

ENVIRONMENTAL SETTLEMENTS AND ADMINISTRATIVE LAW

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The Obama Administration has come under increasing fire for its decisions to settle lawsuits brought by environmental organizations. Industry groups and Republican politicians claim that such settlements, negotiated behind “closed doors,” unfairly exclude regulated entities from regulatory decisionmaking that tangibly affects economic interests. Environmental organizations and their political allies made similar complaints during the Administration of George W. Bush, arguing that the federal government at that time settled lawsuits on terms overly favorable to economic interests and without the participation of environmentalists or the public.

Objections to environmental settlements are often expressed as process concerns. Opponents of an administration’s political direction argue that settlements allow agencies to make policy choices from the shadows while evading, or perhaps even violating, the process established by the Administrative Procedure Act, including the Act’s public participation requirement. This Article is the first to objectively assess those concerns, and it reveals that environmental settlements rarely circumvent norms of administrative law, and that when they do so, courts can—and do—intervene.

To establish that environmental settlements are consonant with administrative law, this Article develops a novel typology of settlements based on the types of obligations they impose on federal agencies. Settlements can involve agency commitment to resource allocation, procedural obligation, or substantive rule. The Article then considers unique aspects of those categories of commitment and explains why none are generally problematic from the perspective of administrative law. Many decisions made in settlements are of a type excluded from notice-and-comment rulemaking. Others involve preliminary matters that are subject to subsequent judicial challenge once the agency has reached a final decision. And others still involve opportunities for public notice and comment. In the rare circumstance where a settlement violates otherwise-applicable notice-and-comment requirements, courts already possess ample authority to either decline to enter the settlement beforehand or to vacate the settlement afterward. Administrative law demands no more.

Environmental settlements have distinct advantages because they provide federal agencies with the opportunity to control litigation risk and overcome bureaucratic inertia. In the absence of a compelling justification for limiting the discretion of agencies to enter into settlements, Congress and the public should allow environmental settlement practices to persist.

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INTRODUCTION

The Obama Administration has come under increasing fire for its decisions to settle lawsuits brought by environmental organizations. Industry groups and Republican politicians claim that such settlements, negotiated behind “closed doors,” unfairly exclude regulated entities from regulatory decisionmaking that tangibly affects economic interests.¹ Congress has taken notice. On February 2, 2012, Arizona Congressman Benjamin Quayle introduced the Sunshine for Regulatory Decrees and Settlements Act of 2012,² designed to “respond [] to a growing problem in regulatory litigation known as the ‘sue-and-settle’ phenomenon.”³ These “sue-and-settle” situations, which

¹ WILLIAM L. KOVACS ET AL., U.S. CHAMBER OF COMMERCE, A REPORT ON SUE AND SETTLE: REGULATING BEHIND CLOSED DOORS 3 (2013) [hereinafter CHAMBER OF COMMERCE REPORT], <http://perma.cc/WBC5-ER3Y>; see generally THE CTR. FOR REGULATORY SOLUTIONS, SUE-AND-SETTLE: REGULATION WITHOUT REPRESENTATION (2014) [hereinafter CENTER FOR REGULATORY SOLUTIONS REPORT], <http://perma.cc/8Q6Z-QAKH>; AM. LEGISLATIVE EXCHANGE COUNCIL, THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S ASSAULT ON STATE SOVEREIGNTY (2013) [hereinafter ALEC REPORT], <http://perma.cc/X3EY-XADY>; ANN NORMAN, NAT'L CTR. FOR POLICY ANALYSIS, ENVIRONMENTAL REGULATION THROUGH LITIGATION (2014), <http://perma.cc/G72Y-XCWB>.

² H.R. 3862, 112th Cong. (2012).

³ H.R. REP. NO. 112-593, at 4 (2012).

primarily involve settlements in environmental litigation brought against the federal government, are claimed to “undercut the public participation and analytical requirements of the Administrative Procedure Act” (“APA”).⁴ One year later, Texas Senator John Cornyn introduced similar legislation designed to curtail settlements in cases brought under the Endangered Species Act (“ESA”).⁵

In May 2013, the U.S. Chamber of Commerce released a report also targeting environmental settlements entitled “Sue & Settle: Regulating Behind Closed Doors.”⁶ The report asserts that the Administration of President Barack Obama settled environmental litigation filed against the U.S. Environmental Protection Agency (“EPA”) and U.S. Fish and Wildlife Service (“FWS”) as a means of improperly setting new policy without complying with administrative procedure and public participation requirements.⁷ The Chamber of Commerce report is not alone in expressing this view. Similar reports were published by other advocacy organizations that favor business interests, including the Center for Regulatory Solutions and the American Legislative Exchange Council.⁸

The sustained criticism of the Obama Administration’s environmental settlements is unsurprising. The Administration has a decidedly different agenda than the Administration of George W. Bush (“Bush II”), and industry groups understandably raise concerns about decisions contrary to their economic interests. Opposite dynamics played out during the Bush II Administration, which often favored economic and business interests over environmental interests. At that time, progressive public interest organizations criticized environmental settlements that were argued to erode protection for public lands.⁹ Such settlements, it was alleged, were negotiated “behind closed doors without public participation” and all to benefit extractive industries at the expense of the public.¹⁰

⁴ *Id.* at 5. The report also expresses the view that the settlements avoid requirements of “the Regulatory Flexibility Act . . . , the Unfunded Mandates Reform Act . . . , and other regulatory process statutes.” *Id.* Because those requirements largely tier off of the APA, this Article treats them all as manifestations of concerns about administrative process. The Democratic members of the House Judiciary Committee disagree with the report, arguing that the bill is a “solution in search of a problem.” *Id.* at 22.

⁵ Endangered Species Act Settlement Reform Act, S. 19/H.R. 1314, 113th Cong. (2013). The proposed legislation would modify litigation and settlement of ESA cases in numerous ways, including eliminating attorney’s fees where a settlement terminates an ESA deadline lawsuit and requiring states and counties to approve of the terms of a settlement related to species living within their jurisdiction. *Id.*

⁶ CHAMBER OF COMMERCE REPORT, *supra* note 1.

⁷ *Id.* at 5–8.

⁸ CENTER FOR REGULATORY SOLUTIONS REPORT, *supra* note 1; ALEC REPORT, *supra* note 1.

⁹ See Michael C. Blumm, *The Bush Administration’s Sweetheart Settlement Policy: A Trojan Horse Strategy for Advancing Commodity Production on Public Lands*, 34 *Envtl. L. Rep. (Envtl. Law Inst.)* 10,397, 10,397 (2004); Tom Turner, *Unsettling Development*, *ENVTL. F.*, Jan./Feb. 2004, at 32, 33; Robert B. Keiter, *Breaking Faith with Nature: The Bush Administration and Public Land Policy*, 27 *J. LAND RESOURCES & ENVTL. L.* 195, 219–20 (2007).

¹⁰ Blumm, *supra* note 9, at 10,397; see also Larry Bell, Op-Ed., *EPA’s Secret and Costly Sue and Settle Collusion*, *FORBES* (Feb. 17, 2013), <http://perma.cc/6MMU-N4QP> (discussing environmental settlements under the Obama Administration and asserting that in sue-and-settle cases “the agency throws the case, somewhat like Bre’r Rabbit agreeing to be thrown into a favorite briar-patch”).

This Article is the first to provide an objective examination of environmental settlements amidst the heated rhetoric.¹¹ Settlement has become a dominant means of resolving legal disputes in a wide range of contexts as parties seek to avoid the expense and uncertainty attendant to judicial resolution of cases.¹² In 2012, federal courts—the courts that hear all environmental litigation brought against the United States—terminated 271,572 civil cases, while holding trials in only 5,478 cases, or 2% of cases.¹³ It has become a common understanding that “[m]ost cases settle.”¹⁴

If most cases settle, and settlement is widely viewed as a public good,¹⁵ are environmental settlements somehow different? Are agencies deploying settlements to subvert principles of administrative law? Do courts meaningfully review the terms of settlements to protect both the interests of affected nonparties and the public? Or is the “sue-and-settle” debate simply a political tug-of-war between economic and environmental interests?

In answering those questions, this Article joins a robust literature examining the public value of settlements and other forms of alternative dispute resolution. Some scholars, such as Professors Owen Fiss, David Luban, and Marc Galanter, have expressed varying degrees of skepticism about the shift from adjudication to settlement.¹⁶ Other scholars have suggested that settlements are the only practical option for overburdened courts.¹⁷ Surprisingly, despite all of the attention paid to settlements, little scholarly consideration has been paid to the unique dynamics that infuse settlements involving the government.

¹¹ Because the concerns expressed about environmental settlements involve cases brought against agencies acting in their regulatory capacity, rather than in their proprietary capacity, this Article considers only that context.

¹² See generally Margaret Meriwether Cordray, *Settlement Agreements and the Supreme Court*, 48 HASTINGS L.J. 9 (1996) (discussing the public policy favoring settlement, including a review of three Supreme Court cases that discuss settlement agreements).

¹³ *Judicial Business 2012: U.S. District Courts*, U.S. COURTS, <http://perma.cc/TZN3-4SJJ>. The remaining 98% of cases were not all resolved by settlements: Judges dispose of cases by granting motions to dismiss and motions for summary judgment. See FED. R. CIV. P. 12(b)(6); FED. R. CIV. P. 56.

¹⁴ Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339 (1994).

¹⁵ See, e.g., *In re Deepwater Horizon*, 739 F.3d 790, 807 (5th Cir. 2014) (rejecting a rule that “would thwart the ‘overriding public interest in favor of settlement’ that we have recognized”); *Bradley v. Sebelius*, 621 F.3d 1330, 1339 (11th Cir. 2010) (“Historically, there is a strong public interest in the expeditious resolution of lawsuits through settlement.”).

¹⁶ See David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995); Galanter & Cahill, *supra* note 14; Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); see also Leora Bilsky & Talia Fisher, *Rethinking Settlement*, 15 THEORETICAL INQUIRIES L. 77 (2014). Professor Ben Depoorter has also argued that the proliferation of settlements including unevenly enforced nondisclosure obligations has led to distortions in publicly available information about the value of cases, which in turn distorts future litigation decisions. See Ben Depoorter, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, 95 CORNELL L. REV. 957 (2010).

¹⁷ See, e.g., Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 48 (1992) (“The dramatic increase in both the number of cases filed per federal judge and in the percentage of those cases that impose severe time demands on judges may suggest that individual settlements could substantially reduce the federal backlog.”).

The analysis offered in this Article reveals that environmental settlements are consistent with principles of administrative law. Moreover, environmental settlements provide important opportunities. They enable strategic litigation choices to allow the federal government to avoid potentially damaging precedent, and in some circumstances they may empower agencies to overcome regulatory ossification.¹⁸ The use of such settlements does, of course, track the political preferences of the incumbent president, but that is the job of administrative agencies.¹⁹ Changes in presidential administrations often herald new policies. As a favorite saying in Washington goes, “elections have consequences.”²⁰ The terms of environmental settlements are just one more consequence.

To demonstrate that environmental settlements do not circumvent administrative law and are not otherwise problematic from a legal perspective, this Article proceeds in four Parts. Part I provides an overview of environmental litigation involving the federal government and discusses both the settlement incentives facing the government and the mechanisms by which such settlements occur. Part II then considers a range of objections to environmental settlements, by economic interests, environmental interests, and academic commentators. Part III develops a novel typology of environmental settlements—which would apply equally to other government settlements—revealing that the commitments made by agencies fall into three categories: resource allocation commitments, procedural commitments, and substantive commitments. Part IV then draws from the groundwork laid to explain that in most instances each category of agency commitment comfortably coexists with administrative law, and that courts already possess ample authority to vacate environmental settlements in the rare circumstance where they do undermine administrative law principles.

Settlement has become a favored tool for litigants in the American justice system, and the federal government is no different.²¹ That is not a bad thing. Avoiding litigation reduces costs borne by the government—both by administrative agencies and the judiciary—and by private party litigants.²² Moreover,

¹⁸ See, e.g., Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1493–94 (2012); Linda R. Cohen & Matthew L. Spitzer, *The Government Litigation Advantage: Implications for the Law*, 28 FLA. ST. U. L. REV. 391, 395 (2000).

¹⁹ This Article does not specifically consider the interplay between environmental settlements—and other settlements with the federal government—and the power of Congress over federal appropriations. For the argument that settlements may allow the Department of Justice to circumvent Congress’s role in appropriations, see Todd David Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 BYU L. REV. 327, 331 (2009).

²⁰ See, e.g., BOB WOODWARD, *THE PRICE OF POLITICS* 14 (2012).

²¹ See generally Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101 (2006) (discussing the “death of adjudication” and the movement toward alternative dispute resolution (“ADR”)).

²² The government must typically pay the legal fees of plaintiffs who successfully litigate against it. That obligation is imposed pursuant to either the Equal Access to Justice Act, 28 U.S.C. § 2412 (2012), or the specific citizen suit provisions of substantive environmental statutes, see, e.g., 42 U.S.C. §§ 7604(d), 7607(f) (2012) (Clean Air Act); 16 U.S.C. § 1540(g)(4) (2012) (Endangered

there is nothing inherently problematic with agencies using litigation as an opportunity to make decisions. The heated rhetoric about “sue-and-settle” conspiracies currently directed at the federal government should, therefore, be recognized as pure politics rather than a diagnosis of a legal infirmity in environmental settlements.

I. ENVIRONMENTAL LITIGATION, SETTLEMENT INCENTIVES, AND LEGAL CONSTRAINTS

Assessing environmental settlements necessarily requires understanding something about environmental litigation and the choices that federal agencies face when they have been sued. The federal government faces a constant flood of environmental lawsuits, and many decisions are themselves subject to multiple challenges.²³ The litigation behavior of environmental plaintiffs—both those advancing economic interests and those advancing environmental interests—“calls to mind what was said of the Roman Legions: that they may have lost battles, but they never lost a war, since they never let a war end until they had won it.”²⁴

In the face of this deluge of lawsuits, settlement is both inevitable and desirable. Such settlements can take two forms. Sometimes the federal government—like any party—agrees to embody the terms of a settlement in a consent decree terminating the litigation, which is a formal order of the court. Other times, the settlement remains a private contractual agreement, and the case ends by means of a motion seeking voluntary dismissal. Both types of settlements constitute voluntary resolutions to litigation and this Article generally refers to them both as “settlements.” Nonetheless, they each manifest certain unique features that will be discussed in this Part. This Part also discusses incentives favoring settlement and special constraints on settlement that occur in the context of federal environmental litigation.

Species Act). Thus, ending a case early that the government will likely lose may save the government more money than the private litigants.

²³ The D.C. Circuit has become so accustomed to “complex” cases, which often involve multi-party challenges to federal environmental regulations, that it has developed a procedure whereby a special panel of judges is assigned to coordinate briefing and oral argument—which can last many hours. See U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT, HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES 13–14 (2013); Per Curiam Order, *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (No. 09-1322) (scheduling oral argument for twenty-six petitions for review challenging an EPA regulation related to greenhouse gases for 280 minutes spread over two days).

²⁴ Reply Brief for the Petitioners, *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871 (1990) (No. 89-640), 1990 WL 505743, at *8 n.9 (quoting *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 702 (1981) (Rehnquist, J., dissenting)). In its brief, the United States specifically referred to the argument of the respondents that they were entitled to “submit new factual materials after the close of the summary judgment hearing,” but the quotation nicely captures the nature of environmental litigation. *Id.*

A. Profiling Environmental Lawsuits

Parties with interests in environmental law often seek to vindicate those interests by filing lawsuits against the federal government seeking either faster, firmer regulatory constraints—typically when the plaintiff is an environmental organization—or slower, laxer regulatory constraints—typically when the plaintiff is either a business or an organization representing economic interests. Between 1995 and 2010, approximately 2,500 lawsuits were filed against EPA alone, about 155 cases a year.²⁵ Most of the cases were filed under the Clean Air Act (59%) and the Clean Water Act (20%).²⁶ The plaintiffs in these lawsuits are manifold. The largest categories of lead plaintiffs include “trade associations (25 percent), . . . private companies (23 percent), local environmental groups and citizens’ groups (16 percent), and national environmental groups (14 percent).”²⁷

The number of environmental lawsuits varies somewhat from year to year, but an analysis performed by the Government Accountability Office found “no discernible trend” in the number of cases brought against EPA.²⁸ Interviews performed as part of that analysis suggest a number of factors affect the quantity of environmental litigation.²⁹ In particular, the greatest number of cases are filed in the wake of a change in presidential administration, promulgation of new regulations, or enactment of statutory amendments.³⁰

The consistently high case volume is explained, in part, by the abundant opportunities for litigation. Many federal environmental laws specifically allow “citizen suits,” which enable any person or corporate entity to bring a civil action to enforce compliance with the statute.³¹ Such citizen suit provisions occur in the Clean Water Act,³² the Clean Air Act,³³ the ESA,³⁴ the Resource Conservation and Recovery Act,³⁵ and the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”),³⁶ as well as in other lesser-known environmental statutes.³⁷ Citizen suit provisions typically enable

²⁵ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-650, ENVIRONMENTAL LITIGATION: CASES AGAINST EPA AND ASSOCIATED COSTS OVER TIME 13 (2011) [hereinafter GAO, ENVIRONMENTAL LITIGATION].

²⁶ *Id.* at 15.

²⁷ *Id.* at 16.

²⁸ *Id.* at 13.

²⁹ *Id.* at 17.

³⁰ *Id.* at 18.

³¹ See generally Jeffrey G. Miller & Brooke S. Dorner, *The Constitutionality of Citizen Suit Provisions in Federal Environmental Statutes*, 27 J. ENVTL. L. & LITIG. 401 (2012) (concluding that citizen suits are constitutional under the Vesting Clause and the Take Care Clause and do not violate the Appointments Clause); see also James R. May, *Now More than Ever: Trends in Environmental Citizen Suits*, 10 WIDENER L. REV. 1, 3–7 (2003) (discussing the importance and necessity of environmental citizen suits).

³² 33 U.S.C. § 1365(a) (2012).

³³ 42 U.S.C. § 7604(a) (2012).

³⁴ 16 U.S.C. § 1540(g) (2012).

³⁵ 42 U.S.C. § 6972(a).

³⁶ *Id.* § 9659(a).

³⁷ Other environmental statutes that allow citizen suits include the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(a) (2012); Deep Seabed Hard Mineral Resources Act, 30

lawsuits against both private parties and the government. Citizen suits against government agencies such as EPA frequently allege a failure of the agency to perform a non-discretionary duty under a specific environmental statute.³⁸ For example, the Clean Air Act allows citizens to bring a suit “where there is alleged a failure of [EPA] to perform an act or duty . . . which is not discretionary.”³⁹ Even where the citizen suit provision of a statute does not apply, plaintiffs can invoke the provisions of the APA to challenge the final action of an environmental agency and also to challenge agency action “unlawfully withheld or unreasonably delayed.”⁴⁰ Because interested parties have ample opportunities to file lawsuits, many federal environmental decisions trigger litigation.⁴¹

U.S.C. § 1427(a); Marine Protection Research and Sanctuaries Act, 33 U.S.C. § 1415(g)(1); Deepwater Port Act, 33 U.S.C. § 1515(a); Energy Policy and Conservation Act, 42 U.S.C. § 6305(a); Powerplant and Industrial Fuel Use Act, 42 U.S.C. § 8435(a); Ocean Thermal Energy Conversion Act, 42 U.S.C. § 9124(a); Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a)(1) (2012); Toxic Substances Control Act, 15 U.S.C. § 2619(a) (2012); Safe Drinking Water Act, 42 U.S.C. § 300j-8(a); and Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11046(a). Notable exceptions that lack citizen suit provisions include the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136–136y (2012); the Marine Mammal Protection Act, 16 U.S.C. §§ 1361–1421h; and the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321–47. Where an environmental law lacks a citizen suit provision, judicial review of agency decisions under that act is available through the APA. *See* 5 U.S.C. § 702 (2012); *see also, e.g.,* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 345 (1989) (considering a claim that the Forest Service violated NEPA and explaining that “respondents brought this action under the Administrative Procedure Act to obtain judicial review of the Forest Service’s decision” (citations omitted)).

³⁸ *See, e.g.,* Consent Decree, Am. Lung Ass’n v. EPA, No. 12-243 (D.D.C. June 15, 2012) (consent decree entered following a citizen suit action against EPA alleging that the Agency “violated its nondiscretionary duty under the Clean Air Act . . . to complete a five-year review of the national ambient air quality standards (‘NAAQS’) for particulate matter”); Order Approving a Consent Decree, Fla. Wildlife Fed’n v. Jackson, No. 08-324 (N.D. Fla. Dec. 30, 2009) (consent decree entered following a citizen suit action against EPA alleging that the Agency failed to satisfy its duty under the Clean Water Act to publish adequate nutrient standards). *See generally* Kristi M. Smith, *Who’s Suing Whom?: A Comparison of Government and Citizen Suit Environmental Enforcement Actions Brought Under EPA-Administered Statutes, 1995-2000*, 29 COLUM. J. ENVTL. L. 359 (2004).

³⁹ 42 U.S.C. § 7604(a)(2). Citizen suits may also be brought against the United States and private parties for alleged violations of “an emission standard or limitation under [the Clean Air Act].” *Id.* § 7604(a)(1). Such lawsuits, which essentially allege that the United States has violated the Act in engaging in proprietary activity like, for example, the Tennessee Valley Authority’s operation of power plants, *see, e.g.,* Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2532 (2011) (addressing claims brought against the United States because of emissions from Tennessee Valley Authority power plants), lie outside the bounds of this Article because they do not involve regulatory decisions.

⁴⁰ 5 U.S.C. § 706(1); *see id.* § 704 (making final agency actions subject to review under the APA). The APA does not permit judicial review of agency decisions committed to an agency’s discretion, *see id.* § 701(a)(2), but courts have construed that exception narrowly, Equal Emp’t Opportunity Comm’n v. Mach Mining, LLC, 738 F.3d 171, 177 (7th Cir. 2013) (describing the committed-to-agency-discretion exception as “generally narrow”).

⁴¹ Environmental agencies render a high volume of decisions, and routine, low-profile decisions often do not result in a legal challenge. For example, a majority of ESA species listing decisions and critical habitat designations escape litigation. Decisions regarding high-profile species, however, are more frequently challenged. *See* Eric Biber & Berry Brosi, *Officious Intermeddlers or Citizen Experts? Petitions and Public Production of Information in Environmental Law*, 58 UCLA L. REV. 321, 356 (2010). Similarly, the U.S. Army Corps of Engineers grants hundreds of indi-

B. Differentiating Private Settlement Agreements and Consent Decrees

Adversarial proceedings where judges issue judgments resolving disputes between adverse parties have long served as the mainstay of the American system of civil justice. Increasingly, however, adversarial process is falling out of favor and, “[i]n both public and private sectors, leaders . . . proffer conciliation as the exemplary model of judgment.”⁴² Efforts to promote conciliation can take many forms, but many agreements ultimately are embodied in either a private settlement or a judge-entered consent decree. While those instruments have significant commonality, they also have three significant differences.⁴³

First, private settlements and consent decrees possess a different legal character. They have much in common: As the Ninth Circuit explained, “A consent decree is essentially a settlement agreement subject to continued judicial policing.”⁴⁴ The difference in judicial role, however, matters a great deal. Private settlement agreements are essentially private contracts that can be enforced only in a lawsuit for breach of contract.⁴⁵ Ordinarily, that lawsuit is collateral to the initial suit that resulted in the private settlement, and, indeed, litigation over the breach of a private settlement agreement may occur before a different judge or even in a different court than the one that considered the initial lawsuit.⁴⁶ This will virtually always be true when the United States is alleged to have breached a private settlement because specific performance will be unavailable, but rather, a plaintiff will be relegated to seeking damages in the Court of Federal Claims,⁴⁷ or perhaps reopening the initial lawsuit to resume

vidual fill permits each year under section 404 of the Clean Water Act. See *ORM Permit Decisions*, U.S. ARMY CORPS OF ENGINEERS, <http://geo.usace.army.mil/egis/f?p=340:1:0>. A search of the Westlaw database reveals orders were issued in only ten cases during the 2013 calendar year addressing an individual permit decision. See Database of 2013 Cases Citing 33 U.S.C. § 1344 (created through Westlaw database search for 33 U.S.C. § 1344 citing references from January 1, 2013 to December 31, 2013) (on file with authors).

⁴² Resnik, *supra* note 21, at 1123. As Professor Judith Resnik explains, some critics of adversarial process “disagree with the premise that ready access to pursuing disputes through courts is useful and argue that too much reliance on adjudication is dysfunctional economically and politically.” *Id.* at 1125.

⁴³ Professor Anthony DiSarro identifies six differences between private settlements and consent decrees in *Six Decrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation*, 60 AM. U. L. REV. 275 (2010). The three distinctions emphasized here are the most important in understanding the resolution of cases involving the federal government as a defendant.

⁴⁴ *United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990).

⁴⁵ See DiSarro, *supra* note 43, at 282–83.

⁴⁶ See generally Jeffrey A. Parness & Matthew R. Walker, *Enforcing Settlements in Federal Civil Actions*, 36 IND. L. REV. 33 (2003) (explaining litigation to enforce settlements in federal court).

⁴⁷ See 28 U.S.C. § 1491(a)(1) (2012); *Coggeshall Dev. Corp. v. Diamond*, 884 F.2d 1, 3 (1st Cir. 1989) (“Federal courts do not have the power to order specific performance by the United States of its alleged contractual obligations.”). Nor can a party believing the United States has breached a private settlement sue in state court. See Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT’L L. REV. 521, 541 n.84 (2003) (“I am aware of no case upholding the jurisdiction of a state court over an affirmative claim against the United States without its consent.”).

pursuit of the claims subject to the settlement.⁴⁸ Consent decrees, on the other hand, are court orders that include an injunction enforcing the terms of the settlement.⁴⁹ In other words, a consent decree is a settlement that is backed by the contempt power of the courts and amenable to modification by court order even over objections of the parties.⁵⁰

Second, because consent decrees are court orders, they are public documents generally available to any interested party with access to a court's docket.⁵¹ The terms of private settlements, like the terms of other private contracts, can be kept secret by the parties, although in many cases those terms are publicly filed with the court.⁵² In other words, private settlements and consent decrees have the potential to result in dramatically different levels of public information about the terms agreed to by the parties. That dynamic makes private settlements a potential source of concern about government secrecy, whereas consent decrees, in the absence of a specific court order to seal, generate information for other interested parties.⁵³

Third, courts play different roles in reviewing the terms of private settlements and consent decrees before entering an order terminating a case. Because consent decrees constitute an order of the court itself, the supervising judge has a significantly greater role to play. A judge must determine that a consent decree is fair and consistent with the public interest before the decree can be entered.⁵⁴ That standard of review is, however, deferential in nature. The court's duty is "not [to] inquire into the precise legal rights of the parties nor reach and resolve the merits of the claim or controversy," but only to "determine that the settlement is fair, adequate, reasonable and appropriate under the particular facts and that there has been valid consent by the concerned parties."⁵⁵ Addi-

⁴⁸ See Parness & Walker, *supra* note 46, at 45–47 (discussing basis for federal subject matter jurisdiction to reopen civil actions following breach of settlement).

⁴⁹ See DiSarro, *supra* note 43, at 277.

⁵⁰ See *id.*; Donald C. Baur, *Settlements in Particular Programs—Factors Distinguishing Administrative from Judicial Settlements—The Distinguishing Characteristics of Judicial Consent Decrees*, in 1 Law of Environmental Protection § 9:81 (Sheldon M. Novick et al. eds., 2013).

⁵¹ See DiSarro, *supra* note 43, at 289–90. A consent decree resolving an environmental lawsuit against the United States could theoretically be sealed by order of the court, but this seems unlikely given the presumption in favor of public access to such documents, see Equal Emp't Opportunity Comm'n v. Nat'l Children's Ctr., Inc., 98 F.3d 1406, 1409 (D.C. Cir. 1996) (explaining that "[a] court's decrees, its judgments, its orders, are the quintessential business of the public's institutions" and therefore there is an "especially strong" presumption against sealing a consent decree), and the authors are aware of no examples of this occurring.

⁵² DiSarro, *supra* note 43, at 277. For an example of a settlement agreement made publicly available because it was filed with the court, see Stipulated Settlement Agreement and Order of Dismissal, Northwoods Wilderness Recovery v. Kempthorne, No. 08-1407 (N.D. Ill. Feb. 12, 2009).

⁵³ For a discussion of the sometimes arbitrary nature of judicial decisions to seal documents, including consent decrees, see Bernard Chao & Derigan Silver, *A Case Study in Patent Litigation Transparency*, 2014 J. DISP. RESOL. (forthcoming 2014).

⁵⁴ See *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983) ("As we have previously held, 'prior to approving a consent decree a court must satisfy itself of the settlement's "overall fairness to beneficiaries and consistency with the public interest."'") (quoting *United States v. Trucking Emp'rs, Inc.*, 561 F.2d 313, 317 (D.C. Cir. 1977)).

⁵⁵ *Id.*

tionally, courts will not permit the parties to terminate litigation through a consent decree that “conflicts with or violates” an applicable statute.⁵⁶

Ordinarily, the presiding judge does not police private settlement terms at all, but rather “[t]he parties are presumed capable of weighing the costs and benefits of going to trial versus settling.”⁵⁷ Once the parties reach a private settlement, the parties move to dismiss the litigation under Federal Rule of Civil Procedure 41(a), which authorizes “a stipulation of dismissal signed by all parties who have appeared.”⁵⁸ The result of Rule 41(a) is that judges typically play no role in assessing a private settlement so long as the settlement is agreed to by all of the parties. Where, however, a party to a lawsuit—typically an intervenor—objects to the terms of a private settlement, then a district court judge has broad discretion to review the terms of the settlement and may dismiss the case only under “terms the court considers proper.”⁵⁹ An intervenor can, then, at her option, transform the supervisory role of the judge in reviewing a private settlement into something that resembles a judge’s role in approving a consent decree. That can, of course, only happen if the party interested in opposing a settlement is first granted intervention.⁶⁰ As will be discussed below, however, courts sometimes decline to allow those interested in the outcome of litigation to participate as intervenors.⁶¹

C. Delimiting Settlement by the Federal Government

Settlements have become an increasingly common feature of the American legal landscape and have come to dominate the resolution of legal disputes, allowing parties to reach an accommodation between each other that obviates

⁵⁶ *Local 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 526 (1986) (“This is not to say that the parties may agree to take action that conflicts with or violates the statute upon which the complaint was based.”).

⁵⁷ Sanford I. Weisburst, *Judicial Review of Settlements and Consent Decrees: An Economic Analysis*, 28 J. LEGAL STUD. 55, 55 (1999). The Federal Rules of Civil Procedure specifically require a similar public interest review for settlements of class action lawsuits. See FED. R. CIV. P. 23(e)(2). There have been some important, albeit rare, exceptions to the rule that judges have no oversight authority outside of the class-action context. See Howard M. Erichson, *The Role of Judges in Non-Class Settlements*, 90 WASH. U. L. REV. 1015 (2013). Professor Howard Erichson raises an important question regarding such judicial intervention in regard to one particular non-class settlement: “[w]hat I wonder is where the judge got the power to ‘approve’ or ‘reject’ the settlement.” *Id.* at 1016.

⁵⁸ FED. R. CIV. P. 41(a)(1)(A)(ii).

⁵⁹ FED. R. CIV. P. 41(a)(2). Rule 41(a)(2) governs circumstances where a plaintiff seeks to voluntarily dismiss her case without the consent of all the parties, which would be the situation if an intervenor objects to a settlement’s terms.

⁶⁰ See, e.g., *United States v. Carpenter*, 298 F.3d 1122, 1125 (9th Cir. 2002) (finding that the district court had abused its discretion in denying motion to intervene filed by two environmental organizations after proposed settlement was filed with district court). An intervenor does not, however, have an absolute right to block settlement by withholding its consent. As the Supreme Court explained in the context of a consent decree, “[i]t has never been supposed that one party—whether an original party, a party that was joined later, or an intervenor—could preclude other parties from settling their disputes and thereby withdrawing from litigation.” *Local 93, Int’l Ass’n of Firefighters*, 478 U.S. at 528–29.

⁶¹ See *infra* Part II.B.

the need for a judge to decide the merits of the case and impose a remedy.⁶² Based on the high volume of environmental litigation, it comes as no surprise that many cases in this context settle as well.⁶³ This section explores some of the incentives facing the federal government—and its litigation adversaries—in considering whether to settle.

A primary reason that the federal government may resolve litigation through negotiated agreements, rather than litigation, is a recognition of substantial legal vulnerability. When the federal government becomes embroiled in litigation, lawyers at the Department of Justice provide a candid analysis of the likelihood for the success of the government's position.⁶⁴ These lawyers have expertise in the field, but are simultaneously removed from the federal officials subject to the lawsuit, and that distance breeds a degree of objectivity, at least in the ideal circumstance.⁶⁵ Moreover, unlike private lawyers, lawyers at the Department of Justice face no fear that a client will seek out new counsel because it received advice viewed as contrary to the client's interest.⁶⁶ And Department of Justice lawyers, unlike private counsel, exercise a degree of decisionmaking authority over the case itself.⁶⁷

A candid assessment of the strengths of the federal government's position in litigation may—and often does—suggest that the government has little pros-

⁶² See Galanter & Cahill, *supra* note 14, at 1339–40 (noting that settlement rates of between 85–95% are misleading because those figures represent all civil cases that do not go to trial—nevertheless, nearly two-thirds of cases settle without a definitive judicial ruling).

⁶³ See GAO, ENVIRONMENTAL LITIGATION, *supra* note 25 (“No trend was discernible in the number of environmental cases brought against EPA from fiscal year 1995 through fiscal year 2010, as the number of cases filed in federal court varied over time. Justice staff defended EPA on an average of about 155 such cases each year, or a total of about 2,500 cases between fiscal years 1995 and 2010.”); see also Robert V. Percival, *The Bounds of Consent: Consent Decrees, Settlements, and Federal Environmental Policy Making*, 1987 U. CHI. LEGAL F. 327, 328 (1987).

⁶⁴ The role of attorneys at the Department of Justice has long been recognized as pursuing the public interest, and not just winning cases for a client. See, e.g., *Berger v. United States*, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”); cf. Nancy Leong, Note, *Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys*, 20 GEO. J. LEGAL ETHICS 163, 196–97 (2007) (discussing the unique role of government attorneys generally).

⁶⁵ Cf. Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345 (2000) (describing the role of Department of Justice lawyers in controlling litigation and raising concerns about the effect on agency priorities).

⁶⁶ With the exception of a few agencies granted independent litigating authority, the Department of Justice is solely responsible for “the conduct of litigation” involving the United States. 28 U.S.C. § 516 (2012).

⁶⁷ See, e.g., Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 125 (2014) (“[T]he Department of Justice is structurally accountable to presidential power to direct and fire officials, and yet it has developed strong norms of professional independence”); Norman W. Spaulding, *Independence and Experimentalism in the Department of Justice*, 63 STAN. L. REV. 409, 416 (2011) (“The discourse around government lawyering . . . reflects an assumption that government lawyers should display a higher degree of professional independence.”) (quotation marks omitted); Thomas L. Sansonetti, *Integrating Environmental Justice at the Department of Justice*, HUM. RTS., Fall 2003, at 9, 9 (explaining that Department of Justice lawyers’ “duty as legal practitioners extends not only to the agencies that we represent but also to the public interest”).

pect of success. That is particularly true of much environmental litigation, specifically litigation alleging that a federal agency has failed to meet a statutory deadline.⁶⁸ Both the facts and the law in such cases are clear: a statute sets a deadline for an agency's action, and the agency has not met that deadline.⁶⁹ In situations where deadlines are short, the federal government has little prospect of prevailing in a lawsuit and may face a court order compelling it to act quickly.⁷⁰ Where the law weighs heavily against the position of the United States, significant incentives for settlement exist. In so doing, the federal government secures for itself an opportunity to negotiate a schedule for its compliance with a governing statute, providing the opportunity for more flexibility than might be permitted under an injunction crafted by a district court judge. The federal government also preserves its own credibility with judges through such settlements, avoiding the prospect of appearing in court to make implausible arguments.⁷¹

Environmental suits may also settle because plaintiffs have different motivations than the federal government for pursuing litigation. In many circumstances, such plaintiffs are deeply invested in the outcome of their particular case. Environmental organizations seek to secure protection for a specific species, community, or landscape, and industry associations seek to stave off specific regulatory restrictions.⁷² Changing the government decision at issue in the litigation is of primary concern. The federal government, on the other hand, may have less invested in any particular decision it has made. Rather, because the federal government is constantly being sued, it has significant incentive to strategically select cases with which to test undecided legal propositions.⁷³ In the long term, a settlement, even if on unfavorable terms, may do less damage to the federal government's interests than running the risk of establishing binding adverse precedent.⁷⁴ This is particularly true because government agencies

⁶⁸ See *infra* Part III.A.

⁶⁹ See Robert L. Glicksman, *The Value of Agency-Forcing Citizen Suits to Enforce Nondiscretionary Duties*, 10 WIDENER L. REV. 353, 356 (2004).

⁷⁰ See *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1193 (10th Cir. 1999) (noting cases setting deadlines of between 5 and 120 days for the agency to take action).

⁷¹ See Nicholas S. Zeppos, *Department of Justice Litigation: Externalizing Costs and Searching for Subsidies*, 61 LAW & CONTEMP. PROBS. 171, 181 (1998) ("Courts know that if DOJ is pursuing the matter (particularly on appeal or certiorari), the stakes must be high and the legal arguments generally sound.")

⁷² See, e.g., *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978); *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Am. Petroleum Inst. v. EPA*, 858 F.2d 261 (5th Cir. 1988).

⁷³ See Shauhin Talesh, *How the "Haves" Come out Ahead in the Twenty-First Century*, 62 DEPAUL L. REV. 519, 519 (2013); Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 99–101 (1974). Professor Shauhin Talesh recently considered the modern implications of Professor Marc Galanter's seminal article about litigation favoring well-resourced, repeat players. Talesh, *supra*, at 519. Specifically, Galanter had argued that litigants who are "repeat players" (as opposed to "one-shotters") shape the development of law by playing for favorable rules—settling cases likely to produce adverse precedent and litigating cases likely to produce rules that promote their interests—and Talesh concludes that this dynamic continues today. *Id.*

⁷⁴ *Mandate Madness: When Sue and Settle Just Isn't Enough: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 112th Cong. (2012) [hereinafter *Mandate Madness*] (testimony of Robert V. Percival); see also Andrew Hessick, *The Impact of Government Appellate Strategies on*

rarely settle on terms substantially more arduous than those expected to result from an adverse judgment at trial.⁷⁵ A federal agency may be willing to negotiate a deal that gives plaintiffs the lion's share of what they seek to avoid the effect that an adverse decision may have on future courts.

Moreover, settlements may occur because agencies view settlement as an opportunity to initiate fraught decisionmaking processes.⁷⁶ Finalizing administrative decisions—including those in the environmental context—is exceedingly difficult.⁷⁷ This difficulty—which arises from, among other things, lengthy public participation requirements, ever-present threats of lawsuits, and lack of resources and political will—has resulted in the ossification of regulatory processes.⁷⁸ Because notice-and-comment rulemaking mandated by the APA takes a long time and consumes extensive agency resources, regulations languish.⁷⁹ This is particularly true for a relatively small number of controversial, high-stakes rulemakings often referred to as “economically significant rules.”⁸⁰ These rules can take many years to complete and require an agency to commit a high proportion of its resources to the single task of finalizing that rule.⁸¹ Congress has tried to overcome this regulatory inertia by setting statutory deadlines that mandate agency action within a certain time, but agencies often fail to comply with those deadlines. For example, a study in 1985 found

the Development of Criminal Law, 93 MARQ. L. REV. 477, 477 (2009); Cohen & Spitzer, *supra* note 18. Professors Linda Cohen and Matthew Spitzer have explained that the government's strategic case selection may be of even greater importance in the Supreme Court. Cohen & Spitzer, *supra* note 18, at 395–96.

⁷⁵ See Percival, *supra* note 63, at 346.

⁷⁶ Professor Jim Rossi provides an extended treatment of the potential for settlements to serve a regulatory function. See generally Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015 (2001). Rossi considered such “rulemaking settlements” at a moment when negotiated rulemaking appeared poised to transform administrative law, see *id.* at 1015, and he viewed rulemaking settlements with a degree of concern because of a potential “principal-agent gap,” *id.* at 1016, and expressed particular concern with such settlements attendant to a transition in presidential power, *id.* at 1039–43. This concern is particularly acute in situations where an administration enters a consent decree that results in vacatur of an earlier administration's regulatory efforts, thereby effectively revoking a regulation without following administrative procedures. Rossi identifies one example, but in the authors' experience such consent decrees are exceedingly rare. Nonetheless, courts should be vigilant in considering a proposed consent decree to ensure that it does not altogether avoid administrative process.

⁷⁷ See generally, e.g., Victor B. Flatt, *Frozen in Time: The Ossification of Environmental Statutory Change and the Theater of the (Administrative) Absurd*, 24 FORDHAM ENVTL. L. REV. 125 (2013); Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Theses: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414 (2012); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

⁷⁸ See generally, e.g., Pierce, *supra* note 18. Ossification of the regulatory process refers to the relative infrequency of formal agency decisionmaking because of the cost and delay attendant to the use of notice-and-comment procedures. *Id.* at 1493. See also McGarity, *supra* note 77, at 1462 (opining that the burden placed on informal rulemaking “has so thoroughly disabled it that it is in danger of becoming a historical monument”).

⁷⁹ Pierce, *supra* note 18, at 1493.

⁸⁰ *Id.* at 1498 & n.35 (citing Exec. Order No. 12,866, 3 C.F.R. 638, 641, 645 (1994), *reprinted in* 5 U.S.C. § 601 (2006)) (stating that “there are only about 100 such rulemakings each year,” and that “they are . . . the most important rulemakings”).

⁸¹ *Id.* at 1498.

that of the 328 deadlines established for rulemaking by the Clean Air Act, EPA acted within the specified period only 17% of the time.⁸² As agencies find it more difficult to initiate and complete notice-and-comment rulemaking processes for fear of political fallout and endless litigation, settlement may become an appetizing alternative. Even where the settlements do not themselves resolve substantive regulatory issues—and they typically do not—merely setting a timeline that can be enforced in court may offer agencies a means of escaping the ossification trap and creating conditions in which regulatory efforts can be successfully completed.

The most common motivator for settlements in general litigation—avoiding litigation costs—may play a relatively small role in facilitating environmental settlements.⁸³ From the federal government’s perspective, litigation costs are relatively less significant because the Department of Justice employs a cadre of attorneys dedicated to representing the United States in court.⁸⁴ Because these attorneys are salaried, rather than paid on a fee basis, the marginal cost of litigating all but the most complex and time-consuming cases is relatively minimal.⁸⁵ Moreover, the costs of litigation do not fall on the regulatory agencies themselves—the named defendants in litigation—because they typically do not reimburse the Department of Justice for the salaries of the lawyers that represent them.⁸⁶

While costs may influence settlement decisions less for the federal government than for private parties, substantial incentives exist favoring settlement.⁸⁷

⁸² *Id.* at 1503 & n.75 (citing ENVTL. & ENERGY STUDY INST. & ENVTL. LAW INST., STATUTORY DEADLINES IN ENVIRONMENTAL LEGISLATION: NECESSARY BUT NEED IMPROVEMENT (1985)).

⁸³ J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1721–22 (2012) (“[A]s federal cases have become more complex, the cost of litigating a case to trial has become prohibitive, or at least undesirable, for many litigants.”).

⁸⁴ See Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 237 n.83 (1976) (“Because the agencies are represented in court by the Department of Justice, they are sometimes insensitive to the costs of litigation, placing their program needs in the forefront.”). The Department of Justice is the world’s largest law office, employing more than 10,000 attorneys nationwide. See *Office Of Attorney Recruitment & Management*, U.S. DEP’T OF JUSTICE, <http://perma.cc/CAW9-24UZ>.

⁸⁵ See Zeppos, *supra* note 71, at 175 (“[B]oth the [private] law firm and the client must directly internalize the cost of litigation errors—certainly more than DOJ and its clients.”). The Department of Justice has two pay scales applicable to attorneys. Those hired by the offices of the various United States Attorneys are compensated under an Administratively Determined pay scale authorized by Title 28 of the U.S. Code., *Entry-Level (Honors Program) and Experienced Attorneys, Attorney Salaries, Promotions, and Benefits*, U.S. DEP’T OF JUSTICE, <http://perma.cc/D5AR-LKD8>. All other attorneys are compensated under the General Schedule for federal employees authorized by Title 5 of the U.S. Code. *Id.* Federal salaries also vary by geographic location. Entry-level attorneys generally earn \$63,091 to \$89,924 with frequent performance-based promotions. *Id.*

⁸⁶ One relatively minor exception to this rule is that EPA and the Department of Justice have entered into an interagency agreement under which EPA pays for the time that Justice Department lawyers spend litigating CERCLA cases on the Agency’s behalf. See U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN. AUDIT DIV., AUDIT OF SUPERFUND ACTIVITIES IN THE ENVIRONMENT AND NATURAL RESOURCES DIVISION FOR FISCAL YEARS 2011 AND 2012 (2013), <http://perma.cc/PQG9-6RYS>. That exception rarely relates to regulatory decisions of the Agency.

⁸⁷ The potential award of fees to prevailing plaintiffs suing the United States may affect settlement incentives to a degree. Such awards do come out of the defendant agency’s budget when arising

These incentives are reinforced by courts eager for parties to voluntarily resolve cases. It is not uncommon for district courts, and even courts of appeals, to refer parties—including the United States—to mediation in hopes that cases will settle.⁸⁸ This practice accords with the general recognition by courts of a “broad public interest” favoring settlement.⁸⁹ Indeed, courts have even suggested that “a bad settlement is almost always better than a good trial.”⁹⁰ The parties to federal litigation then themselves face considerable incentives to settle cases, and those incentives are magnified by judges eager to facilitate voluntary resolution of cases.

Notwithstanding the pressure to settle, the federal government also faces unique constraints and limitations. These constraints arise from two distinct sources. First, some environmental statutes place procedural obligations on the federal government before it can enter into a settlement. For example, several environmental statutes require publication of a notice of any proposed settlement or consent decree in the Federal Register, coupled with an opportunity for the public to comment.⁹¹ CERCLA contains such a requirement for all settlements resolving the liability of a potentially responsible party to the United States.⁹² Where the United States seeks to enter such a settlement, which typically must be enshrined in a consent decree, it must first provide a thirty-day public comment period.⁹³ The United States must then “consider any comments filed . . . in determining whether or not to consent to the proposed settlement and may withdraw or withhold consent to the proposed settlement if such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper, or inadequate.”⁹⁴ The Clean Air Act has similar provisions that specifically require public notice and opportunities to comment for

from an APA suit subject to the Equal Access to Justice Act. *See* 28 U.S.C. § 2412(d)(4) (2012). Where, however, fees are provided by a citizen suit provision, any fee award comes out of the Department of Treasury’s Judgment Fund, a permanent, indefinite appropriation available to pay many judgments against, and settlements by, the United States. *See, e.g.*, 42 U.S.C. §§ 7604(d), 7607(f) (2012); 16 U.S.C. § 1540(g)(4) (2012); 31 U.S.C. § 1304 (2012); *see also* Payment of Attorney’s Fees in Litigation Involving Successful Challenges to Federal Agency Action Arising Under the Administrative Procedure Act and the Citizen-Suit Provisions of the Endangered Species Act, 24 Op. O.L.C. 311, 311 (2000). Nonetheless, in the experience of one of the authors, the prospect of such fee awards rarely figures into the decision as to whether to pursue settlement, but may influence the contours of a negotiation once an agency, in consultation with the Department of Justice, has deemed settlement an appealing possibility. Moreover, where a complaint alleges both APA and citizen suit claims, agencies have an incentive to structure settlements to appear to arise out of the APA claims, not the citizen suit claims, and thereby avoid payment of fees from the agency’s budget.

⁸⁸ Richard M. Calkins, *Mediation: A Revolutionary Process That Is Replacing the American Judicial System*, 13 CARDOZO J. CONFLICT RESOL. 1, 8 (2011).

⁸⁹ *See, e.g.*, *S. Union Gas Co. v. FERC*, 840 F.2d 964, 971 (D.C. Cir. 1988).

⁹⁰ Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783, 812 (2004) (quoting *Hispanics United v. Vill. of Addison*, 988 F. Supp. 1130, 1149 (N.D. Ill. 1997) (internal citations omitted)); *see also In re Warner Commc’ns Sec. Litig.*, 618 F. Supp. 735, 740 (S.D.N.Y. 1985); *Strong v. BellSouth Telecomms., Inc.*, 173 F.R.D. 167, 172 (W.D. La. 1997).

⁹¹ *See, e.g.*, 42 U.S.C. § 7413(g) (Clean Air Act); *id.* § 9622(i) (CERCLA).

⁹² *Id.* § 9622(i).

⁹³ *Id.*

⁹⁴ *Id.* § 9622(i)(3).

settlements resolving cases in which the United States is a defendant.⁹⁵ Other statutes apply similar requirements to specific categories of settlements. The imminent hazard provisions of the Resource Conservation and Recovery Act, for example, require notice and comment for any settlement containing terms that could affect public health.⁹⁶ The rule that settlements should be subject to notice and comment is not, however, universal. Neither the ESA nor the Clean Water Act, for example, contain such a requirement. Moreover, because the adoption of a settlement is not typically considered a final agency action, the notice-and-comment provisions of the APA do not require public processes in the absence of specific statutory command.⁹⁷

Second, the Department of Justice has developed internal guidelines to govern its settlement decisions, although the views about the proper scope of its settlement authority that it has articulated have diverged over time. The Administration of Ronald Reagan first established guidelines as part of an effort to convince courts to vacate consent decrees that had been entered into during previous administrations.⁹⁸ Those guidelines were set forth in a memorandum signed in 1986 by Attorney General Edwin Meese. The Meese Memo was premised on the view that due to separation of powers concerns, courts lack constitutional authority to enter certain types of consent decrees binding the United States, even with the consent of defendant agencies.⁹⁹ The Meese Memo specifically prohibited Department of Justice lawyers from agreeing to any consent decree or private settlement agreement that significantly constrained the discretion of an executive branch agency or department.¹⁰⁰ The guidelines further prohibit any consent decree through which a court enforced duties on federal

⁹⁵ *Id.* § 7413(g) (“At least 30 days before a consent order or settlement agreement . . . is final or filed with a court, the Administrator shall provide a reasonable opportunity by notice in the Federal Register to persons who are not named as parties or intervenors to the action or matter to comment in writing.”).

⁹⁶ *Id.* § 6973(d).

⁹⁷ See *Home Builders Ass’ns of N. Cal. v. Norton*, 293 F. Supp. 2d 1, 5 (D.D.C. 2002) (stating that notice-and-comment requirements of APA rulemaking provisions do not apply to adoption of a proposed consent decree; adoption of a decree is not an agency act). For an argument that settlements should be treated as final agency actions, see Dustin Plotnick, Note, *Agency Settlement Reviewability*, 82 *FORDHAM L. REV.* 1367, 1371 (2013) (“[S]ettlements should not be entitled to [a] presumption of unreviewability.”).

⁹⁸ See *Mandate Madness*, *supra* note 74, at 6. The Reagan Administration was particularly concerned with an environmental consent decree in which EPA had agreed to a detailed timetable to promulgate guidelines and limitations governing the discharge by twenty-one industries of sixty-five specified pollutants. See *Citizens for a Better Env’t v. Gorsuch*, 718 F.2d 1117, 1120–21 (D.C. Cir. 1983). Industry groups sought to vacate the decree on the grounds that the 1977 Amendments to the Clean Water Act rendered it obsolete. In considering that argument, the D.C. Circuit raised the question of whether the decree impermissibly infringed on EPA’s discretion under the Act. See *Env’tl. Def. Fund, Inc. v. Costle*, 636 F.2d 1229, 1258 (D.C. Cir. 1980). The government proffered the Meese Memorandum to support its argument for vacatur of the consent decree, but the D.C. Circuit was not persuaded. See *Citizens for a Better Env’t*, 718 F.2d at 1130.

⁹⁹ Memorandum from Edwin Meese III, Attorney Gen., to All Assistant Attorneys General and All United States Attorneys, Department Policy Regarding Consent Decrees and Settlement Agreements (Mar. 13, 1986) [hereinafter Meese Memo], <http://perma.cc/P288-VC3P>.

¹⁰⁰ *Id.* The Meese Memo prohibited consent decrees without the Attorney General’s approval that: (1) divest discretionary power granted by Congress or the Constitution to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties; (2)

agencies that would not have been the proper subject of an injunction following a ruling on the merits of the case.¹⁰¹

The Meese Memorandum was not the Department of Justice's final word on the matter. In 1999, the Department released a new memorandum that remains in effect today authored by Randolph D. Moss, the Acting Assistant Attorney General overseeing the Office of Legal Counsel.¹⁰² The Moss Memo relaxed the policy set forth in the Meese Memo.¹⁰³ Contrary to the Meese Memo, the Moss Memo concluded that Article III of the Constitution does not preclude the executive branch from "entering into judicially enforceable discretion limiting settlements as a general matter or bar federal courts from entering consent decrees that limit executive branch discretion whenever such decrees purport to provide broader relief than a court could have awarded pursuant to an ordinary injunction."¹⁰⁴ However, Article III limitations may arise when the terms of the governmental promise are "too amorphous to be susceptible to Article III federal judicial enforcement."¹⁰⁵

The Meese Memo and the Moss Memo evidence ongoing, thoughtful deliberation within the Department of Justice about settlement policy and the willingness and ability of the Attorney General to guide the practice of federal lawyers. These mechanisms internal to the Department of Justice, coupled with existing statutory limitations on settlement, create the backdrop against which the federal government negotiates settlements.

II. PUBLIC PARTICIPATION, PRIVATIZATION, AND POLITICAL PREFERENCE

Environmental settlements have proven controversial for over a decade. In 2004, Professor Michael Blumm argued that the Bush II Administration manipulated litigation for political ends, both by failing to strenuously defend decisions made by earlier administrations and by entering "sweetheart settlement[s]."¹⁰⁶ Blumm referred to this as a "'Trojan Horse' approach to changing public land policy" and claimed it involved "first inviting litigation from industry; then . . . avoiding a court decision on the merits through settlement

commit the executive branch to promulgate, amend, or revise regulations; or (3) commit the executive branch to expend unappropriated funds or seek appropriations from Congress. *Id.*

¹⁰¹ *See id.* The memorandum suggests that such a consent decree is "constitutionally impermissible." *Id.*

¹⁰² Memorandum from Randolph D. Moss, Acting Assistant Attorney Gen., Office of Legal Counsel, to Raymond C. Fischer, Assoc. Attorney Gen. (June 15, 1999) [hereinafter Moss Memo], <http://perma.cc/GS48-Q38R>. For a discussion of the role of the Office of Legal Counsel, see generally Arthur H. Garrison, *The Opinions by the Attorney General and the Office of Legal Counsel: How and Why They Are Significant*, 76 ALB. L. REV. 217 (2012); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010).

¹⁰³ *See* Moss Memo, *supra* note 102.

¹⁰⁴ *Id.* at 126.

¹⁰⁵ *Id.*; see also Michael T. Morley, *Consent of the Governed or Consent of the Government? Problems with Consent Decrees in Government-Defendant Cases*, 16 U. PA. J. CONST. L. 637, 643-44 (2014) (discussing the Moss Memo and contending that consent decrees raise serious Article III concerns due to the lack of adverseness between the parties seeking them).

¹⁰⁶ Blumm, *supra* note 9, at 10,397.

agreements that gave the industry everything it could have hoped for through litigation.”¹⁰⁷ The report prepared for the U.S. Chamber of Commerce criticizing environmental settlements entered into by the Obama Administration reflects an identical sentiment expressed from a vantage point across the ideological spectrum.¹⁰⁸ The report asserts that “[b]y filing lawsuits covering significant EPA rulemakings and regulatory initiatives, and then quickly settling, [environmental] groups have been able to circumvent the normal rulemaking process and effect immediate regulatory action with the consent of the agencies themselves.”¹⁰⁹

This Part attempts to disaggregate the concerns that have been expressed about environmental settlements, both by environmentalists during the Bush II Administration, and by industry groups during the Obama Administration. Three dominant themes emerge. First, environmental settlements allow agencies to avoid procedural constraints on decisionmaking imposed by the APA, particularly public participation requirements. Second, narrow intervention rules prevent affected parties from participating in settlement negotiations, further insulating the decisions made through settlements. And third, environmental settlements allow agencies to inappropriately make political decisions that may run counter to the goals of Congress. This Part also considers a more general critique of settlements that has surfaced in the academic literature, namely, that settlements serve the function of privatizing law by shifting the locus of power in litigation from judges to parties.

In discussing these four concerns, this Part offers a preliminary account as to why the concerns expressed by advocacy organizations and academics are overblown. Part IV returns to this preliminary account and explains in greater detail the reasons that environmental settlements are consonant with the APA.

A. *Circumventing Public Participation and Administrative Process*

The APA imposes procedural requirements on agencies promulgating new substantive regulations, including the requirement that the agency solicit and consider public comments.¹¹⁰ Opponents of environmental settlements argue that they allow agencies to avoid those constraints. As explained by the Cham-

¹⁰⁷ *Id.*

¹⁰⁸ See generally CHAMBER OF COMMERCE REPORT, *supra* note 1.

¹⁰⁹ *Id.* at 12. The Chamber of Commerce report acknowledges that “business groups have also taken advantage of the sue and settle approach,” but because the report limits its consideration to settlements during the Obama Administration, it asserts that “advocacy groups have used sue and settle much more often in recent years.” *Id.*

¹¹⁰ 5 U.S.C. § 553(c) (2012). The APA also imposes certain procedural requirements for adjudications and courts have held that agencies can articulate generally applicable rules through adjudicatory processes. See *id.* § 554; *Goodman v. FCC*, 182 F.2d 987, 994 (D.C. Cir. 1999) (“[T]he nature of adjudication is that similarly situated non-parties may be affected by the policy or precedent applied, or even merely announced in dicta.”).

ber of Commerce, environmental settlements are developed “behind closed doors—with no participation by other affected parties or the public.”¹¹¹

The concern that environmental settlements circumvent otherwise required public participation is a unifying theme in the criticism of the practices of both the Bush II Administration and the Obama Administration. It permeates the Chamber of Commerce report, and has also been expressed by influential political allies of the business community.¹¹² For example, in the lead-up to a confirmation hearing, Senator David Vitter wrote to Avi Garbo, who had been nominated for the position of EPA General Counsel, asking him to promise to ensure that industry groups “have a seat at the table in any negotiations” over settlements to resolve lawsuits brought by environmental organizations.¹¹³ The House Judiciary Committee has similarly explained that environmental settlements “can come as a surprise to the regulated community and the general public,” and thereby “undercut the public participation and analytical requirements of the . . . APA.”¹¹⁴ These concerns echo those raised by environmental organizations and their allies during the Bush II Administration. In 2003, Earthjustice issued a press release criticizing a settlement entered into by the U.S. Bureau of Land Management, alleging that it constituted a “secret deal” that “cuts the public out and guts federal environmental laws behind closed doors with few fingerprints on the deal.”¹¹⁵ Professor Blumm similarly argued that the Bush II Administration used a “sweetheart settlement process” that occurred “behind closed doors without public participation or any change in legislation.”¹¹⁶ And Professor Patrick Parenteau argued that the Administration used “sweetheart deals to settle lawsuits . . . without public participation or Congressional review.”¹¹⁷

Critics of environmental settlements also express concerns unrelated to public participation. For example, it has been argued that settlements enable agencies to make decisions without involvement by other elements of the executive branch. The Chamber of Commerce report asserts that environmental settlements “avoid . . . review by the Office of Management and Budget . . . and other agencies”¹¹⁸ and the House Resources Committee echoes that concern.¹¹⁹ At first blush it may seem strange that Congress and representatives of the

¹¹¹ CHAMBER OF COMMERCE REPORT, *supra* note 1, at 3.

¹¹² *See id.* at 3, 6, 11, 24; *see also* CENTER FOR REGULATORY SOLUTIONS REPORT, *supra* note 1, at 1 (“The ‘sue-and-settle’ tactic . . . is an affront to government openness and transparency.”).

¹¹³ *See* Anthony Lacey, Vitter Sees Ozone ‘Sue-and-Settle’ Case as Test for EPA Counsel Nominee, INSIDE EPA, June 21, 2013.

¹¹⁴ H.R. REP. NO. 112-593, at 5 (2012).

¹¹⁵ *Conservationists Challenge Bush Administration Abandonment of Wilderness Protections: Millions of Acres in the West Threatened by Illegal Deal*, EARTHJUSTICE (May 5, 2003), <http://perma.cc/35G-VBLL>.

¹¹⁶ Blumm, *supra* note 9, at 10,397.

¹¹⁷ Patrick Parenteau, *Anything Industry Wants: Environmental Policy Under Bush II*, 14 DUKE ENVTL. L. & POL’Y 363, 394 (2004).

¹¹⁸ CHAMBER OF COMMERCE REPORT, *supra* note 1, at 11.

¹¹⁹ H.R. REP. NO. 112-593, at 5 (2012) (noting that settlements avoid review by the Office of Information and Regulatory Affairs, a unit of the Office of Management and Budget). For a fascinating insider’s view of the role the Office of Management and Budget plays in EPA regulatory efforts, *see generally* Lisa Heinzerling, *Inside EPA: A Former Insider’s Reflections on the Rela-*

business community worry that settlements allow one component of the executive branch—environmental agencies—to potentially avoid consultation with another component of the executive branch—the Office of Management and Budget (“OMB”). That concern makes sense, however, because OMB performs a “regulatory impact analysis” for every “major” regulation that includes a cost-benefit analysis,¹²⁰ and the Agency is generally viewed as tilting regulation in favor of economic interests.¹²¹

As Part IV discusses, despite the breathless accusations, environmental settlements do not circumvent administrative law—including public participation requirements. Most settlements involve types of decisions that fall outside the ambit of the notice-and-comment provisions of the APA, meaning that the agency involved could have made the decision embodied in the settlement without providing notice to the public or accepting public comments.¹²² Moreover, as Part III reveals, courts have exhibited an appropriate willingness to intercede where settlements do circumvent administrative law constraints.

B. Limiting Intervention

The ability of interested parties to intervene to oppose settlements is also front and center in the current debate.¹²³ Federal Rule of Civil Procedure 24 allows “anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action” and whose interest “as a practical matter” could be impaired.¹²⁴ Both environmental and industry groups invoke Rule 24 as a means of joining litigation brought against the federal government that may affect their interests.¹²⁵ Since industry groups assert that environmental settlements make policy changes in the absence of avenues for public participation, they argue that they should be able to intervene to participate in negotiations and potentially oppose any settlement.¹²⁶

tionship Between the Obama EPA and the Obama White House, 31 PACE ENVTL. L. REV. 325 (2014).

¹²⁰ See Curtis W. Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 FORDHAM URB. L.J. 1257, 1261 (2006).

¹²¹ Sidney A. Shapiro, *OMB and the Politicization of Risk Assessment*, 37 ENVTL. L. 1083, 1084 (2007).

¹²² Moreover, many consent decrees contain a standard clause that attempts to ensure APA compliance. See, e.g., Stipulated Settlement Agreement Relating to WildEarth Guardians v. Salazar at ¶ 20, *In re Endangered Species Act Section 4 Deadline Litig.*, No. 10-377 (D.D.C. May 10, 2011) (“No provision of the Agreement shall be interpreted as, or constitute, a commitment or requirement that Defendants take any action in contravention of the ESA, the APA, or any other law or regulation, either substantive or procedural.”).

¹²³ See, e.g., NORMAN, *supra* note 1, at 3, 11; CHAMBER OF COMMERCE REPORT, *supra* note 1, at 28–29.

¹²⁴ FED. R. CIV. P. 24(a).

¹²⁵ See, e.g., *Pennaco Energy, Inc. v. U.S. Dep’t of Interior*, 377 F.3d 1147, 1150 (10th Cir. 2004); Michael Ray Harris, *Intervention of Right in Judicial Proceedings to Review Informal Federal Rulemakings*, 40 HOFSTRA L. REV. 879, 894 (2012).

¹²⁶ See, e.g., CHAMBER OF COMMERCE REPORT, *supra* note 1, at 28–29; CENTER FOR REGULATORY SOLUTIONS REPORT, *supra* note 1, at 3.

In the face of an increasing number of intervention petitions, courts have on occasion denied intervention to industry groups in cases involving environmental settlements.¹²⁷ For example, in 2013 the D.C. Circuit affirmed a district court order denying the Utility Water Act Group's motion to intervene in *Defenders of Wildlife v. Jackson*.¹²⁸ The case involved a consent decree in which EPA agreed to deadlines for reviewing, and possibly revising, its 1982 Clean Water Act effluent limitation guidelines for coal- and steam-fired power plants.¹²⁹ The district court ruled that the organization lacked constitutional standing and therefore could not intervene as of right, and that decision was affirmed on appeal.¹³⁰ The district court found that the Utility Water Act Group lacked standing because in the court's view the group "has not articulated any concrete, particularized, actual, and imminent injury it or its members will suffer" from establishment of a schedule for a future rulemaking.¹³¹ Similar reasoning could bar industry groups from intervening in many lawsuits that seek court orders directing environmental agencies to initiate rulemaking proceedings.

Industry groups are not alone in expressing concern about limitations on intervention. Environmentalists too have expressed concern about court decisions preventing them from intervening.¹³² This controversy should be understood, however, as separate and distinct from questions related to environmental settlements because rules relating to intervention affect numerous aspects of litigation outside of the settlement context: intervention controls who can raise legal issues, who can appeal from an adverse judgment, and who can present oral argument. Moreover, even when interested parties are allowed to intervene on behalf of the government, they have no legal right to participate in settlement negotiations.¹³³ Narrow interpretation of Rule 24 may, therefore,

¹²⁷ Jenny Hopkinson, *Industry Steps up Push to Intervene in EPA 'Sue-and-Settle' Suits*, INSIDE EPA, May 31, 2013.

¹²⁸ See generally *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317 (D.C. Cir. 2013) (affirming the denial of intervention because the Utility Water Act Group lacks Article III standing and there is no appellant with standing).

¹²⁹ See generally *Defenders of Wildlife v. Jackson*, 284 F.R.D. 1 (D.D.C. 2012) (holding that district court had subject matter jurisdiction over the action, organization lacked standing to intervene as of right, organization lacked legally protectable interest in rulemaking schedule proposed by environmental groups, and permissive intervention was not warranted).

¹³⁰ *Id.* at 6; see also *Defenders of Wildlife*, 714 F.3d at 1323.

¹³¹ *Defenders of Wildlife*, 284 F.R.D. at 6.

¹³² See, e.g., Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 328 (1989); Elyn J. Bullock, Note, *Acid Rain Falls on the Just and the Unjust: Why Standing's Criteria Should Not Be Incorporated into Intervention of Right*, 1990 U. ILL. L. REV. 605, 639 (1990).

¹³³ The American Legislative Exchange Council argues that "EPA has . . . made a practice of opposing participation by states—the regulated entities—in settlement discussions with environmental organizations." ALEC REPORT, *supra* note 1, at 6. To reverse that trend, industry groups have advocated for a notification system that would provide all stakeholders with "timely and transparent access to information" involving any legal action, or notice of intended legal action, against EPA, thereby providing parties with an early opportunity to intervene. Letter from 201 businesses and organizations to Robert Perciasepe, Acting EPA Adm'r (Apr. 10, 2013), <http://perma.cc/4MBM-JQ2J>. Moreover, they have argued that intervenors should have a guaranteed right to participate in any settlement negotiation. See CHAMBER OF COMMERCE REPORT, *supra* note 1, at

augment concerns about environmental settlements, but to the extent reform is needed, that reform should target Rule 24 itself rather than settlement practices.

C. *Instantiating Political Preferences*

A third persistent criticism of environmental settlements is that they allow agencies to pursue and entrench a political agenda. This criticism too has cut across political administrations.

The political-agenda critique was most clearly articulated by environmentalists during the Bush II Administration. Professor Blumm argued that “the Bush [II] Administration seemed to aggressively employ litigation to advance its policy objectives at every turn,”¹³⁴ and that the Administration accomplished a “public land revolution . . . largely through sweetheart settlements with extractive industries.”¹³⁵ Professor Parenteau viewed settlements within the larger context of the Bush II Administration’s environmental agenda, and argued that they constituted an important tool to pursue “the task of systematically and unilaterally dismantling over thirty years of environmental and natural resources law.”¹³⁶ The House Judiciary Committee has expressed similar concerns, suggesting that environmental agencies may prefer to pursue regulatory action through settlements where agency action (or inaction) is controversial, such as where an agency seeks to institute a major new regulatory program that imposes high costs on the regulated community.¹³⁷ According to industry attorneys, that dynamic, coupled with “litigation leverage over the agency,” provides incentives to the agency to settle with the environmental plaintiffs.¹³⁸ The Chamber of Commerce report implies that agencies use settlements strategically by suggesting that the agencies welcome such lawsuits as an opportunity to make decisions.¹³⁹

Critics argue that environmental settlements not only allow agencies to pursue policy goals, but also that those settlements may bind future administrations to those goals.¹⁴⁰ It is argued that this feature of settlements violates a

28–29; *see also* Letter from the U.S. Senate Committee on Environment & Public Works to Gina McCarthy, Assistant Adm’r, Office of Air and Radiation, EPA (Apr. 16, 2013), <http://perma.cc/R484-43FW>.

¹³⁴ Blumm, *supra* note 9, at 10,419.

¹³⁵ *Id.* at 10,398.

¹³⁶ Parenteau, *supra* note 117, at 363.

¹³⁷ *See* H.R. REP. NO. 112-593, at 4 (2012); *see also* Jeffrey M. Gaba, *Informal Rulemaking by Settlement Agreement*, 73 GEO. L.J. 1241, 1260–61 (1985) (discussing rulemaking through settlement agreements and potential agency bias, and suggesting that compliance with APA procedures should rebut any suggestion of impropriety).

¹³⁸ *See* Christopher R. Nester & David R. Overstreet, *Oil and Gas Alert: Sue and Settle—The Growing Problem of Closed Door Rulemaking*, K&L GATES (Apr. 5, 2013), <http://perma.cc/Z7YG-KDBM>.

¹³⁹ CHAMBER OF COMMERCE REPORT, *supra* note 1, at 11 (“Sue and settle occurs when an agency intentionally relinquishes its statutory discretion by accepting lawsuits from outside groups”) (emphasis added).

¹⁴⁰ *See, e.g., id.* at 5; Nester & Overstreet, *supra* note 138.

general rule that current government actors cannot bind their successors.¹⁴¹ The prohibition against entrenchment is “meant to ensure that each government can be democratically responsive to its own electorate and is not bound by the preferences of the past.”¹⁴²

These criticisms are both unconvincing and, frankly, odd. Creating new legislative constraints on the ability of agencies to enter into settlements naturally constrains the suite of options among which an agency can choose. Where agencies believe settlement either advances their policy goals or avoids potentially damaging adverse precedent, deciding to settle is both sensible and an exercise of the very discretion that opponents of settlement assert they are trying to protect. Moreover, objecting to settlements because agencies at times use them to advance policy goals misunderstands the fundamental nature of agencies. They are, of course, precisely designed as instruments through which the executive branch can pursue the policy decisions delegated by Congress.

D. Privatizing Public Law

Outside of the specific debate over environmental settlements, scholars have expressed generalized concerns about the rise of settlements as a form of dispute resolution. Judicial decisions, it is argued, perform an important public function. Where parties voluntarily terminate cases through settlement, private settlements substitute for public decisions, thereby undermining articulation of law.

Professor Owen Fiss first articulated this concern when he famously criticized settlements for both their impact on the parties to litigation and the public.¹⁴³ By Fiss’s account, settlements are problematic because “[c]onsent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done.”¹⁴⁴ Settlement also impoverishes the development of law. The job of judges “is not to maximize the ends of private parties, nor simply to secure peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.”¹⁴⁵ Settlements, then, Fiss argues, disempower courts by preventing them from carrying out their public role.¹⁴⁶

¹⁴¹ See *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (“[O]ne legislature may not bind the legislative authority of its successors”) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 90 (1765)); Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 881 (2011) (“In a democracy, governments are not allowed to bind future governments.”).

¹⁴² Serkin, *supra* note 141, at 881.

¹⁴³ See generally Fiss, *supra* note 16.

¹⁴⁴ *Id.* at 1075.

¹⁴⁵ *Id.* at 1085.

¹⁴⁶ See *id.* at 1085–86.

Fiss's critique of settlements has spawned much debate.¹⁴⁷ For example, Professors Samuel Issacharoff and Robert Klonoff acknowledge that settlements may at times undermine the public role of the judiciary in cases "in which the fundamental values of the society are put before hopefully courageous judges."¹⁴⁸ But they argue that Fiss overlooks the increasing number of claims by multiple injured parties, arguing that "[m]ass society yields mass harms, and all citizens are better off for the prospect of a secure, if imperfect, system of compensation and deterrence."¹⁴⁹ Professor Amy Cohen, on the other hand, has argued that avenues for alternative dispute resolution can themselves embody and articulate public values.¹⁵⁰

Regardless of one's perspective on this debate, settlements with the government would seem to avoid some of the privatization problems threatened by settlements involving only private litigants. The resolution of a dispute with the government necessarily involves deliberation by the government—executive branch staff oversees the lawsuit and negotiates a settlement, and that settlement is ultimately approved by politically accountable government officials.¹⁵¹ As such, the erosion of the public sphere of grave concern to Fiss does not occur, or at least occurs to a lesser degree, in government settlements. Instead, the articulation of legal norms shifts from one government entity (the courts) to another (agencies). Where, as with the environmental settlements considered in this Article, the executive branch is already primarily responsible for implementing the legal norms at issue—embodied in environmental statutes—this shift in authority creates no significant cause for concern.

III. ENVIRONMENTAL SETTLEMENTS IN PRACTICE

The United States routinely resolves litigation brought against it through settlements. Such settlements often happen in cases involving environmental disputes. This Article focuses on a subset of such settlements, specifically when settlements resolve environmental lawsuits brought against the federal govern-

¹⁴⁷ See, e.g., Howard M. Erichson, *Foreword: Reflections on the Adjudication-Settlement Divide*, 78 *FORDHAM L. REV.* 1117 (2009); Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 *FORDHAM L. REV.* 1177 (2009); Bilsky & Fisher, *supra* note 16; Luban, *supra* note 16. As Professor Amy Cohen has written, "[i]t is hard to overstate the impact of [Fiss's article] on the ADR Community. *Against Settlement* is reproduced in all of our major casebooks, and many, if not most, ADR proponents have marshaled a response." Amy J. Cohen, *Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values*, 78 *FORDHAM L. REV.* 1143, 1144 (2009).

¹⁴⁸ Issacharoff & Klonoff, *supra* note 147, at 1192.

¹⁴⁹ *Id.* at 1202.

¹⁵⁰ Cohen, *supra* note 147, at 1145.

¹⁵¹ Settlements with the United States must be approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or an Assistant Attorney General, all of which are political appointees subject to the advice and consent of the Senate. See 28 C.F.R. § 0.160(d) (2014).

ment for regulatory activity, rather than lawsuits arguing that proprietary conduct of the United States violates environmental statutes.¹⁵²

Whenever the federal government agrees to a settlement, it assumes the obligations specified in that document. This Part identifies three categories of commitments that federal agencies assume in environmental settlements: First, settlements may involve an agency committing to allocate resources to commence or complete a decisionmaking process. Such settlements are referred to as “resource allocation settlements.” Second, a settlement may impose on an agency an obligation to undertake identified procedural steps before reaching a decision. Such settlements are referred to as “procedural settlements.” Third and finally, settlements may involve agencies making substantive commitments about the substance of a decision. Such settlements are referred to as “substantive settlements.”¹⁵³

Particular settlements may, of course, involve multiple categories of commitments. An agency may promise to act within a certain time, using a certain set of procedures, and based on a certain view of its underlying statutory authority. Nonetheless, these three categories involve distinctive dimensions that inform Part IV’s analysis of whether environmental settlements threaten to circumvent administrative law. The following sections further explicate these categories and provide examples of each.¹⁵⁴

¹⁵² For example, the United States is often sued by private parties as a potentially responsible party under CERCLA. *See, e.g.*, *United States v. Atl. Research Corp.*, 551 U.S. 128 (2007); *Shell Oil Co. v. United States*, 672 F.3d 1283 (Fed. Cir. 2012). Such lawsuits, while environmental in nature, do not involve exercise of administrative power and lie beyond the scope of this Article.

¹⁵³ This typology resembles one proposed in 1985 by Jeffery Gaba in an article examining the potential for settlements to accomplish rulemaking. *See Gaba, supra* note 137, at 1243–48. In considering that class of settlement, Gaba also identifies three categories of settlements: scheduling agreements, process agreements, and substantive agreements. *Id.* More than twenty-five years later, gaps in his analysis have emerged, because he did not foresee the full range of settlement possibilities. Most importantly, his categorization overlooks important differences between settlements committing to make decisions, and settlements establishing timelines for decisionmaking processes, both of which we categorize as resource allocation settlements. His analysis of substantive and process agreements also does not consider the full range of commitments that agencies may incorporate into settlements. As such, theoretical boundaries proposed here provide a more complete picture of current settlement practices.

¹⁵⁴ The examples provided in this section are drawn from the Obama Administration because the controversy currently debated in Congress involves this Administration’s practices. Settlements from other administrations fall into the same categories. For example, the Bush II Administration settled a lawsuit brought by the State of Alaska challenging the Roadless Rule promulgated by the Clinton Administration, a settlement that agreed to “issue, within 60 days, a proposed temporary regulation that would exempt the Tongass National Forest from the application of the Roadless Rule.” Turner, *supra* note 9, at 39; *see generally* Robert L. Glicksman, *Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administrations*, 34 ENVTL. L. 1143 (2004) (providing a detailed discussion of the history of the Roadless Rule in the Clinton and Bush II Administrations). That settlement constitutes a substantive settlement because it involves a commitment by the Agency to temporarily exempt the Tongass, which is a substantive decision.

A. Resource Allocation Settlements

When agencies commit to making a decision, or making a decision on a particular time frame, such commitments essentially involve resource allocation. Agency decisionmaking processes consume agency resources: agency staff have only so much time; political decisionmakers have only so much attention; and the agency's coffers have only so many funds to pay for printing, information technology services, public hearings, and other costs.¹⁵⁵ When agencies decide to engage in a particular decisionmaking process, they commit these resources, but do not inherently make any determination about the substantive decision itself, or the procedural rules that will be used in reaching that decision.¹⁵⁶ For example, when EPA agrees to review and possibly revise new source performance standards under the Clean Air Act applicable to municipal solid waste landfills—as it did in a settlement in *Environmental Defense Fund v. Jackson*—EPA is agreeing to commit agency resources to reviewing a particular standard, but is not making any representation about whether or how it will revise that standard.¹⁵⁷

Resource allocation settlements are the most common form of environmental settlement.¹⁵⁸ That is because settlements are often used to resolve litigation involving allegations that an agency has failed to meet mandatory statutory deadlines or has unreasonably delayed discretionary action.¹⁵⁹ Settlements that resolve such litigation naturally involve the agency promising to make a decision, for example, by committing to a particular timetable for proposing and finalizing regulations.¹⁶⁰ Many recent settlements identified as problematic by the Chamber of Commerce and others fall into this category.¹⁶¹ For example, of the seventy-one settlements criticized in the Chamber of Commerce report, thirty-three involved settlements through which EPA committed itself to making a final decision about approval of state plans to implement the Clean Air

¹⁵⁵ See generally, e.g., Arthur Earl Bonfield, *Administrative Procedure Acts in an Age of Comparative Scarcity*, 75 IOWA L. REV. 845 (1990).

¹⁵⁶ Procedural settlements and substantive settlements also typically involve a commitment of agency resources, because following procedures and implementing substantive policy itself requires resource expenditure. In a sense, resource allocation settlements, then, can be viewed as a catchall category that covers agency commitments of resources unrelated to specific procedural or substantive commitments.

¹⁵⁷ Consent Decree, *Env'tl. Def. Fund v. Jackson*, No. 11-4492 (S.D.N.Y. Oct. 1, 2012).

¹⁵⁸ Deadline settlements are the lion's share of the settlements cited in the Chamber of Commerce report and specifically suits related to deadlines under the Clean Air Act and the Endangered Species Act. CHAMBER OF COMMERCE REPORT, *supra* note 1, at 43–44. Others have noted the frequency of deadline settlements. See William Yeatman, *Deadline Citizen Suits: An Idea Whose Time Has Expired*, 8 APPALACHIAN NAT. RES. L.J. 51, 63–64 (2013); Benjamin Jesup, *Endless War or End This War? The History of Deadline Litigation Under Section 4 of the Endangered Species Act and the Multi-District Litigation Settlements*, 14 VT. J. ENVTL. L. 327, 351 (2013).

¹⁵⁹ See Percival, *supra* note 63, at 330; Gaba, *supra* note 137, at 1244.

¹⁶⁰ See, e.g., Consent Decree, *Am. Lung Ass'n v. EPA*, No. 12-243 (D.D.C. Sept. 4, 2012). EPA agreed to complete a five-year review of the national ambient air quality standards as required by the Clean Air Act, 42 U.S.C. § 7409(d)(1) (2012), and to sign a notice of proposed rulemaking no later than June 14, 2012 and final rulemaking no later than December 14, 2012. Consent Decree, *supra*.

¹⁶¹ See CHAMBER OF COMMERCE REPORT, *supra* note 1, at 10.

Act.¹⁶² The report also identified settlements that involved commitments to undertake decisionmaking processes under the Clean Water Act,¹⁶³ ESA,¹⁶⁴ Surface Mining Control and Reclamation Act,¹⁶⁵ and Federal Land Policy Management Act.¹⁶⁶

The resolution of the two cases described below—one by a private settlement and one by a consent decree—are good examples of resource allocation settlements. In both cases, the relevant federal agency committed to make a decision. In the first example, the FWS agreed to reconsider an aspect of a decision designating critical habitat for an endangered species.¹⁶⁷ In the second, EPA agreed to take final action on state plans implementing regional haze regulations by a specified deadline.¹⁶⁸

1. *Designation of Critical Habitat for the Hine's Emerald Dragonfly*

Once a species is listed as threatened or endangered, the ESA requires the relevant wildlife agency—the FWS for terrestrial and fresh-water aquatic species—to designate as critical habitat those areas containing “physical or biological features . . . essential to the conservation of the species and . . . which may require special management considerations or protection.”¹⁶⁹ In 1995, the FWS designated the Hine’s emerald dragonfly as endangered.¹⁷⁰ Twelve years later, and after a lawsuit brought by the Center for Biological Diversity and a coalition of environmental groups, the FWS designated 13,221 acres of critical habitat in Illinois, Michigan, Missouri, and Wisconsin.¹⁷¹ In so doing, the FWS decided to exclude from its critical habitat designation over 14,000 acres within national forests that provided habitat for the dragonfly.¹⁷²

On March 10, 2008, the Center for Biological Diversity and six other organizations again filed suit, challenging the FWS’s decision not to designate national forest land as critical habitat.¹⁷³ The organizations reached a settlement

¹⁶² See *id.* at 30–42; see also 42 U.S.C. § 7410.

¹⁶³ See Consent Decree, *Defenders of Wildlife v. Jackson*, No. 10-1915 (D.D.C. Mar. 18, 2012).

¹⁶⁴ See Settlement Agreement, *Friends of Animals v. Salazar*, No. 10-357 (D.D.C. July 21, 2010).

¹⁶⁵ See Settlement Agreement, *Coal River Mountain Watch v. Salazar*, No. 08-2212 (D.D.C. Mar. 19, 2010).

¹⁶⁶ See Settlement Agreement, *Colo. Env'tl. Coal. v. Salazar*, No. 09-85 (D. Colo. Feb. 15, 2011).

¹⁶⁷ See Stipulated Settlement Agreement and Order of Dismissal, *Northwoods Wilderness Recovery v. Kempthorne*, No. 08-1407 (N.D. Ill. Feb. 12, 2009); see also Stipulated Settlement Agreement and Proposed Order of Dismissal, *Northwoods Wilderness Recovery*, No. 08-1407, 2009 WL 857785.

¹⁶⁸ Consent Decree, *Nat'l Parks Conservation Ass'n v. Jackson*, No. 11-1548 (D.D.C. Nov. 9, 2011).

¹⁶⁹ 16 U.S.C. § 1532(5)(A)(i) (2012).

¹⁷⁰ Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for the Hine's Emerald Dragonfly (*Somatochlora hineana*), 60 Fed. Reg. 5267 (Jan. 26, 1995) (codified at 50 C.F.R. pt. 17).

¹⁷¹ Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Hine's Emerald Dragonfly, 72 Fed. Reg. 51,102 (Sept. 5, 2007) (codified at 50 C.F.R. pt. 17).

¹⁷² *Id.*

¹⁷³ Complaint for Declaratory and Injunctive Relief, *Northwoods Wilderness Recovery v. Kempthorne*, No. 08-1407 (N.D. Ill. Mar. 10, 2008), 2008 WL 2322273.

with the FWS to resolve the case, based on which the case was dismissed on February 12, 2009.¹⁷⁴

Under the terms of the settlement, the FWS agreed to reconsider its decision to exclude national forest land—in other words, the FWS agreed to commit agency resources to reopen and reconsider its earlier decision. Under the terms of the settlement, the existing critical habitat designation would remain in place during that process. After entering into the settlement, the FWS sought additional public comment on whether it should designate national forest land as critical habitat for the Hine’s emerald dragonfly. Shortly after President Barack Obama took office, the FWS issued a new final rule designating a total of 26,000 acres of critical habitat, including 13,000 acres of national forest land.¹⁷⁵

2. Implementation of the Regional Haze Rule

In 1990, Congress amended the Clean Air Act in an effort, among other things, to address air visibility in certain designated areas of particular natural value and beauty.¹⁷⁶ EPA acted to effectuate that purpose in 1999, issuing the “Regional Haze Rule.” The Rule requires installation of proven, cost-effective, and widely available pollution controls to limit air emissions from old industrial facilities—those from thirty-five to fifty years old—when emissions impair the visibility experienced within 156 parks and wilderness areas.¹⁷⁷ To achieve that goal, the Rule requires states to develop and submit to EPA state implementation plans to reduce pollution that impairs visibility.¹⁷⁸ The Rule gave states until December 17, 2007 to accomplish that task.¹⁷⁹ Under the statutory provisions of the Clean Air Act, when a state fails to submit an adequate implementation plan, EPA has two years to develop and implement a federal implementation plan for that state.¹⁸⁰

In 2009, EPA made a finding that thirty-seven states, the District of Columbia, and the Virgin Islands had either failed to submit a plan to implement the Regional Haze Rule, or had submitted an inadequate plan.¹⁸¹ That finding started the statutory clock for EPA to issue a federal plan. Nonetheless, two

¹⁷⁴ See Stipulated Settlement Agreement and Order of Dismissal, *supra* note 167; see also Stipulated Settlement Agreement and Proposed Order of Dismissal, *supra* note 167.

¹⁷⁵ Endangered and Threatened Wildlife and Plants; Final Revised Critical Habitat for Hine’s Emerald Dragonfly (*Somatochlora hineana*), 75 Fed. Reg. 21,394 (Apr. 23, 2010) (codified at 50 C.F.R. pt. 17) (describing previous federal actions and background of the critical habitat designation).

¹⁷⁶ 42 U.S.C. § 7491 (2012); see Michael T. Palmer, *The Regional Haze Rule: EPA’s Next Phase in Protecting Visibility Under the Clean Air Act*, 7 ENVTL. LAW. 555, 559 (2001).

¹⁷⁷ See Regional Haze Regulations, 64 Fed. Reg. 35,714 (July 1, 1999) (codified at 40 C.F.R. pt. 51); EPA, REGIONAL HAZE CONSENT DECREE FACT SHEET, <http://perma.cc/4VT5-GNQZ>.

¹⁷⁸ 40 C.F.R. §§ 51.308–309 (2014).

¹⁷⁹ *Id.*

¹⁸⁰ 42 U.S.C. § 7410(c).

¹⁸¹ See Finding of Failure to Submit State Implementation Plans Required by the 1999 Regional Haze Rule, 74 Fed. Reg. 2392 (Jan. 15, 2009) (codified at 40 C.F.R. pt. 52).

years later, EPA had not issued plans to cover the states it had identified in 2009, and a coalition of environmental organizations filed suit.¹⁸²

On November 9, 2011, the parties lodged with the district court a consent decree to resolve the lawsuit.¹⁸³ The consent decree established a schedule by which EPA would consider any state implementation plan that had been submitted since 2009, and issue a federal implementation plan if no adequate plan had been submitted—in other words, EPA agreed to commit agency resources to complete a mandatory regulatory process.¹⁸⁴ As required by the Clean Air Act, EPA published a notice of the proposed consent decree in the Federal Register and provided a thirty-day public comment period.¹⁸⁵ After considering those comments, EPA filed a motion asking the district court to enter the consent decree.¹⁸⁶ The district court granted that motion on March 30, 2012.¹⁸⁷

B. Procedural Settlements

Procedural settlements involve agencies agreeing to a particular process to govern an agency's decisionmaking.¹⁸⁸ Such agreements are relatively rare—only a handful of the settlements identified as problematic by the Chamber of Commerce involve procedural commitments.¹⁸⁹ Theoretically, such commitments could involve a wide range of procedural rules. For example, an agency could commit to reopen a public comment period; to hold public hearings; to consult with state, local, or tribal governments; or to undertake environmental review.¹⁹⁰ Perhaps unsurprisingly, most recent procedural settlements track that final possibility: settlements resolving allegations that the agency violated its obligations under the National Environmental Policy Act (“NEPA”).¹⁹¹ Such

¹⁸² The plaintiffs in the lawsuit included the National Parks Conservation Association, Montana Environmental Information Center, Grand Canyon Trust, San Juan Citizens Alliance, Our Children's Earth Foundation, Plains Justice, Powder River Basin Resource Council, Sierra Club, and Environmental Defense Fund. See Complaint, Nat'l Parks Conservation Ass'n v. Jackson, No. 11-1548 (D.D.C. Aug. 29, 2011).

¹⁸³ Consent Decree, *Nat'l Parks Conservation Ass'n*, No. 11-1548.

¹⁸⁴ *Id.* at ¶¶ 3–4.

¹⁸⁵ See Proposed Consent Decree, Clean Air Act Citizen Suit, 77 Fed. Reg. 281 (Jan. 4, 2012); Proposed Consent Decree, Clean Air Act Citizen Suit, 76 Fed. Reg. 75,544 (Dec. 2, 2011).

¹⁸⁶ Memorandum in Support of Motion to Enter Partial Consent Decree, *Nat'l Parks Conservation Ass'n*, No. 11-1548.

¹⁸⁷ See Order Entering Partial Consent Decree, *Nat'l Parks Conservation Ass'n*, No. 11-1548.

¹⁸⁸ See Gaba, *supra* note 137, at 1244–45. Professor Gaba referred to this type of agreement as a “process agreement” and stated that, as of 1985, the only significant process agreement was the so-called Flannery Decree and there were questions as to whether this Decree impermissibly restricted EPA's exercise of its discretion. Gaba speculated that it was “unlikely that so comprehensive a process agreement will be negotiated in the future.” *Id.* As our analysis reveals, the twenty-five years since Gaba's article reveal that procedural settlements need not be “comprehensive” and manifest in a number of forms.

¹⁸⁹ See CHAMBER OF COMMERCE REPORT, *supra* note 1, at 30–42. In his 1985 article discussing settlements, Jeffrey Gaba identified only one procedural settlement. Gaba, *supra* note 137, at 1245.

¹⁹⁰ See 5 U.S.C. §§ 552b, 553 (2012); 42 U.S.C. § 4331(b) (2012).

¹⁹¹ 42 U.S.C. §§ 4321–35. It is unsurprising that settlements would involve commitments related to performance of environmental analysis because approximately 100 NEPA cases are filed each

settlements are inherently procedural in nature—they do not directly shape the agency's ultimate substantive decision, but rather, shape the process by which the agency reaches that decision.¹⁹²

The following settlements exemplify this category, and one of them also provides an example of the role of courts in policing the bounds of environmental settlements, a role that will be addressed further below.¹⁹³ The first involves a decision by the U.S. Forest Service to impose a moratorium on certain decisions related to mining pending completion of a programmatic environmental impact statement. As will be discussed, the settlement was itself subject to a separate legal challenge and ultimately set aside because, in part, the court ruled that the decision embodied in the settlement should have been subject to notice-and-comment rulemaking.¹⁹⁴ The second involves a challenge to an environmental review process conducted in support of an agency plan. After the district court ruled that the agency had violated its obligations under NEPA, the parties entered a settlement that set out the procedure the agency would implement on remand.¹⁹⁵

1. *Initiation of Environmental Review of Mining Activities Within the Allegheny National Forest*

In 1923, the federal government purchased land in Pennsylvania to create the Allegheny National Forest, allowing prior owners to retain mineral rights over much of the area.¹⁹⁶ Under that arrangement, mineral rights owners retain a right to disturb the surface to access their minerals. Historically, such surface disturbing activities occurred through a process in which the mineral rights owner would notify the Forest Service sixty days prior to undertaking activities, and the Forest Service would issue a "Notice to Proceed" ("NTP").¹⁹⁷ In 2008, Forest Service Employees for Environmental Ethics and other environmental organizations sued the Forest Service alleging that the Agency had violated NEPA by failing to analyze the foreseeable environmental effects of mining and surface disturbance before issuing an NTP.¹⁹⁸ The environmental plaintiffs

year. See JAY E. AUSTIN ET AL., A "HARD LOOK" AT JUDICIAL DECISION MAKING UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 6 (2004), <http://perma.cc/63YH-DA6P>.

¹⁹² NEPA imposes purely procedural obligations on federal agency decisions. See *Roberts v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("It is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.").

¹⁹³ See *infra* Part IV.

¹⁹⁴ See *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 254–55 (3d Cir. 2011).

¹⁹⁵ See *Cal. Res. Agency v. U.S. Dep't of Agric.*, No. 08-1185, 2009 WL 6006102 (N.D. Cal. Sept. 29, 2009).

¹⁹⁶ See *Minard Run Oil Co.*, 670 F.3d at 242; *About the Forest*, U.S. DEP'T OF AGRIC., <http://perma.cc/U9RK-FFRJ>.

¹⁹⁷ See *Minard Run Oil Co.*, 670 F.3d at 242.

¹⁹⁸ See Complaint for Declaratory and Injunctive Relief (National Environmental Policy Act), *Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv.*, No. 08-323 (W.D. Pa. filed Nov. 20, 2008), 2008 WL 5596934; First Amended Complaint for Declaratory and Injunctive Relief (National Environmental Policy Act), *Forest Serv. Emps. for Envtl. Ethics*, No. 08-323 (W.D. Pa. filed Dec. 4, 2008), 2008 WL 5596935.

cited thirty-four NTPs issued between September 2007 and June 2008 as the basis for their NEPA claims.¹⁹⁹

On April 8, 2009, the environmental plaintiffs and the Forest Service entered a private settlement to resolve the case.²⁰⁰ Under the terms of the settlement, the Forest Service agreed to perform environmental analysis pursuant to NEPA prior to issuing future NTPs—in other words, the Forest Service agreed to follow a specified procedure when undertaking certain actions.²⁰¹ The Forest Service then put in place a moratorium on processing any new NTPs until “the appropriate level of environmental analysis has been conducted under the NEPA,” estimating that a “forest-wide site specific environmental analysis . . . for activity anticipated between now and 2013” would take at least a year to complete.²⁰²

The settlement did not resolve the controversy over oil development within the Alleghany National Forest. On June 1, 2009, owners of mineral rights in the forest and their allies, led by the Minard Run Oil Company, sued the Forest Service and the environmental organizations party to the earlier settlement, seeking an injunction compelling the Forest Service to issue NTPs before completing a forest-wide environmental impact statement.²⁰³ That lawsuit alleged, among other things, that the settlement constituted “a dramatic and arbitrary change in the manner in which the Forest Service and oil and gas drillers had historically interacted in the [Forest] in dealing with issues concerning private mineral rights.”²⁰⁴ The district court granted Minard Run a preliminary injunction and subsequently vacated the settlement agreement.²⁰⁵ The Third Circuit affirmed the district court’s ruling, holding, in part, that the Forest Service’s decision to perform environmental review before issuing NTPs should itself have gone through notice-and-comment rulemaking.²⁰⁶

2. Completion of Environmental Review for California Forest Plans

The National Forest Management Act (“NFMA”) requires the U.S. Forest Service to promulgate a forest plan for each national forest, and further requires the Agency to update the plans at least every fifteen years.²⁰⁷ In 2006, the Forest Service finalized new forest plans for four national forests in California.²⁰⁸ Cali-

¹⁹⁹ See First Amended Complaint for Declaratory and Injunctive Relief (National Environmental Policy Act), *supra* note 198, at ¶ 24.

²⁰⁰ Settlement Agreement, *Forest Serv. Emps. for Envtl. Ethics*, No. 08-323 (W.D. Pa. June 19, 2009), 2009 WL 4091171.

²⁰¹ *Id.* at ¶ 1.

²⁰² *Minard Run Oil Co. v. U.S. Forest Serv.*, No. 09-125, 2009 WL 4937785, at *12 (W.D. Pa. Dec. 15, 2009).

²⁰³ *Id.* at *1.

²⁰⁴ *Id.*

²⁰⁵ See *Minard Run Oil Co. v. U.S. Forest Serv.*, 894 F. Supp. 2d 642, 664 (W.D. Pa. 2012); *Minard Run Oil Co.*, 2009 WL 4937785, at *34.

²⁰⁶ *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 254–55 (3d Cir. 2011).

²⁰⁷ See 16 U.S.C. § 1604(a), (f)(5) (2012).

²⁰⁸ See *Cal. Res. Agency v. U.S. Dep’t of Agric.*, Nos. 08-1185, 08-3884, 2009 WL 6006102, at *4 (N.D. Cal. Sept. 29, 2009). The Forest Service first issued forest plans in 2004, but then withdrew

fornia and a coalition of environmental organizations filed suit, asserting claims related to NFMA and NEPA.²⁰⁹ Specifically, they alleged the plans violated NFMA because the Forest Service had not adequately consulted with the state before approving the plans. They further alleged that the Forest Service had violated NEPA because it had considered an inadequate range of alternatives and had neglected to fully analyze the impact of building and maintaining roads in areas currently roadless.²¹⁰

The district court granted partial summary judgment to California and the environmental organizations.²¹¹ The court ruled that the Forest Service had sufficiently consulted with the state to satisfy its obligations under NFMA; however, the Service had improperly neglected potential cumulative impacts of authorizing road construction in roadless areas and had considered an inadequate range of alternative options for monitoring compliance with the provisions of the new forest plans.²¹² The court ordered the parties to provide briefing on the appropriate remedy for the legal violations it had identified.²¹³

On December 15, 2010, the parties filed a proposed settlement resolving the question of remedy.²¹⁴ The Forest Service agreed to prepare a supplemental environmental impact statement to reconsider management of roadless areas and analyze alternative monitoring options, and further specifically committed to consider certain identified areas of the forests for designation for exclusively back-country or wilderness uses.²¹⁵ The settlement also set forth a “collaborative process” through which the parties could “exchange information” about roads and trails within the forests.²¹⁶ In other words, the Forest Service agreed to implement certain procedures when reconsidering its prior decision. On January 4, 2011, the court dismissed the case.²¹⁷

C. Substantive Settlements

Substantive settlements involve agency commitments directly related to substantive law.²¹⁸ Such settlements pose the most significant threat of circumventing administrative procedures because the APA typically requires notice-and-comment rulemaking for agency decisions setting future-oriented legal

them recognizing that it had omitted necessary information from the environmental impact statement that supported the plans. *Id.* at *3.

²⁰⁹ See Complaint for Declaratory and Injunctive Relief at ¶¶ 9–13, *Cal. Res. Agency*, Nos. 08-1185, 08-3884.

²¹⁰ See *id.*

²¹¹ *Cal. Res. Agency*, 2009 WL 6006102, at *20.

²¹² *Id.* at *11, *15, *17.

²¹³ *Id.* at *20.

²¹⁴ Settlement Agreement, *Cal. Res. Agency*, Nos. 08-1185, 08-3884 (N.D. Cal. Dec. 15, 2010).

²¹⁵ *Id.* at exhibit A, ¶ 1.

²¹⁶ *Id.* at exhibit A, ¶ 3.

²¹⁷ Stipulation and Order, *Cal. Res. Agency*, Nos. 08-1185, 08-3884, (N.D. Cal. Jan. 4, 2011) (dismissing the case with prejudice with the court retaining jurisdiction to oversee compliance); see also Stipulation and (Proposed) Order, *Cal. Res. Agency*, Nos. 08-1185, 08-3884 (N.D. Cal. Dec. 15, 2010), 2010 WL 5810464.

²¹⁸ See Gaba, *supra* note 137, at 1243.

rules.²¹⁹ Where agencies agree to settlements that involve substantive commitments, however, they typically do not entirely resolve an agency decisionmaking process, but rather commit to subsidiary decisions necessary to ultimate resolution.

The three settlements below illustrate this dynamic. In the first, the FWS agreed not to exercise one option made available to it by the ESA in making a final decision about the status of certain species.²²⁰ In the second, EPA agreed to issue a regulation imposing emissions limitations on a particular industry, an agreement that embodied a predicate determination that the Agency had a mandatory duty to issue such limitations.²²¹ And in the third, the Bureau of Land Management and the Forest Service agreed to substantive modifications of a management regime for certain federal lands.²²² In that circumstance, the Ninth Circuit held the consent decree improper because it involved a regulatory act that should have been subject to notice-and-comment rulemaking.²²³

1. *Resolution of Deadlines for More than 250 Candidate Species Under the Endangered Species Act*

The ESA has long been a locus of litigation for organizations concerned with protecting species. The ESA allows any concerned citizen, or citizen groups, to file a petition seeking protection for a species, and the statute includes deadlines by which the relevant wildlife agency is required to respond.²²⁴ Many petitions are filed, and the FWS often fails to respond within the required time.²²⁵ By the end of 2010, the FWS identified more than 250 species for which petitions had been filed and the Agency had not yet resolved the peti-

²¹⁹ See 5 U.S.C. §§ 551(4), 553 (2012).

²²⁰ See Stipulated Settlement Agreement Relating to WildEarth Guardians v. Salazar, *In re Endangered Species Act Section 4 Deadline Litig.*, No. 10-377 (D.D.C. May 10, 2011), ECF No. 31-1 [hereinafter WEG Settlement]; Stipulated Settlement Agreement Relating to Center for Biological Diversity v. Salazar, *In re Endangered Species Act Section 4 Deadline Litig.*, No. 10-377 (D.D.C. July 12, 2011) [hereinafter CBD Settlement]. In response to a listing petition, the ESA directs the FWS to find that a listing is warranted, not warranted, or warranted but precluded by processes to evaluate listing of other species. 16 U.S.C. § 1533(b)(3)(B) (2012). Through the consent decrees, the FWS committed not to make warranted but precluded findings.

²²¹ *Am. Nurses Ass'n v. Jackson*, No. 08-2198, 2010 WL 1506913, at *1 (D.D.C. Apr. 15, 2010).

²²² *Conservation Nw. v. Sherman*, 715 F.3d 1181, 1184 (9th Cir. 2013).

²²³ *Id.* at 1188.

²²⁴ 16 U.S.C. § 1533(b)(3)(A)–(B). The ESA requires the designated wildlife agency—either the FWS for terrestrial and fresh-water aquatic species, or the National Marine Fisheries Service for marine or anadromous species—to make an initial finding on a petition within ninety days “to the maximum extent practicable” as to “whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted.” *Id.* § 1533(b)(3)(A). Within a year, the agency must then make a finding as to whether the petitioned action is warranted, not warranted, or warranted but precluded by higher-priority actions. *Id.* § 1533(b)(3)(B). And if the agency determines listing is warranted, it then commences the formal listing process. *Id.* § 1533(b)(3)(B)(ii).

²²⁵ See, e.g., Jesup, *supra* note 158, at 348–51; James Kilbourne, *The Endangered Species Act Under the Microscope: A Closeup Look from a Litigator's Perspective*, 21 ENVTL. L. 499, 501–02 (1991). As Benjamin Jesup, an attorney for the Department of Interior, has noted, “FWS . . . never stopped making petition findings, but there were many that were years overdue.” Jesup, *supra* note 158, at 362.

tion,²²⁶ and several species went extinct while the FWS failed to act on a petition seeking protection for those species.²²⁷

Because of the delay, a number of environmental organizations, including WildEarth Guardians and the Center for Biological Diversity, sued the FWS. In June 2010, thirteen such lawsuits were consolidated for pretrial proceedings before the Judicial Panel on Multidistrict Litigation.²²⁸

The FWS entered separate settlements with WildEarth Guardians and the Center for Biological Diversity, resolving each of their lawsuits.²²⁹ Under the settlements, the FWS agreed to a series of deadlines culminating in the Agency rendering decisions on all of the petitions pending before the Agency no later than September 2016.²³⁰ In rendering its decisions, the FWS agreed to determine that the species at issue either warranted listing or did not warrant listing, thereby committing not to exercise its statutory authority to find a listing warranted but precluded by higher priorities.²³¹ That constituted a substantive commitment by the Agency: the FWS disclaimed an aspect of its authority and agreed not to rely on one of the options contemplated in the ESA in resolving the petitions subject to the settlement.²³² In exchange, WildEarth Guardians and the Center for Biological Diversity dismissed their claims, agreed to limit the number of additional petitions they filed, and agreed to abstain from further deadline litigation for a period of time.²³³

As the settlement process was nearing its conclusion, the Safari Club International, an organization advocating for the interests of the hunting community, moved to intervene on behalf of the FWS.²³⁴ The Safari Club asserted an interest in three of the species—the greater sage grouse, the New England cottontail, and the lesser prairie chicken—and sought to be involved in the litigation because its members hunted those species.²³⁵ It specifically objected to the

²²⁶ See Candidate Notice of Review, 75 Fed. Reg. 69,222, 69,224 (Nov. 10, 2010) (codified at 50 C.F.R. pt. 17); Jesup, *supra* note 158, at 364–65.

²²⁷ See NICOLE ROSEMARINO, WILDEARTH GUARDIANS, AMERICA'S TOP 40: A CALL TO ACTION FOR THE NATION'S MOST IMPERILED SPECIES 46 (2009), <http://perma.cc/P8TH-2N3E>.

²²⁸ *In re Endangered Species Act Section 4 Deadline Litig.*, 716 F. Supp. 2d 1369 (J.P.M.L. 2010).

²²⁹ See WEG Settlement, *supra* note 220; CBD Settlement, *supra* note 220.

²³⁰ WEG Settlement, *supra* note 220, at ¶¶ 1–8; CBD Settlement, *supra* note 220, at ¶ (B).

²³¹ WEG Settlement, *supra* note 220, at ¶ 10; CBD Settlement *supra* note 220, at ¶ (B)(4).

²³² See 16 U.S.C. § 1533(b)(3)(B) (2012); see also *In re Endangered Species Act Section 4 Deadline Litig.*, 277 F.R.D. 1, 2 (D.D.C. 2011). Notably, the court determined that “[t]hese consolidated cases . . . do not seek to require FWS to reach any particular substantive decision on the petitions to list the species. Rather, plaintiffs only seek, and the settlements only provide, that the FWS be required to make a determination in a somewhat timely fashion.” *Id.*

²³³ WEG Settlement, *supra* note 220, at ¶¶ 9–12; CBD Settlement, *supra* note 220, at ¶¶ 8–10. As Jay Tutchton explained: “Guardians made three principal commitments: (1) not to bring any ESA Section 4 deadline litigation (or challenges to warranted-but-precluded findings) prior to March 31, 2017; (2) to limit itself to filing petitions to list no more than ten species in any of FWS’s fiscal years through the end of FY 2016 (September 30, 2016); and (3) to move jointly with FWS to dismiss five existing cases challenging warranted-but-precluded findings.” James J. Tutchton, *Getting Species on Board the Ark One Lawsuit at a Time: How the Failure to List Deserving Species Has Undercut the Effectiveness of the Endangered Species Act*, 20 ANIMAL L. 401, 426–27 (2014).

²³⁴ See *In re Endangered Species Act Section 4 Deadline Litig.*, 277 F.R.D. at 1.

²³⁵ *Id.* at 1–2.

FWS's commitment not to invoke the warranted but precluded provision of the ESA, and argued that by disclaiming a statutory option, "the settlement agreements establish an illegal procedure—the elimination of the Service's statutory authority to find that a proposal to list a species is warranted but precluded by higher priorities."²³⁶ The district court denied the Safari Club's motion to intervene, ruling that the organization lacked standing and thus could not intervene as of right, and the court further declined to grant permissive intervention.²³⁷ The ruling was affirmed by the D.C. Circuit,²³⁸ and on September 9, 2011, the district court approved the settlements.²³⁹

2. *Promulgation of Hazardous Air Pollutant Emissions Limits for Power Plants*

In addition to addressing visibility,²⁴⁰ the 1990 Clean Air Act Amendments also sought to jump-start EPA's lagging program to control hazardous air pollutants.²⁴¹ Congress sought to accomplish that task by means of two mechanisms: first, Congress itself specified 188 specific hazardous air pollutants,²⁴² and, second, Congress directed EPA to promulgate emissions standards "as expeditiously as practicable" for categories of sources of such pollutants.²⁴³ Moreover, Congress specifically directed EPA to study whether power-generating facilities should be a regulated category of sources of hazardous air pollutants.²⁴⁴ In 2000, EPA issued a rule adding one category of such facilities—coal- and oil-fired electric utility steam generating units—to the list of regulated categories of sources of hazardous air pollutants.²⁴⁵ Once EPA designated that category of

²³⁶ See *In re Endangered Species Act Section 4 Deadline Litig.-MDL No. 2165*, 704 F.3d 972, 976 (D.C. Cir. 2013) (affirming the decision of the district court without reaching the Safari Club's objections to the settlement agreements).

²³⁷ *In re Endangered Species Act Section 4 Deadline Litig.*, 277 F.R.D. at 5–9.

²³⁸ *In re Endangered Species Act Section 4 Deadline Litig.-MDL No. 2165*, 704 F.3d at 980.

²³⁹ Order Granting Joint Motion for Approval of Settlement Agreement Relating to WildEarth Guardians v. Salazar, *In re Endangered Species Act Section 4 Deadline Litig.*, No. 10-377 (D.D.C. Sept. 9, 2011). As of April 1, 2014, a total of four federal courts have determined that particular groups have no basis for challenging the legal agreements signed with WildEarth Guardians and Center for Biological Diversity. See Nat'l Ass'n of Home Builders v. U.S. Fish & Wildlife Serv., No. 12-2013, 2014 WL 1278630, at *3 (D.D.C. Mar. 31, 2014) (In the twenty-six-page opinion, Judge Sullivan wrote, "[t]he agreements . . . seek to clear the backlog of species on the [candidate list]. They do not dictate that the service reach any particular substantive outcome on any petition or listing determination."); *In re Endangered Species Act Section 4 Deadline Litig.*, 270 F.R.D. 1 (D.D.C. 2010).

²⁴⁰ See *supra* Part III.A.2.

²⁴¹ See Thomas O. McGarity, *Hazardous Air Pollutants, Migrating Hot Spots, and the Prospect of Data-Driven Regulation of Complex Industrial Complexes*, 86 TEX. L. REV. 1445, 1445–47 (2008).

²⁴² 42 U.S.C. § 7412(b)(1) (2012).

²⁴³ *Id.* § 7412(e)(1).

²⁴⁴ *Id.* § 7412(n)(1).

²⁴⁵ See Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825, 79,826 (Dec. 20, 2000).

electrical facilities for regulation, the Clean Air Act gave the Agency at most two years to issue emissions limitations.²⁴⁶

EPA failed to complete its work by the statutory deadline, and in 2008, environmental organizations sued to compel the Agency to issue emissions limitations.²⁴⁷ On October 28, 2009, EPA published notice of a proposed consent decree in the Federal Register.²⁴⁸ Under the proposed consent decree, EPA committed to initiate a rulemaking to set emissions standards by March 16, 2011, and a final rule setting such standards by November 16, 2011.²⁴⁹ In other words, the consent decree embodied a substantive decision by EPA that it had a mandatory duty to issue emissions standards now that it had listed coal- and oil-fired electrical steam generating units as a category of sources emitting hazardous air pollutants.

The Utility Air Regulatory Group intervened as a defendant and challenged the terms of the consent decree. The Group alleged, among other things, that it was impermissibly excluded from negotiations between EPA and the plaintiffs, and it further objected to the deadlines established in the consent decree.²⁵⁰ The Group further argued that the proposed decree improperly committed the Agency to issuing emissions standards, rather than merely considering whether to issue such standards.²⁵¹

The district court rejected each of those objections and entered the consent decree on April 15, 2010.²⁵² In so doing, the court ruled that even if the settlement embodied a substantive determination about the nature of EPA's regulatory obligations, that determination could be challenged at the point at which EPA issued final standards.²⁵³

²⁴⁶ 42 U.S.C. § 7412(c)(5).

²⁴⁷ Plaintiffs filed a complaint on December 18, 2008 alleging that EPA had failed to perform a mandatory nondiscretionary duty under section 112(c)(5) of the Clean Air Act, 42 U.S.C. § 7412(c)(5), by failing to promulgate final maximum achievable control technology emissions standards for hazardous air pollutants from coal- and oil-fired electric utility steam generating units, as required by section 112(d) of the Act, 42 U.S.C. § 7412(d). *See* Complaint Against Stephen L. Johnson, EPA, *Am. Nurses Ass'n v. Jackson*, No. 08-2198, 2010 WL 1506913 (D.D.C. Apr. 15, 2010).

²⁴⁸ Proposed Consent Decree, *Clean Air Act Citizen Suit*, 74 Fed. Reg. 55,547 (Oct. 28, 2009).

²⁴⁹ Consent Decree at ¶¶ 3–4, *Am. Nurses Ass'n*, 2010 WL 1506913.

²⁵⁰ *Am. Nurses Ass'n*, 2010 WL 1506913, at *1–2.

²⁵¹ *Id.*

²⁵² *Id.* at *3 (“[W]hile an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent.” (quoting *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 528–29 (1986))).

²⁵³ *Id.* (“Should haste make waste, the resulting regulations will be subject 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. If EPA needs more time to get it right, it can seek more time.”).

3. *Modification of Management Regime for Endangered Species in Northwest Forests*

Management of federally owned old-growth forests in the northwestern United States has been an ongoing source of controversy due to the potential effects management decisions have on the northern spotted owl.²⁵⁴ In 2007, federal agencies modified the Northwest Forest Plan, which governs management of Bureau of Land Management and Forest Service lands, and eliminated a “Survey and Manage” provision, which had required the agencies to conduct surveys of land slated for resource extraction in order to identify endangered species—primarily invertebrates—and manage authorized activities to protect those species.²⁵⁵

Environmental organizations challenged the Northwest Forest Plan revision, alleging that the agencies had completed inadequate environmental review and thereby violated NEPA, and had also violated NFMA, the ESA, and the Federal Land Policy and Management Act.²⁵⁶ The district court granted summary judgment to the plaintiffs, ruling in part that the agencies had deployed a faulty methodology for analyzing the effects of the “Survey and Manage” provisions and had failed to consider an appropriate no-action alternative.²⁵⁷ The court declined to decide the question of remedy and ordered further briefing.²⁵⁸

Rather than filing additional briefing, the parties proposed a settlement agreement in which the federal agencies agreed to retain the “Survey and Manage” program with modifications.²⁵⁹ Specifically, the settlement revised the list of species subject to “Survey and Manage,” provided a series of new exemptions from pre-disturbance surveys for certain types of activities, and included an explanation of new management requirements for certain species.²⁶⁰ In other words, the settlement agreement made substantive modifications to the prior management regime for the relevant federal lands.

D.R. Johnson Lumber Company, a defendant-intervenor in the case, objected to the settlement, alleging that the revisions to the “Survey and Manage” Program imposed by the settlement could only properly be implemented through notice-and-comment rulemaking.²⁶¹ The district court overruled the objections and entered the settlement, but on appeal the Ninth Circuit reversed. The Ninth Circuit explained that the district court judge had abused his discretion by “enter[ing] a consent decree that permanently and substantially amends an agency rule that would have otherwise been subject to statutory

²⁵⁴ See generally, e.g., Erik Loomis & Ryan Edgington, *Lives Under the Canopy: Spotted Owls and Loggers in Western Forests*, 52 NAT. RES. J. 99 (2012).

²⁵⁵ *Conservation Nw. v. Sherman*, 715 F.3d 1181, 1184 (9th Cir. 2013).

²⁵⁶ See Complaint for Injunctive and Declaratory Relief, *Conservation Nw. v. Rey*, 674 F. Supp. 2d 1232 (W.D. Wash. 2009) (No. 08-1067), 2008 WL 4485394.

²⁵⁷ *Conservation Nw.*, 674 F. Supp. 2d at 1244–53.

²⁵⁸ *Id.* at 1257.

²⁵⁹ Settlement Agreement, *Conservation Nw.*, 674 F. Supp. 2d 1232.

²⁶⁰ See *Conservation Nw.*, 715 F.3d at 1184–85.

²⁶¹ *Id.*

rulemaking procedures.”²⁶² The court then held that the settlement at issue ran afoul of that principle because it “allowed the Agencies effectively to promulgate a *substantial and permanent* amendment to Survey and Manage without having followed statutorily required procedures.”²⁶³ In other words, the Ninth Circuit determined that the terms of the consent decree would circumvent the notice-and-comment rulemaking requirements, and thus determined that the district court could not enter the consent decree.

IV. ENVIRONMENTAL SETTLEMENTS AND ADMINISTRATIVE LAW IN HARMONY

As this Article describes, the business community and some of its congressional allies currently advocate for placing limits on the federal government’s discretion to settle cases, citing concerns about public participation and undermining the orderly development of administrative law. During the Bush II Administration, environmentalists and their congressional allies made similar demands. At the same time, settlement has become the dominant method of resolving disputes in the private sector, and constitutes an important legal strategy for presidential administrations of all political stripes. Settlements may also, in the right circumstances, provide an avenue to break the logjams currently plaguing administrative agency decisionmaking processes.

This Part addresses the question of whether the existing settlement practices of the federal government can be reconciled with principles of administrative law. It explains that the two can be reconciled and, indeed, that settlement practices do not violate or circumvent administrative law norms. As environmental settlements serve an important function, this Article therefore suggests that the federal government should retain broad discretion in this arena.

To demonstrate that settlements pose no threat to administrative law, this Part considers each category of settlement—resource allocation settlements, procedural settlements, and substantive settlements—in turn. The analysis offered reveals that each category can, in most circumstances, be reconciled with administrative law. Moreover, as the examples in Part III demonstrate, when federal agencies occasionally overstep and enter into settlements that purport to make substantive regulatory changes that would ordinarily be subject to notice-and-comment rulemaking, courts already possess ample authority and opportunity to intercede.²⁶⁴

²⁶² *Id.* at 1187.

²⁶³ *Id.* at 1188.

²⁶⁴ See *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236 (3d Cir. 2011); *Conservation Nw.*, 715 F.3d 1181.

A. Resource Allocation and Agency Discretion

As described in Part III, agency decisions ordering regulatory priorities and establishing the timing of regulatory actions are essentially decisions allocating agency resources.²⁶⁵ Regulatory efforts—whether instigated at the agency’s own initiative, or in response to a settlement—require dedication of the time of agency staff and, in many environmental situations, will involve investment in scientific research and information technology to manage public participation and develop the basis for reasoned agency decisionmaking. Litigating cases also consumes agency resources. While attorneys at the Department of Justice carry out the day-to-day case management tasks, both programmatic and legal staffs at environmental agencies are also involved in all aspects of cases—from drafting and reviewing pleadings and briefs to preparing for the occasional deposition.²⁶⁶

Decisions about how best to allocate the agency’s resources to advance its policy goals should be left, except in exceptional circumstances, with the agency itself, particularly because agencies receive maximum deference when allocating their resources.²⁶⁷ As Professor Eric Biber has explained, “the federal government must make difficult choices every day about how to allocate its resources between different problems, concerns, dreams, and goals.”²⁶⁸ Because of the “centrality” of resource allocation decisions in the process of carrying out the business of the federal government, “it is not surprising that the [Supreme] Court has viewed resource allocation as [] central to agency discretion.”²⁶⁹ Indeed, the Supreme Court has held that agency allocation of resources from a “lump-sum appropriation” are among the few categories of agency decisions “committed to agency discretion” and thus beyond the scope of judicial review under the APA.²⁷⁰

That does not mean that there is never room for courts to review agency resource allocation decisions. The APA has limited applicability to such decisions because it authorizes judicial review of “agency action unlawfully withheld or unreasonably delayed.”²⁷¹ Courts have construed this mandate narrowly. Even in circumstances where an agency fails to act in the face of a clear congressional deadline, courts will only intervene when the delay is “egre-

²⁶⁵ See *supra* notes 153–66 and accompanying text.

²⁶⁶ See Zeppos, *supra* note 71, at 178 (explaining that while Department of Justice attorneys significantly affect litigation, agencies also assert their views as litigation progresses).

²⁶⁷ See, e.g., *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (noting that even where an agency has violated a statutory deadline, before intervening the court should consider “the effect of expediting delayed action on agency activities of a higher or competing priority”).

²⁶⁸ Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 17 (2008).

²⁶⁹ *Id.*

²⁷⁰ See *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993).

²⁷¹ 5 U.S.C. § 706(1) (2012).

gious.”²⁷² That is because, at least in part, decisions allocating resources, like enforcement decisions, “involve [] a complicated balancing of a number of factors which are peculiarly within [an agency’s] expertise.”²⁷³ As the Third Circuit said, “the quintessential discretion” of an agency is “to allocate [its] resources and set its priorities.”²⁷⁴

Even in the limited circumstances where courts will review agency decisions about the ordering of the agency’s priorities and actions, such review is limited to circumstances of agency inaction.²⁷⁵ In the absence of a legal bar to the agency taking particular action, courts are not in the business of calling a halt to an agency decisionmaking process because the court believes that the agency should allocate resources elsewhere.²⁷⁶ In other words, the kind of decision embodied in a resource allocation settlement—the decision to dedicate resources to a particular regulatory process—is precisely the type of agency decision most insulated from judicial review. Courts simply do not interfere with agency choices about how to order resources and priorities and when to affirmatively commit to undertake a particular decisionmaking process on a particular timetable. Because such a decision is not normally subjected to judicial review or process requirements of the APA, such a commitment embodied in a settlement circumvents no provision of administrative law.

Critics of such settlements argue that resource allocation decisions sometimes constrain substantive results and that deadlines made through settlements impermissibly curtail the discretion of the agency in the future.²⁷⁷ That perspec-

²⁷² *Telecomm. Research & Action Ctr.*, 750 F.2d at 79; see also Michael D. Sant’Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Drugging*, 79 GEO. WASH. L. REV. 1381 (2011).

²⁷³ *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The Court explained that enforcement decisions necessarily involve consideration of “whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.” *Id.* Many of those same factors are inextricably raised when agencies make decisions to allocate resources to a particular regulatory project.

²⁷⁴ See *Biber*, *supra* note 268, at 17–18 (quoting *Oil, Chem. & Atomic Workers Union v. Occupational Safety & Health Admin.*, 145 F.3d 120, 123 (3d Cir. 1998)).

²⁷⁵ *Id.* at 3 (discussing the importance of *Massachusetts v. EPA*, 549 U.S. 497 (2007), to administrative law because “it affirmatively concluded that private parties could seek judicial review of an agency’s decision not to issue a regulation”).

²⁷⁶ There are, however, cases in which courts have refused to force agency action because of concerns about resource allocation as well as courts that acted in the opposite fashion, requiring agencies to act because the court concluded that no resource allocation concerns existed. *Compare, e.g.*, *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100–02 (D.C. Cir. 2003) (reversing and remanding a district court judgment that held a decision by the Secretary of the Interior to have been unreasonably delayed because the district court did not first consider the limited resources and competing priorities of the Bureau of Indian Affairs), *with In re Cal. Power Exch. Corp.*, 245 F.3d 1110, 1125 (9th Cir. 2001) (deferring to the agency’s decision to “focus [] its resources” and give “higher priority” to structural remedies of the California electricity market instead of retroactive refund determinations), *and In re Bluewater Network*, 234 F.3d 1305, 1316 (D.C. Cir. 2000) (granting mandamus to require an agency to promulgate rules where the agency “has not shown that expedited rulemaking . . . will interfere with other, higher priority activities”).

²⁷⁷ See CHAMBER OF COMMERCE REPORT, *supra* note 1, at 11 (“Sue and settle occurs when an agency intentionally relinquishes its statutory discretion by accepting lawsuits from outside groups

tive ignores that such settlement decisions are precisely an exercise of agency discretion over the agency's resources. Even as deadline settlements cabin agency discretion after settlement, the availability of that tool to resolve litigation enhances discretion beforehand, empowering agencies to decide how best to proceed once they have been sued in light of the agency's policy preferences and potential legal liability.

It is true, of course, that a deadline embodied in a settlement may bind future administrations and thereby limit agency flexibility after the fact.²⁷⁸ And, in an extreme case, a monumental commitment of resources could prevent a future administration from pursuing its own policy agenda by capturing all available agency resources.²⁷⁹ While such settlements are theoretically possible, they are likely to be rare or nonexistent in reality. Agencies ordinarily have sufficient resources to pursue multiple—if finite—regulatory objectives. Committing to one decisionmaking process, then, is not the functional equivalent of foreclosing all others.

Moreover, if a settlement involved such an extraordinary commitment of resources, existing judicial mechanisms should prove adequate. If a settlement is embodied in a consent decree, the public interest review conducted by the supervising judge would allow that judge to consider whether the resources involved in the decree are so significant that they will improperly limit what else the agency can do.²⁸⁰ While judges often do not directly supervise the terms of private settlements, such settlements are only as good as their utility in a future enforcement lawsuit.²⁸¹ Because specific performance of contractual obligations is unavailable against the federal government, federal judges will rarely if ever be tasked with enforcing an environmental settlement,²⁸² and rather a plaintiff will either reopen her initial lawsuit or seek damages for breach of contract in the Court of Federal Claims.²⁸³

Finally, settlements that impose deadlines often include internal mechanisms for adjustment and change. Consider, for example, the consent decree that resolved the *National Parks Conservation Association* case addressing the

which effectively dictate the priorities and duties of the agency through legally binding, court-approved settlements negotiated behind closed doors—with no participation by other affected parties and the public.”).

²⁷⁸ See Serkin, *supra* note 141, at 892, 896–97 (categorizing consent decrees as a form of “contractual entrenchment” or pre-commitment because they “lock in the results of collaboration between the government and a particular interest group” and they are “largely immune from efforts by subsequent government actors to modify or repeal”).

²⁷⁹ See *id.* at 906; Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295, 301 (1987) (“[O]ne of the evils to be guarded against is the collusive settlement—government lawyers settling a suit on favorable terms to the opposing party because they expect that successive administrations may be less sympathetic to its cause.”).

²⁸⁰ See *supra* notes 54–61 and accompanying text.

²⁸¹ See *supra* notes 57–61 and accompanying text.

²⁸² *Coggeshall Dev. Corp. v. Diamond*, 884 F.2d 1, 3 (1st Cir. 1989) (“Federal courts do not have the power to order specific performance by the United States of its alleged contractual obligations.”).

²⁸³ See 28 U.S.C. § 1491(a)(1) (2012); Parness & Walker, *supra* note 46, at 45–47 (discussing basis for federal subject matter jurisdiction to reopen civil actions following breach of settlement).

Regional Haze Rule.²⁸⁴ The decree included a provision that allowed the parties to return to “the Court to resolve [any] dispute”²⁸⁵ and provided that the agreed-upon deadline “may be extended for a period of 60 days.”²⁸⁶

Resource allocation settlements, then, do not undermine administrative law. Opponents of a particular regulatory decision may argue that a settlement forces an agency’s hand by compelling it to regulate on a sometimes rapid timetable,²⁸⁷ but such criticism is more appropriately aimed at Congress. Congress decided to impose the relevant statutory deadline in the first place. The agency merely settled a lawsuit claiming it failed to comply with that deadline, a lawsuit it is virtually certain to lose.²⁸⁸ This is an important realization because, by the numbers, this type of settlement accounts for the largest share of those identified in the Chamber of Commerce report.²⁸⁹

B. Procedural Rules and Process Exemption

Like resource allocation decisions, the operating procedures of agencies typically fall outside of the procedural requirements of the APA. Agencies have long been held to have inherent power to structure their own processes and

²⁸⁴ Consent Decree, Nat’l Parks Conservation Ass’n v. Jackson, No. 11-1548 (D.D.C. Nov. 11, 2011), ECF 4-1.

²⁸⁵ *Id.* at ¶ 16.

²⁸⁶ *Id.* at ¶ 7.

²⁸⁷ See, e.g., NORMAN, *supra* note 1, at 5–6.

²⁸⁸ Congress’s responsibility in such lawsuits is compounded by the fact that it often enacts statutes with explicit deadlines and then fails to fund the agencies adequately to meet those deadlines. See Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Department of Interior and Commerce*, 64 U. COLO. L. REV. 277, 294 (1993) (concluding that the Department of Interior never asks Congress for enough money to actually comply with section 4 of the ESA because that could result in more ESA listings and potential political problems).

²⁸⁹ CHAMBER OF COMMERCE REPORT, *supra* note 1, at 30–42. The prevalence of resource allocation settlements, and deadline litigation generally, should come as no surprise as agencies often fail to meet deadlines. See, e.g., WILLIAM YEATMAN, COMPETITIVE ENTER. INST., EPA’S WOEFUL DEADLINE PERFORMANCE RAISES QUESTIONS ABOUT AGENCY COMPETENCE, CLIMATE CHANGE REGULATIONS, “SUE AND SETTLE” (2013), <http://perma.cc/88BM-QZ3G>. William Yeatman reports that EPA has failed to meet the vast majority of statutory deadlines imposed by the Clean Air Act, and as a result, believes in the existence of “serious questions regarding the agency’s competence and discretion.” *Id.* at 1. An alternate explanation for EPA’s tardiness is that Congress has consistently failed to provide the Agency with adequate resources to fulfill the multifarious obligations, a lack of resources that appears intentional. See Press Release, H. Comm. on Appropriations, Appropriations Committee Releases Fiscal Year 2014 Interior and Environment Bill (July 22, 2013), <http://perma.cc/W2XD-XANQ> (proposing a 34% reduction in funding for EPA); Coral Davenport, *EPA Funding Reductions Have Kneecapped Environmental Enforcement*, NAT’L J. (Mar. 4, 2013), <http://perma.cc/GY7N-4XNR> (“Over the past two years, Congress has cut EPA’s budget by a whopping 18 percent . . .”). As Coral Davenport has explained, “[c]utting the agency’s budget doesn’t take away its obligations to enforce environmental laws and implement new regulations, but it has dramatically weakened and slowed EPA’s ability to fulfill its mandate.” Davenport, *supra*. Yeatman himself has recognized that this dynamic is in play. See Yeatman, *supra* note 158, at 52 (“[I]t is, after all, Congress’s fault for assigning responsibilities without appropriating commensurate funds.”).

need engage administrative procedures formalized by the APA only when they issue “legislative rules.”²⁹⁰

The distinction between procedural and substantive rules finds its genesis in the language of the APA. Section 551 defines the term “rule” as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.”²⁹¹ That definition applies to rules of all stripes, whether they involve substance, procedure, or timing. But the APA then exempts certain rules from the notice-and-comment requirement, and that list of exceptions includes “rules of agency organization, procedure, or practice.”²⁹²

Procedural settlements plainly fall within the exception written into section 553, and, therefore, just like resource allocation decisions, even if agencies were to make these decisions outside the context of a settlement, the agencies would not need to engage in notice-and-comment rulemaking.²⁹³

There are, of course, minimum procedural requirements with which agencies must comply. For example, NEPA requires agencies to complete an environmental impact statement for “major Federal actions significantly affecting the quality of the human environment.”²⁹⁴ Where agencies fall below the procedural floor set by statutes like NEPA and the APA, courts can intervene—although such intervention will occur only after the agency makes a final decision.

Neither NEPA nor the APA, however, places a ceiling on the amount of process that agencies implement as part of rendering a decision.²⁹⁵ NEPA does not, for instance, prohibit environmental analysis for non-major actions. And the APA does not prohibit agencies from extending public comment periods or holding additional public hearings.²⁹⁶ When, therefore, an agency agrees in a

²⁹⁰ See generally Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 52 ADMIN. L. REV. 547 (2000); see also Michael Deminico & Heather Eisenlord, *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit: Environmental Law*, 70 GEO. WASH. L. REV. 378, 389 (2002) (explaining “the state of the law in the D.C. Circuit” as finding that agencies possess “inherent power” to “correct a ministerial error in a quasi-judicially enacted rule” and “issue a binding pronouncement reinterpreting a legislatively enacted rule not to apply to certain interested parties that were otherwise covered by the rule, without an additional round of notice and comment rulemaking,” but that an agency must “comply with the APA or qualify for an exception if it attempts to amend a legislatively enacted rule” (quotation marks omitted)).

²⁹¹ 5 U.S.C. § 551(4) (2012).

²⁹² *Id.* § 553(b)(3)(A); see also David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 282–89 (2010) (discussing rules exempted from notice-and-comment procedures provided for by section 553).

²⁹³ See 5 U.S.C. § 553(b)(3)(A).

²⁹⁴ 42 U.S.C. § 4332(2)(C) (2012).

²⁹⁵ See, e.g., *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978) (“This much is absolutely clear. Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.” (quotation marks omitted)). That, of course, does not mean that courts are generally free to impose additional procedures on agencies. See *id.* at 543–44.

²⁹⁶ See 5 U.S.C. § 553 (requiring publication of proposed rules and an opportunity to comment).

settlement to afford additional process, the requirements of the APA are not circumvented.

In rare circumstances, courts can—and do—police procedural settlements where additional procedures will compromise private rights. Consider, for example, the settlement at issue in the *Minard Run* case.²⁹⁷ The Forest Service agreed to perform an environmental impact study before allowing holders of mineral rights to enter the Alleghany National Forest and build roads and other infrastructure to mine.²⁹⁸ Those mineral rights holders filed suit alleging that the delay impermissibly impaired their interests and the Third Circuit agreed.²⁹⁹ While critics might claim that the case illustrates the “sue-and-settle” problem, it should be understood as demonstrating that the current system works and that meaningful constraints on environmental settlements already exist.

C. Substantive Rules and Alternative Process Pathways

So far, this Part has demonstrated that resource allocation settlements and procedural settlements pose no threat to administrative law. The final category of settlements—substantive settlements—seems most potentially problematic because it commits agencies to particular substantive decisions, or even makes such substantive decisions. Nonetheless, these settlements also, for the most part, do not circumvent administrative law. And where such circumvention is threatened, courts possess ample authority to intervene.

Substantive settlements are rare. That rarity likely arises from several sources. Department of Justice memoranda guiding federal settlement practices disapprove of settlements that make substantive changes to regulatory law.³⁰⁰ Environmental agencies are also unlikely to favor substantive settlements because they are the most likely to bring unwanted attention from Congress and the public to the agencies’ activities.³⁰¹ Finally, substantive settlements may prejudice judicial review of eventual final regulatory decisions. That would be so if the settlement predetermined the outcome of a subsequent administrative process.³⁰²

Substantive settlements do occasionally occur, and such settlements are not problematic from the perspective of administrative law so long as one of two conditions is met.

²⁹⁷ See generally *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236 (3d Cir. 2011).

²⁹⁸ *Id.* at 245.

²⁹⁹ *Id.* at 257.

³⁰⁰ See Moss Memo, *supra* note 102.

³⁰¹ See, e.g., CHAMBER OF COMMERCE REPORT, *supra* note 1.

³⁰² *Air Transp. Ass’n v. Nat’l Mediation Bd.*, 663 F.3d 476, 487 (D.C. Cir. 2011) (“Decisionmakers violate the Due Process Clause and must be disqualified when they act with an ‘unalterably closed mind’ and are ‘unwilling or unable’ to rationally consider arguments.”); *Wyoming v. U.S. Dep’t of Agric.*, 661 F.3d 1209, 1264 (10th Cir. 2011) (noting that predetermining the outcome of a decisionmaking process subject to an environmental analysis requirement would violate NEPA).

First, substantive settlements can incorporate notice-and-comment procedures, and some statutes even require public participation.³⁰³ The APA has a capacious definition of the term “rule,” and nothing in the Act’s definition of the word as “the whole or a part of an agency statement of general or particular applicability and future effect” precludes development of rules through settlements.³⁰⁴ To the extent that settlements themselves conform to the procedural requirements of the APA, using them as a vehicle to resolve substantive legal issues does not circumvent administrative law.

A settlement that renders ultimate substantive decisions after notice-and-comment procedures would arguably be subject to a different standard of review than the promulgation of a regulation.³⁰⁵ Courts should be wary of private settlements that purport to make final, substantive changes to law, and should review such decisions carefully in collateral litigation like that which occurred following the procedural settlement in *Minard Run*.³⁰⁶ Where a consent decree is at issue, district judges should be attentive to procedural or substantive irregularities. Ultimately, however, the public interest review afforded to consent decrees is not functionally dissimilar from the malleable arbitrary and capricious standard set forth in the APA.³⁰⁷ Indeed, empirical evidence suggests that in practice judges have two forms of judicial review—deferential review and non-deferential review—and both administrative review and review of consent decrees fall within the deferential mode.³⁰⁸

³⁰³ See, e.g., 42 U.S.C. § 6973(d) (2012).

³⁰⁴ See 5 U.S.C. § 551(4) (2012).

³⁰⁵ Compare *supra* Part I.B (describing standards of review for settlements and consent decrees), with 5 U.S.C. § 706(2)(A) (establishing standards of review for administrative decisions).

³⁰⁶ As has been discussed, courts already exercise such oversight. See *supra* Part III.B.1. Professors Gaba and Rossi have similarly called on courts to exercise authority to monitor settlements and consent decrees for efforts to circumvent administrative process. Rossi advocates for an *ex ante*—at the time of the initial settlement—hard-look review of the merits of settlements since public participation in the rulemaking settlement process “may be narrower and more secretive than that occurring through normal APA procedures.” See Rossi, *supra* note 76, at 1050. Gaba, on the other hand, suggests an *ex post* approach in which courts take a “hard look” at rules developed through settlement agreements, noting however, that such an approach could hinder settlement negotiation. Gaba, *supra* note 137, at 1280–82. In our view, courts already have ample authority to ensure the appropriateness of settlements or consent decrees either at the time they are entered, or during later proceedings challenging further administrative actions.

³⁰⁷ See *supra* notes 54–56 and accompanying text (discussing judicial review of consent decrees); 5 U.S.C. § 706(2)(A) (delineating standard of review for administrative law cases).

³⁰⁸ See David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 169 (2010) (reporting rates of affirmance across agencies, standards of review, and categories of cases). A study performed by Professor David Zaring did not find complete uniformity in the application of deferential and non-deferential review, and other commentators, such as Professors Kati Kovacs and Margaret Kwoka, have identified particular substantive fields where courts seem to exercise what, in the words of Kovacs, amounts to “super-deference.” Kati Kovacs, *Leveling the Deference Playing Field*, 90 OR. L. REV. 583, 585 (2011) (discussing decisions by the military); see generally Margaret Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185 (2013) (discussing decisions about Freedom of Information Act requests); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008) (examining different approaches to deference where agencies interpret statutes or regulations). These findings do not, however, suggest meaningfully distinct treatment of different standards of review such that courts would be likely to defer under public interest review where they would have interceded under the arbitrary and capricious standard. Rather,

Second, substantive settlements do not evade administrative law constraints so long as they result in a formal decision that itself can be subject to judicial review. That condition tracks the ordinary rule of administrative law that only final agency actions are subject to judicial review, and that when a final agency action occurs, subsidiary decisions are also subject to challenge.³⁰⁹ As a district court judge explained, “[m]yriad subsidiary decisions are required in the process of promulgating regulations, but it is the final decision to adopt (or not to adopt) a given rule that transforms words on paper into binding law.”³¹⁰

Many substantive settlements will fall into this situation because the substantive issues resolved are merely precursors to a formalized administrative process that will itself result in a decision subject to judicial review. Consider, for example, the *In re Endangered Species Act Litigation* settlement through which the FWS agreed to consider certain petitions to list species as threatened or endangered within certain time constraints and without exercising its option to find a listing warranted but precluded.³¹¹ As described above, that final aspect of the settlement involved a substantive decision.³¹² Nonetheless, that substantive commitment would not appear to predetermine the FWS’s ultimate decision about whether to list particular species, and those decisions could be the subject of judicial review. Moreover, in such future litigation, a party may raise any argument it wanted that the settlement did actually prejudice the outcome of the decisionmaking process. As a result, the settlement results in no circumvention of the APA.³¹³

Most final affirmative regulatory decisions compelled by settlements will necessarily involve a formal agency decision, but that is not necessarily true for deregulatory decisions. Where agencies agree to roll back regulations that have become final, courts should be particularly vigilant to ensure that agencies are not evading administrative law constraints. So, for example, an agency could enter a settlement purporting to rescind a regulation currently in force. Such a

Kovacs and Kwoka argue that in certain substantive fields, courts exercise more deference even when applying the same standard of review. See Kovacs *supra*; Kwoka, *supra*.

³⁰⁹ 5 U.S.C. § 704; Karst *Env’t. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1295–96 (D.C. Cir. 2007) (noting that lawsuit alleging violation of NEPA must also allege that a final agency action has occurred).

³¹⁰ *Chamber of Commerce v. NLRB*, 879 F. Supp. 2d 18, 26 (D.D.C. 2012); see also *Sierra Club v. U.S. Dep’t of Interior*, 384 F. Supp. 2d 1, 20 (D.D.C. 2004) (“Internal agency drafts . . . are not final agency action . . .”).

³¹¹ See WEG Settlement, *supra* note 220, at ¶ 10; CBD Settlement, *supra* note 220, at ¶ (B)(4); see also *In re Endangered Species Act Section 4 Deadline Litig.*, 716 F. Supp. 2d 1369 (J.P.M.L. 2010).

³¹² See *supra* notes 220–39 and accompanying text.

³¹³ Those unhappy with a settlement may nonetheless argue that the APA has been circumvented, but such complaints typically voice political, rather than legal, opposition. See *Complaint for Declaratory and Injunctive Relief at ¶¶ 2–13, Okla. & Domestic Energy Producers Alliance v. U.S. Dep’t of Interior*, No. 14-123 (N.D. Okla. Mar. 17, 2014) (declaring that these settlements circumvent the APA, the ESA, and the U.S. Constitution because the plaintiffs were “deprived of an opportunity to participate in shaping the substantive policy choices embedded in FWS’s settlements” and “[r]ather than pursuing this change through legislation or rulemaking, FWS chose the expedient of ‘friendly’ settlements of a series of lawsuits brought by like-minded, special interest litigants”).

decision would ordinarily require notice-and-comment rulemaking, and public participation should also be required if an agency attempts such deregulatory action through a settlement or consent decree. But courts already have ample opportunities to consider such decisions. The availability of collateral litigation renders even these settlements unproblematic for administrative law because courts can intervene.³¹⁴

There is one type of potential substantive settlement that raises potential concerns for subversion of administrative law: a consent decree agreeing to vacate a formally promulgated rule. Ordinarily, if the federal government seeks to modify or replace a policy originally subject to notice-and-comment rulemaking, it can accomplish that task only through a new notice-and-comment rulemaking process. The APA does, however, give courts the authority to vacate such a rule if the court finds the rule arbitrary or capricious or otherwise unlawful.³¹⁵ This judicial power raises the prospect that the federal government could proffer a consent decree to a judge under which the judge would vacate the policy, accomplishing repeal without any administrative process.³¹⁶ Such a consent decree has rarely if ever occurred, and courts already have ample authority to guard against such a subversion of administrative law by monitoring the terms of consent decrees.³¹⁷ Courts should, however, remain vigilant and refuse to enter consent decrees with the effect of vacating formally adopted regulations.

CONCLUSION

Environmental settlements have become the subject of significant public and political scrutiny. Republican legislators in both chambers of Congress

³¹⁴ The Bush II Administration's agreement to temporarily exempt the Tongass National Forest from the Roadless Rule issued in the waning days of the Clinton Administration is an example of such conduct. See Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 41,865, 41,865-66 (proposed July 15, 2003). The Clinton Administration's final rule specifically extended to the Tongass, see Glicksman, *supra* note 154, at 1156-57, and the Bush II Administration settled a lawsuit challenging that rule by effectively rescinding it, at least temporarily. Because the Administration codified this settlement in a final rule, rather than purporting to rescind the earlier rule pursuant to a settlement, it did not insulate its decision from the possibility of judicial review.

³¹⁵ See 5 U.S.C. § 706 (2012).

³¹⁶ The potential for such tactics could be particularly high soon after a new administration takes office. Cf. Rossi, *supra* note 76, at 1039-43 (considering settlements after a presidential transition).

³¹⁷ Administrations do on occasion enter settlements in which they agree to reconsider the formally adopted policies of prior administrations. See *id.* Such settlements do not evade judicial review because the formal decision to amend or modify the original policy will itself be subject to challenge under the APA. A related but distinct litigation tactic that does not involve settlements or consent decrees also raises the specter of evasion of administrative process. An administration hostile to a policy of its predecessor can choose not to appeal a district court ruling vacating that decision, thereby securing vacatur of the rule or regulation based solely on the legal view of one judge. Such "no-appeals" occur. For example, the Bush II Administration decided not to appeal a district court ruling vacating the Roadless Rule. See *Wyoming v. Dep't of Agric.*, 414 F.3d 1207, 1210 (10th Cir. 2005). Environmental intervenors did appeal from that decision, but the Administration released a new final rule, mooting the appeal. *Id.* at 1212-13.

have introduced legislation to curb federal government settlement practices, and a host of advocacy organizations have called for reform. During the Bush II Administration, environmentalists expressed similar concerns.

A primary complaint about environmental settlements is that they enable agencies to skirt or violate the constraints of administrative law. As this Article demonstrates, these complaints are mistaken. Environmental settlements fully conform to administrative law principles, and existing legal safeguards properly preclude collusion. This analysis reveals the current “sue-and-settle” debate for what it is: a war of words relying on emotionally charged rhetoric to score political points.

Lawmakers and the public should not be led astray. Reasonable debate can occur about the scope of environmental statutes. For example, regulated parties may (and do) seek revision of the ESA to relax the obligation of the FWS to swiftly act on petitions to list species, or of the Clean Air Act to relax the obligation of EPA to periodically revisit air emissions standards. Those arguments should be considered, and resolved, within the terrain of substantive environmental law, rather than under the guise of reforming settlement practices.

Environmental settlements provide federal agencies with an important tool to strategically control litigation risk. Settlements also serve as a vehicle for agencies to facilitate and motivate their own decisionmaking processes and overcome regulatory ossification. Environmental settlements will inevitably anger a president’s opponents, but that alone is not a reason to curtail the discretion of federal agencies.

