necessary for the resolution of disputes concerning interpretation of the decree or for responding to changed circumstances.

<sup>32</sup> Miller, 14 *Envtl. L. Rep.* at 10080 (cited in note 11).

<sup>33</sup> *Id.*

<sup>34</sup> SARA, 42 U.S.C.A. § 9622(d)(1)(A) (cited in note 2). Section 122 of these amendments, which contains the mandatory consent decree provisions, creates a special set of settlement procedures that the government has discretion to follow.

The utility of the consent decree device in enforcing negotiated commitments is illustrated by EPA's experience with voluntary testing agreements for chemicals. In an effort to accelerate the testing of chemical substances, EPA negotiated voluntary testing agreements with chemical manufacturers as a substitute for the adoption of testing requirements under the Toxic Substances Control Act ("TSCA").<sup>35</sup> This policy was found to be a violation of TSCA because the voluntary agreements were not enforceable through the mechanism established by TSCA, including a citizen suit provision.<sup>36</sup> In response to the court's decision, EPA, the chemical industry, and environmentalists agreed on a policy of negotiating enforceable consent decrees as a substitute for protracted informal rule making.<sup>37</sup>

In light of the extensive use made of consent decrees in government enforcement actions, it is not surprising that such decrees occasionally are used to resolve citizen suits against executive agencies. The advantage of consent decrees in such cases is that they permit immediate access to a court for enforcement of settlement commitments and they provide a forum for resolving interpretation disputes and for responding to changed circumstances. Despite these advantages, the Justice Department recently adopted a policy designed to restrict the use of consent decrees in cases involving executive agencies.

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<sup>35</sup> 15 U.S.C. § 2603 (1982).

<sup>36</sup> *Natural Resources Defense Council v. U.S. E.P.A.*, 595 F. Supp. 1255, 1260-62 (S.D.N.Y. 1984).

<sup>37</sup> EPA, *Procedures Governing Testing Consent Agreements and Test Rules Under the Toxic Substances Control Act*, 51 Fed. Reg. 23706 (1986). Under the new procedures adopted by EPA, negotiations will take place between EPA, industry, and other interested parties under a strict timetable following public notice and solicitation of public participation. If the negotiations are successful, they will result in a consent agreement in which industry apparently will agree to conduct testing subject to the same enforcement mechanisms that would be available to EPA were the agency to promulgate a test rule under TSCA Section 4. If the negotiations do not achieve consensus by a specified date (which just occurred for negotiations to develop a consent agreement for testing of 2-ethyl-hexanol, "TSCA Section 4 Consent Order Negotiations Break Down on 2-EH," *Pesticide & Toxic Chemical and Toxic News* 4 (Nov. 5, 1986)), EPA will proceed with informal rule making under TSCA Section 4. EPA believes that "consent agreements can be finalized more promptly than rules . . . while affording equivalent procedural safeguards" because they will "be enforceable on the same basis as test rules." 51 Fed. Reg. at 23708. Violation of a consent agreement will constitute a "prohibited act" in violation of TSCA Section 15(1). *Id.*

## II. JUSTICE DEPARTMENT POLICY AND AUTHORITY TO ENTER CONSENT DECREES

### A. Justice Department Policy

In March 1986, Attorney General Meese unveiled a new "Policy Regarding Consent Decrees and Settlement Agreements."<sup>38</sup> Without citing any specific examples of abuses, the Attorney General alleged that in the past "executive departments and agencies have, on occasion, misused [the consent decree] device and forfeited the prerogatives of the executive branch in order to preempt the exercise of those prerogatives by a subsequent administration."<sup>39</sup> He further alleged that, "[t]hese errors sometimes have resulted in an expansion of the powers of the judiciary, often with the consent of the government, at the expense of the executive and legislative branches."<sup>40</sup>

It is extraordinary for an administration already well into its second term to decry abuses by executive agencies, but the change in Justice Department policy does not stem from contemporary abuses. It apparently is a result of the Reagan Administration's frustration with its failure to overturn employment discrimination consent decrees entered during a previous administration. Yet the new guidelines apply to all cases in which the Justice Department is involved, and their terms are of particular significance for environmental litigation against executive agencies.

While their contours are not clearly delineated, the Justice Department guidelines clearly are intended to restrict the kinds of settlement commitments executive agencies make; they also seek to reduce substantially the number of consent decrees entered against governmental defendants. The guidelines prohibit government agencies from entering into a consent decree "that divests a [government official] of discretion" or "that converts into a mandatory duty the otherwise discretionary authority of [an official] to revise, amend, or promulgate regulations."<sup>41</sup> Also prohibited are settlement agreements "that interfere with [agency] authority to revise, amend or promulgate regulations through the procedures set forth in the Administrative Procedure Act."<sup>42</sup> The policy provides that the sole remedy for an agency's failure to com-

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<sup>38</sup> Department of Justice Guidelines Memorandum (cited in note 6).

<sup>39</sup> *Id.* at I.

<sup>40</sup> *Id.* See generally, Peter M. Shane, *Federal Policy Making by Consent Decree: An Analysis of Agency and Judicial Discretion*, 1987 U. Chi. Legal F. 241, 242, 279-90.

<sup>41</sup> Department of Justice Guidelines Memorandum at II.A.1.

<sup>42</sup> *Id.* at II.B.1. The APA rule-making procedures are codified at 5 U.S.C. §§ 556-557.

ply with the terms of a settlement agreement is a revival of the underlying lawsuit. The policy also prohibits any commitment to spend funds that have not been budgeted and any consent decrees that would require an agency to seek a particular appropriation.<sup>43</sup>

The motivation behind the guidelines is surprising in light of the infrequency with which consent decrees are used in cases involving governmental defendants.<sup>44</sup> Aside from one highly unusual decree upheld by the Court of Appeals for the D.C. Circuit,<sup>45</sup> consent decrees have not generated much controversy in environmental cases.

Most environmental settlements involving governmental defendants are not implemented by consent decrees but rather by agreements to hold the litigation in abeyance while the agency considers a regulatory change sought by plaintiffs. Cases challenging regulatory decisions are usually settled in this manner because of the need for agency compliance with notice and comment procedures for rule making under the Administrative Procedure Act. In these cases the agency agrees to propose a regulatory change for public comment. Plaintiffs agree to dismiss their lawsuit if, after notice and comment rule making, the agency decides to adopt the proposed regulatory change.<sup>46</sup> If the regulatory proposals are not adopted, the litigation can be reinstated without invoking the enforcement powers of the court. Although settlement agreements not embodied in consent decrees do not have the force of a judicial order, they occasionally specify that the court shall retain jurisdiction to resolve disputes arising out of the interpretation and implementation of the agreement.<sup>47</sup> The most notable exception to this pattern is described below.

## B. The Flannery Decree

The most controversial environmental consent decree entered was the decree upheld by the D.C. Circuit in *Citizens for a Better Environment v. Gorsuch*.<sup>48</sup> That case involved an unusual consent decree—approved by District Court Judge Thomas Flannery.

<sup>43</sup> Department of Justice Guidelines Memorandum at II.A.2, II.B.2 (cited in note 6).

<sup>44</sup> Most settlements involving the EPA, for example, are already implemented by holding the litigation in abeyance pending performance of settlement commitments, rather than through consent decrees. Gaba, 73 Geo. L.J. at 1246-47 (cited in note 5).

<sup>45</sup> *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117 (D.C. Cir. 1983).

<sup>46</sup> See Gaba, 73 Geo. L.J. at 1246 (cited in note 5).

<sup>47</sup> See, for example, *Settlement Agreement, State of New York v. Thomas*, No. 84-1472 (D.C. Cir. May 9, 1986) (par. 5).

<sup>48</sup> 718 F.2d 1117 (D.C. Cir. 1983).

nery—which settled several lawsuits challenging EPA's failure to perform a host of nondiscretionary duties imposed by the Clean Water Act.<sup>49</sup> In the "Flannery decree," EPA agreed to a comprehensive program for carrying out its responsibilities under the Act. EPA agreed to promulgate, in accordance with a detailed timetable, guidelines, effluent limits, and performance standards regulating the discharge of sixty-five pollutants by twenty-one industries. Although the decree did not specify the substance of the regulations to be adopted by EPA, it outlined criteria to be used by the agency in determining whether or not to regulate certain pollutants.

Industry intervenors sought unsuccessfully to vacate the decree on the ground that the 1977 Amendments to the Clean Water Act had rendered it obsolete. After losing in the district court, they appealed. The D.C. Circuit raised *sua sponte* the question whether the decree impermissibly infringed on the EPA Administrator's discretion under the Act.<sup>50</sup> It was conceded that the decree did infringe on the Administrator's discretion by including requirements not specifically contained in the Act, but the court held that this infringement was not impermissible. The court emphasized that the decree was consistent with the purposes of the Act, that it did not prescribe the content of the regulations that EPA must promulgate, and that EPA had consented to it.<sup>51</sup> Judge Wilkey, in dissent, argued that the decree imposed duties not specifically required by the Act and beyond the remedial powers of the court, that it effectively bound future EPA Administrators in the exercise of executive discretion, and that such decrees could prejudice third parties and invite abuse.<sup>52</sup>

The Flannery decree was unusually detailed in its specification of actions to be taken by EPA and the criteria to be employed by EPA in developing regulations. No other environmental consent decree has contained such detailed commitments for action by EPA.<sup>53</sup> Yet, in light of the fact that EPA had fallen hopelessly far behind the statutory deadlines for implementing the Act, there were excellent reasons why EPA chose to make the commitments

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<sup>49</sup> *Natural Resources Defense Council, Inc. v. Train*, 8 *Env't Rep. Cas. (BNA)* 2120 (D.D.C. 1976). The relevant provisions of the Clean Water Act are codified at 33 U.S.C. § 1251 *et seq.* (1982).

<sup>50</sup> *Environmental Defense Fund, Inc. v. Costle*, 636 F.2d 1229, 1258 (D.C. Cir. 1980).

<sup>51</sup> *Citizens for a Better Environment*, 718 F.2d at 1127-30.

<sup>52</sup> *Id.* at 1130-37 (Wilkey, J., dissenting).

<sup>53</sup> See Gaba, 73 *Geo. L.J.* at 1245 n.15 (cited in note 5); Hall, 63 *Iowa L. Rev.* at 616-17 (cited in note 18).

contained in the decree.

Faced with statutory obligations to adopt a detailed regulatory program covering virtually all sources of industrial discharges into waterways, EPA was floundering in a task that would take more than a decade to perform. Faced with claims that its initial efforts to implement the Act violated the law, EPA risked substantial additional delays if it did not prevail in the lawsuits. In return for greater flexibility in the manner in which it promulgated the regulations, which EPA thought crucial, EPA agreed to follow certain procedures designed to ensure that the ambitious but overdue regulations actually would be promulgated with reasonable dispatch.<sup>54</sup> Subsequent experience has shown that the decree, under which the agency is still operating, has produced significant results.<sup>55</sup>

The unusual circumstances surrounding the Flannery decree and the fact that EPA has not entered into similar decrees in other cases suggest that the alleged evils animating the Justice Department settlement guidelines are, in the context of environmental law, greatly exaggerated.

### C. Judicial and Executive Authority and Consent Decrees

Despite the D.C. Circuit's approval of the Flannery decree, the Justice Department policy is based on the premise that courts do not have the constitutional authority to enter such decrees, even with the consent of executive agencies. The Justice Department guidelines assert "that it is constitutionally impermissible for the courts to enter consent decrees containing . . . provisions where the courts would not have had the power to order such relief had the matter been litigated."<sup>56</sup> This premise, rejected by the D.C. Circuit in *Citizens for a Better Environment*,<sup>57</sup> also was rejected by the Supreme Court in *Local Number 93 v. City of Cleveland*.<sup>58</sup> There the Court concluded that "to the extent that the consent decree is not otherwise shown to be unlawful, the court is not barred from entering a consent decree merely because it might lack authority . . . to do so after a trial."<sup>59</sup>

This confirms that the Justice Department guidelines are not constitutionally required, contrary to the basic premise on which

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<sup>54</sup> See Hall, 63 Iowa L. Rev. at 611-48 (discussing the decree's specific provisions).

<sup>55</sup> Gaba, 73 Geo. L.J. at 1245.

<sup>56</sup> Department of Justice Guidelines Memorandum at I.3. (cited in note 6).

<sup>57</sup> 718 F.2d at 1126-27.

<sup>58</sup> 106 S. Ct. 3063, 3078 (1986).

<sup>59</sup> *Id.*

they are founded.<sup>60</sup> However, even if the guidelines are not constitutionally based, the Attorney General clearly has the authority to set standards for the settlement of litigation by government attorneys as long as they respect statutory or constitutional requirements.

While there is no reason to believe that the guidelines violate statutory or constitutional directives, they appear to be based on an unreasonably restrictive view of the permissible scope of settlement commitments. The guidelines are founded on the notion that executive agencies can commit to taking only those actions that a court could order following litigation. When coupled with the Justice Department's extraordinarily narrow view of the remedial powers of the federal courts,<sup>61</sup> the guidelines could destroy some of the principal advantages of consent decrees. Even if interpreted in accordance with more conventional views of the remedial powers of federal courts, the guidelines are unworkable because the precise contours of relief that a court could order after trial may be unknown at the time of settlement.

### III. EXECUTIVE DISCRETION AND THE BOUNDS OF PERMISSIBLE SETTLEMENTS

The linchpin of the new Justice Department policy directive is that executive agencies should not agree to consent decrees that limit their exercise of discretion. However, any kind of settlement commitment can be viewed as a limitation on the exercise of executive discretion, for it inevitably reflects some kind of choice about how to exercise discretion. Yet because it is the agency that

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<sup>60</sup> Although the Justice Department guidelines are founded on the premise that courts do not have the constitutional authority to enter decrees that provide relief beyond that which could be awarded after trial, see note 56 and accompanying text, the Department maintains that the Attorney General has plenary authority to agree to settlements on such terms. "The Attorney General has plenary authority to settle cases tried under his direction, including authority to enter into settlement agreements on terms that a court could not order if the suit were tried to conclusion." Department of Justice Guidelines Memorandum at I.3 (cited in note 6). Thus, the Justice Department apparently adheres to the view that courts have no constitutional authority to ratify certain agreements that the executive has the authority to make.

<sup>61</sup> In recent cases the Justice Department has taken the position that even if an executive agency has acted contrary to law, a court may only award relief expressly specified in a statute authorizing judicial review, disregarding the traditionally broad scope of the equitable relief available to courts. See, for example, *Environmental Defense Fund v. Thomas*, 627 F. Supp. 566, 568 (D.D.C. 1986) (rejecting government's claim that a court could not award even declaratory relief "to ensure that [nondiscretionary] duties are performed without the interference of other officials acting outside the scope of their authority in contravention of federal law").

chooses to make a settlement commitment, such commitments may be entirely consistent with the agency's exercise of discretion. The more difficult questions concern the extent to which an agency should be free to change its mind after choosing to make a settlement commitment.

#### A. The Character of the Infringement on Executive Discretion

The Justice Department guidelines provide that executive agencies

should not enter into a consent decree that divests the Secretary or agency administrator, or his successors, of discretion committed to him by Congress or the Constitution where such discretionary power was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties.<sup>62</sup>

Because it is difficult to imagine any kind of discretionary decision-making authority that would not be encompassed within one of these categories, the operative distinction in the policy is not the type or purpose of discretion, but whether the decree infringes on its free exercise.

Thus, the guidelines make the permissibility of consent decrees turn on whether or not settlement commitments involve discretionary or nondiscretionary acts. This formulation is uniquely ill-suited for the settlement of a broad class of environmental litigation brought under citizen suit provisions that authorize suits against executive officials who fail to perform a nondiscretionary duty. Often in such cases the very issue being litigated is whether a statute makes agency action mandatory or discretionary.<sup>63</sup> If an agency cannot settle such cases by agreeing to perform an action that it maintains is discretionary, settlement will be impossible unless the agency admits that it has a mandatory duty to act. Yet a principal benefit of settlement to the agency may be a desire to avoid an adverse judgment at trial on precisely that issue.<sup>64</sup>

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<sup>62</sup> Department of Justice Guidelines Memorandum at II.A.3 (cited in note 6).

<sup>63</sup> It is not uncommon for the government to assert in defense of citizen suits charging an agency with failure to perform a non-discretionary duty that the duty actually is discretionary because the agency has several choices open to it. See, for example, *NRDC v. Train*, 411 F. Supp. 864 (S.D.N.Y. 1976); *Concerned Citizens of Adamstown v. EPA*, No. 84-3041, slip op. at 4, 6 (D.D.C. Aug. 21, 1985) (holding that although EPA has discretion to take either one of two courses of action, it has a mandatory duty to take one of them); see also *Citizens for a Better Environ. v. Costle*, 515 F. Supp. 264, 270 (N.D. Ill. 1981).

<sup>64</sup> *Concerned Citizens of Adamstown*, No. 84-3041, slip op. at 4.

Moreover, virtually every commitment to take action will involve some restraint on the agency's exercise of discretion.<sup>65</sup> When an agency clearly has failed to perform a mandatory duty, such as promulgating a set of regulations by a statutory deadline, even an agreement to a revised performance schedule infringes on the agency's discretion. Yet few plaintiffs would agree to settlements that simply require an agency to perform its mandatory duty without specifying some schedule for performance. Thus, even though process-oriented commitments concerning discretionary acts may have a significant impact on the substance of regulatory decisions, they may be necessary to enhance the prospects for the agency's timely compliance.

The argument that executive agencies have no authority to limit their own exercise of discretion also is unpersuasive in this context. Executive agencies clearly have the authority to choose how to exercise their discretion. Agencies are free to adopt and to follow new procedural requirements not mandated by statute.<sup>66</sup> If an agency makes such a choice, as EPA did prior to entry of the Flannery decree, a consent decree embodying that choice cannot be said to infringe on the agency's exercise of its discretion. Because the decree ratifies the agency's choice of how to exercise its discretion, the only real concern for preserving agency discretion must focus on the impact of the decree on the agency's discretion to change its mind in the future.<sup>67</sup>

The Justice Department guidelines apparently seek to reserve for executive agencies the absolute right to change their policies at any time. The guidelines prohibit consent decrees that convert "discretionary authority of the Secretary or agency administrator to revise, amend, or promulgate regulations" into a mandatory duty.<sup>68</sup> They also specify that the sole remedy for an agency's failure to carry out a settlement agreement to exercise discretion in a particular way should be the revival of the lawsuit.<sup>69</sup> While this may have little impact on some settlements, in other cases, where timely implementation of a settlement agreement is critical, it may

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<sup>65</sup> Similarly, virtually any relief granted by a court that compels agency action restricts to some degree an agency's discretion. See *NRDC v. Gorsuch*, 16 Env't Rep. Cas. (BNA) 2084, 2087 (D.D.C. 1982), *aff'd as Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117 (D.C. Cir. 1983).

<sup>66</sup> *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978).

<sup>67</sup> See *United States v. Nixon*, 418 U.S. 683, 695-96 (1974); *Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

<sup>68</sup> Department of Justice Guidelines Memorandum at II.A.1 (cited in note 6).

<sup>69</sup> *Id.* at I.3.

jeopardize substantially the prospects for settlement. Few plaintiffs will be willing to put claims of unreasonable agency delay on hold if the agency retains the ability to change its mind after delaying the litigation. Similarly, if the same policy were to apply in environmental enforcement cases, it is unlikely that an industry defendant would agree to make substantial investments in pollution control on terms that leave EPA free to change its mind at any time.

Settlement agreements embody contractual commitments whose worth increases in direct proportion to the extent to which they bind the parties. If one party is incapable of providing assurances that the agreement will be carried out, the chances for settlement will be slim.<sup>70</sup> As courts have recognized, the voluntary cessation of illegal activity does not render a claim moot if there is a reasonable expectation that the activity will resume.<sup>71</sup> Thus, even where an agency has stated that it will pursue a particular course of action desired by plaintiffs, parties may litigate a case to judgment if the agency cannot make a binding commitment to that effect.

#### B. Impact on Discretion Exercised by Future Administrations

The Justice Department guidelines reflect an intense concern that settlements should not bind future administrations. This is generally a worthy goal, for there is no reason why consent decrees should operate to restrict executive discretion any longer than is necessary to implement statutory requirements. Rarely would this require that a decree restrict the decision-making authority of future executives. However, the claim that no administration has the authority to enter into consent decrees that effectively may bind future administrations is a more questionable proposition.

By necessity, executive agencies undertake many actions that have a profound impact on the policy choices available to future administrations.<sup>72</sup> Some executive decisions, such as long-term

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<sup>70</sup> Note, 1 Pace *Env'tl. L. Rev.* at 156-57 (cited in note 5). When the proverbial shoe is on the other foot, the government clearly expects to be able to enforce settlement agreements against private parties. Indeed, when it adopted its new policy on negotiation of consent agreements to replace test rules under the Toxic Substances Control Act § 4 (cited in note 35), EPA emphasized the importance of having an enforcement mechanism so that violators of such agreements will be subject to criminal and/or civil liability. 51 *Fed. Reg.* 23706, 23708 (1986).

<sup>71</sup> *Environmental Defense Fund, Inc. v. Gorsuch*, 713 F.2d 802, 810 (D.C. Cir. 1983).

<sup>72</sup> Current executive decisions about budgets, tax policy, national defense, and regulatory matters, for example, have significant implications for future administrations, as the

contracts and spending commitments, may be very difficult for future administrations to reverse without legislative action. Although no administration can preclude future administrations from attempting to reverse its policies, the ability to make commitments that future administrations will honor may be crucial to the executive's ability to carry out actions that are in the best interests of the country.<sup>73</sup> Indeed, the successful settlement of litigation, which often depends on the executive's ability to make binding commitments, may actually widen the range of discretionary choices open to future administrations.

The authority of executive agencies to make binding settlement commitments must be considered in the context of the broad authority of executive officials to conduct litigation. That executive authority is derived from Article II of the Constitution, and Congress has conferred broad powers on the Attorney General to conduct litigation in pursuit of the national interest.<sup>74</sup> While Congress may limit the authority of the Attorney General with respect to civil or criminal litigation, it must do so expressly; courts will not lightly infer restrictions on the Attorney General's authority.<sup>75</sup> Courts rarely balk at attempts by the executive to settle litigation.<sup>76</sup>

In the absence of express statutory restrictions on the settlement process, the fundamental limitation on the executive's power to settle litigation is that the terms of the settlement must not violate applicable law. The court's jurisdiction to enter a consent decree depends on the statute that the decree is intended to en-

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current Administration so frequently has asserted with reference to the legacy of the prior Administration. If the current Administration disapproves of a consent decree designed to vindicate a statutory requirement, it may always amend the statute, as has been proposed in connection with the *AT&T* decree, for example. By contrast, the *Flannery* decree was expressly ratified by Congress in the 1977 Amendments to the Clean Water Act. 123 Cong. Rec. 39,181 (1977) ("The conference agreement was specifically designed to codify the so-called 'Flannery decision.'").

<sup>73</sup> See, for example, *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

<sup>74</sup> 28 U.S.C. §§ 516, 519 (1986).

<sup>75</sup> *United States v. California*, 332 U.S. 19, 27-28 (1947); *United States v. Tonry*, 433 F. Supp. 620, 622 (E.D. La. 1977). But see *S & E Contractors, Inc. v. United States*, 406 U.S. 1, 12-15 (1972).

<sup>76</sup> Courts have even questioned their own capacity to determine whether a settlement agreed to by the executive comports with a minimal "public interest" requirement imposed by statute. See, for example, *Maryland v. United States*, 460 U.S. 1001, 1004 (1983) (Rehnquist, J., dissenting from summary affirmance). But see *United States v. California*, 332 U.S. 19 (1947) (per curiam) (Court disregards attempt by Attorney General and Secretary of Interior to bind federal government by stipulation purporting to transfer to state the authority over lands previously held to be subject to federal control).

force.<sup>77</sup> Thus, settlements must be in furtherance of statutory objectives and may not contravene congressional directives.<sup>78</sup>

The capacity of an executive official to enter into a settlement that may effectively bind his or her successor largely depends on the nature of the statutory obligations that the settlement is designed to discharge. No Congress can irrevocably bind a subsequent Congress, but it can enact legislation that imposes obligations to be performed by executive agencies over the course of more than one administration. Statutory duties that an agency has failed to perform rarely will require remedial actions that must be performed over a period of time that runs beyond the term of a single administration (as in the Clean Water Act mandates at issue in the Flannery decree). In such cases, however, it may be justifiable to make settlement commitments that require actions by future administrations. Future administrations are free to seek modification or rescission of settlements and decrees that they inherit, or even to convince Congress to amend or repeal the statutes to relieve them of their statutory duties, but future administrations should not be free to disregard continuing obligations that Congress has imposed upon executive agencies.

Parties ordinarily can be expected to settle a lawsuit only if the terms of the settlement are more favorable than the expected outcome of a trial discounted by the additional costs of continuing the litigation.<sup>79</sup> Thus, in the absence of misconduct or collusive action, government agencies are not likely to accept settlements on terms substantially more onerous than those expected to result from an adverse judgment at trial. If a settlement agreement accepted by the government contains terms that executive agencies view as constraining their exercise of discretion, it is likely that the settlement was accepted to avoid the risk of even more onerous restraints on executive action that might flow from an adverse judgment at trial.

Fears that executive agencies deliberately will adopt settlement agreements to constrain unreasonably the policies of future administrations are exaggerated because they ignore several prophylactics. Except in lame duck administrations, the political process should serve as a deterrent to an existing administration's attempts to subvert democratic dynamics. Although the standards applied by courts in determining whether to approve consent de-

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<sup>77</sup> *System Federation v. Wright*, 364 U.S. 642, 651 (1961).

<sup>78</sup> *Local Number 93 v. City of Cleveland*, 106 S. Ct. 3063, 3077 (1986).

<sup>79</sup> See Landes, 14 *J.L. & Econ.* at 66-69 (cited in note 13).

crees are far from stringent,<sup>80</sup> they do offer some judicial check on executive abuse. In addition to requiring that a settlement is reasonable and a result of good faith bargaining, courts should insist that its terms be consistent with statutory requirements. Because most settlement agreements in environmental cases involve obligations whose duration is defined by statute, any constraints on the discretion of future administrations should flow from Congress, rather than executive consent.

Moreover, experience shows that courts scrutinize more closely settlement terms that appear to contain substantial limitations on executive discretion.<sup>81</sup> Courts generally have construed the terms of settlement agreements to avoid such limitations. This has been particularly true where settlements do not appear to bear a reasonable relationship to concessions won from the adverse party<sup>82</sup> and where a change of administration has occurred.<sup>83</sup> Thus, even if an individual executive agency has little incentive to question its own authority to enter into settlements that limit future executive discretion, courts can be expected to prevent egregious abuses.<sup>84</sup>

Courts also retain the inherent power to modify decrees even over the objections of a party.<sup>85</sup> While modification of a consent decree over the objections of a party is an extraordinary measure, changed circumstances that render the decree inequitable justify such modification.<sup>86</sup> Thus, future administrations are free to seek

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<sup>80</sup> "[A] consent decree must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction," be within the general scope of the pleadings, and "further the objectives of the law upon which the complaint was based." *Local Number 93*, 106 S. Ct. at 3077 (citations omitted). Compare Justice Rehnquist's dissent in *Maryland v. United States*, 460 U.S. 1001, 1004 (questioning whether courts have jurisdiction to make a "public interest" finding required for approval of consent decrees under the Tunney Act). The conference committee report of the Superfund Amendments and Reauthorization Act of 1986 also reflects congressional understanding that courts approving consent decrees required by that Act should "determine whether relevant requirements of the Act have been met and whether entry of the decree is in the public interest." Superfund Amendments and Reauthorization Act of 1986, Conf. Rep. No. 99-262, 99th Cong., 2d Sess. 252 (1986).

<sup>81</sup> See *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117 (D.C. Cir. 1983) and cases cited in note 83.

<sup>82</sup> *Alliance to End Repression v. City of Chicago*, 742 F.2d 1007, 1015 (7th Cir. 1984).

<sup>83</sup> See, for example, *National Audubon Society, Inc. v. Watt*, 678 F.2d 299 (D.C. Cir. 1982). Compare *Women's Equity Action League v. Bell*, 743 F.2d 42 (D.C. Cir. 1984).

<sup>84</sup> The issue also may be raised by third-party intervenors affected by the settlement. See *Local Number 93*, 106 S. Ct. at 3079.

<sup>85</sup> See *System Federation v. Wright*, 364 U.S. 642, 651 (1961); *Ferrell v. Pierce*, 743 F.2d 454, 461 (7th Cir. 1984); *Duran v. Elrod*, 760 F.2d 756, 758 (7th Cir. 1985).

<sup>86</sup> *Firefighters v. Stotts*, 467 U.S. 561, 574 (1984); *System Federation*, 364 U.S. at 651. The Federal Rules of Civil Procedure provide that a court "may relieve a party or his legal representative from a final judgment, order or proceeding" if, among other grounds, "it is no longer equitable that the judgment should have prospective application" or for "any other

modification of decrees that they believe unfairly constrain executive discretion. However, a change in administration should not by itself be sufficient to warrant modification of consent decrees that implement continuing statutory obligations.

### C. Impact on Unrepresented Third Parties

Consent decrees cannot impose legal duties or obligations on a third party who did not consent to the decree.<sup>87</sup> Yet they may have a substantial impact on the interests of persons not represented during settlement negotiations. Consent decrees settling government enforcement actions preclude subsequent citizen enforcement actions under the environmental laws.<sup>88</sup> Settlement agreements relating to regulatory policy can have a substantial impact on the interests of persons affected by regulations.<sup>89</sup> Thus, concerns have been raised that the kind of private ordering of public rights that may occur in regulatory policy settlements may unfairly prejudice the rights of third parties.<sup>90</sup>

These criticisms, however, are not unique to settlements. Judgments obtained after trial that affect regulatory policy also may affect the interests of third parties not involved in the litigation.<sup>91</sup> To prevent prejudice to the interests of unrepresented third parties, the Federal Rules of Civil Procedure authorize intervention by third parties whose interests may be affected by the outcome of litigation.<sup>92</sup> The citizen suit provisions of the environmental statutes generally permit private parties to intervene as of right in government enforcement actions.<sup>93</sup> Intervention in actions brought against the government is governed by the standard for

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reason justifying relief from the operation of the judgment." Fed. Rule Civil Proc. 60(b)(5)-(6).

<sup>87</sup> See *Delaware Valley Citizens' Council v. Com. of Pa.*, 674 F.2d 976, 987 (3d Cir. 1982).

<sup>88</sup> See *Miller*, 14 *Env'tl. L. Rep.* at 10081 (cited in note 11); *State of Mich. v. City of Allen Park*, 573 F. Supp. 1481, 1484 n.5 (E.D. Mich. 1983).

<sup>89</sup> For a detailed discussion of how settlement agreements may affect the substance of regulations adopted by an agency, see generally Gaba, 73 *Geo. L. Rev.* 1241 (cited in note 5).

<sup>90</sup> See note 6.

<sup>91</sup> Thus, Judge Wilkey's concern in *Citizens for a Better Environment*, 718 F.2d at 1136, that "third parties who wish to know of such consent decrees would be faced with the nearly impossible task of monitoring all of the nation's district courts," applies with equal force to third parties affected by cases brought to trial.

<sup>92</sup> Fed. Rule Civil Proc. 24.

<sup>93</sup> See citizen suit provisions cited in note 3. EPA regulations require delegated state environmental programs to permit similar citizen intervention rights to "supervise" the enforcement of the programs. *Miller*, 14 *Env'tl. L. Rep.* at 10071 (*Env'tl. L. Inst.*) (cited in note 11).

intervention in Rule 24 of the Federal Rules of Civil Procedure.<sup>94</sup>

In environmental enforcement cases brought by the government, proposed consent decrees often are filed simultaneously with the filing of the complaint. Although this does not provide an opportunity for intervention prior to negotiation of the decree, Justice Department policy does provide for public notice and an opportunity for comment prior to judicial entry of the decree.<sup>95</sup> Private parties may intervene to contest the entry of such a decree, although decrees often are approved by courts over the objections of intervenors.<sup>96</sup> In cases involving efforts to clean up hazardous waste sites under the Superfund legislation, Congress has required the government actively to encourage public participation through early notification requirements and intervenor funding of up to \$50,000 per site.<sup>97</sup>

Although there is no requirement for public notice of settlements in litigation brought against the government by private parties, affected interest groups closely monitor litigation that potentially may affect their interests.<sup>98</sup> These groups are aware of lawsuits that affect their interests and they routinely intervene in such litigation to preserve their rights. If settlement negotiations ensue in such cases, EPA generally permits intervenors to participate in settlement negotiations.<sup>99</sup>

This is not to say that current policy adequately protects all third-party interests, particularly the interests of those that are not well organized. A policy of publicizing all proposed settlements involving government agencies might increase the awareness of less organized interests. However, such groups that do not have the resources to contest proposed settlements, still would not be able to affect their ultimate approval by courts. Although nonparties usually are not precluded from challenging the validity of consent de-

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<sup>94</sup> *Id.* at 10071-10072.

<sup>95</sup> 28 C.F.R. § 50.7 (1986). Similar notice and an opportunity for comment is now required by statute for settlement of enforcement actions brought pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. § 6973(d), and the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 6917 (as amended by SARA, 42 U.S.C.A. § 9617).

<sup>96</sup> Local Number 93, 106 S. Ct. at 3079.

<sup>97</sup> SARA § 117, to be codified at 42 U.S.C. § 9617.

<sup>98</sup> An aggressive trade press and specialized environmental reporters provide timely information on litigation involving environmental regulations. See, for example, such publications as *BNA Environment Reporter*, *Environmental Law Reporter*, and *Inside EPA*.

<sup>99</sup> This was not always the case. During Administrator Gorsuch's tenure at EPA, such negotiations often took place without the participation of representatives of environmental groups who were parties to the litigation. Jonathan Lash, *A Season of Spoils* 49 (1984).

crees in subsequent litigation, it is difficult for them to prevail after decrees have gone into effect.<sup>100</sup> Moreover, in one unusual case an affected third party was precluded from challenging the validity of a consent decree even though it previously had sought unsuccessfully to intervene to challenge the entry of the decree.<sup>101</sup> Even though consent decrees may have a substantial impact on the course of subsequent agency rule making,<sup>102</sup> the availability of an administrative forum in which third parties can participate helps mitigate the problem of third-party exclusion.<sup>103</sup>

Concern also has been expressed that executive agencies will fail to adequately represent the interest of the executive branch by entering into collusive settlement agreements so as to strengthen their case for funding a particular program.<sup>104</sup> However, because settlement agreements must now be approved by both the Justice Department and the Office of Management and Budget, there is little danger that they will be used by a particular agency to feather its nest. Citizen suits against executive agencies, and the settlement agreements they produce, may have a substantial impact on agency priorities,<sup>105</sup> but this is consistent with the role Congress intended for private parties to play in the implementation and enforcement of federal environmental law.

### CONCLUSION

Because litigation is risky and costly, settlement is, and will remain, a prominent feature of a legal system that permits parties to compromise their disputes. Consent decrees have proven to be a useful and efficient means for ratifying and enforcing settlement

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<sup>100</sup> David A. Feller, *Private Enforcement of Federal Anti-Pollution Laws Through Citizen Suits: A Model*, 60 *Denver L.J.* 553, 565 (1983).

<sup>101</sup> In *National Wildlife Federation v. Gorsuch*, 744 F.2d 963 (3d Cir. 1984), the National Wildlife Federation ("NWF") was precluded from challenging a consent decree settling litigation between EPA and the state of New Jersey even though NWF's prior motion to intervene to contest the entry of the decree had been denied. The Third Circuit emphasized that NWF had not attempted to intervene in a prior related action raising the identical issue, that NWF did not appeal the denial of their motion for intervention, and that NWF could participate in subsequent administrative proceedings that provided for final resolution of the issues it raised. *Id.* at 971-72.

<sup>102</sup> See Note, 1 *Pace Env'tl. L. Rev.* at 160 (cited in note 5); *Natural Resources Defense Council v. Costle*, 561 F.2d 904, 910-11 (D.C. Cir. 1977) (reversing denial for motion to intervene on the ground that proceedings to implement consent decree will have a substantial impact on participants in rule makings mandated by the decree).

<sup>103</sup> *National Wildlife Federation v. Gorsuch*, 744 F.2d 963, 971 (3d Cir. 1984); *Environmental Defense Fund v. Costle*, 79 F.R.D. 235, 240 (D.D.C. 1978).

<sup>104</sup> See Easterbrook, 1987 *U. Chi. Legal F.* at 34 (cited in note 17).

<sup>105</sup> Gaba, 73 *Geo. L.J.* at 1253 n.73 (cited in note 5).

agreements.

The Justice Department's recently issued guidelines profess to recognize the usefulness of consent decrees as devices "for ending litigation without trial, providing the plaintiff with an enforceable order, and insulating the defendant from the ramifications of an adverse judgment."<sup>106</sup> They also reaffirm that settlement agreements "remain a perfectly permissible device" that "should be strongly encouraged."<sup>107</sup> However, by unreasonably restricting the range of commitments the government may offer in settlement of litigation, they cannot help but discourage settlements.<sup>108</sup> A decision to restrict severely the circumstances in which consent decrees may be used by executive agencies is more likely to reflect hostility toward the role Congress has given private parties to perform in the implementation and enforcement of environmental policy than a genuine need to preserve executive prerogatives.

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<sup>106</sup> Department of Justice Guidelines Memorandum at I (cited in note 6).

<sup>107</sup> *Id.* at I.3.

<sup>108</sup> Shortly after the new Justice Department guidelines were announced, settlement negotiations between the National Wildlife Federation and the government in *National Wildlife Federation v. Hodel*, No. 85-837 (E.D. Cal. 1985) broke down largely because of the Justice Department's unwillingness to have a negotiated settlement included in a consent decree. Although plaintiffs requested an exception from the Justice Department guidelines, as permitted with the written approval of the Attorney General, Deputy Attorney General or Associate Attorney General, defendants refused to seek such an exception. See Letter from Jay Hair, Executive Vice-President of the National Wildlife Federation, to Hon. William P. Horn, Assistant Secretary for Fish, Wildlife, and Parks (1986) (on file with the University of Chicago Legal Forum). The case went to trial and the court issued a judgment in favor of plaintiffs while modifying the injunctive relief to embrace defendants' proposed actions.

In the future the government may attempt to rely on the settlement guidelines to insist that it cannot do more than voluntarily cease illegal behavior without making any commitments concerning the future behavior of government agencies. Compare the strategy employed unsuccessfully by defendants seeking to avoid liability in citizen suits brought under the Clean Water Act in *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986), cert. granted, 107 S. Ct. 872 (1987).

