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

Henry N. Butler & Nathaniel J. Harris, George Mason University School of Law

Harvard Journal of Law & Public Policy, Forthcoming 2014

George Mason University Law and Economics Research Paper Series

13-57
SUE, SETTLE, AND SHUT OUT THE STATES: DESTROYING THE ENVIRONMENTAL BENEFITS OF COOPERATIVE FEDERALISM

Henry N. Butler1
Nathaniel J. Harris2

I. INTRODUCTION

Federal environmental policy has long relied on the states to assist in the development and implementation of environmental regulations.3 Under this “cooperative federalism,” states not only administer federal rules but also receive flexibility in setting standards and enforcement priorities.4 In recent years, environmental advocacy groups have increasingly succeeded in using a faux litigation strategy to effectively trample the statutory regulatory framework and to shut out the states from important policy decisions.5 As explained below, this policy-making process—called “sue-and-settle” or “suit-and-settlement”—not only violates the statutory framework, but also leads to haphazard policy making that should violate the standards of any serious policy analyst.

1 George Mason University Foundation Professor of Law and Executive Director, Law & Economics Center, George Mason University School of Law.
2 George Mason University School of Law, Class of 2013, and Law Clerk to The Honorable Harris L. Hartz, United States Court of Appeals for the Tenth Circuit. The authors acknowledge the financial support of the Mercatus Center at George Mason University and the Law & Economics Center at George Mason University School of Law. Helpful and insightful comments from the referees are greatly appreciated.
Sue-and-settle is being used by environmental advocacy groups and federal regulators to shut the states out of their statutorily created roles. The basic scenario of this so-called institutional reform litigation\(^6\) is straightforward. An environmental advocacy group sues a federal agency, usually the EPA, for failing to adequately police state action under federal environmental laws. Specifically, the advocacy group alleges that the EPA has a nondiscretionary duty to ensure that states establish certain standards and that the agency has failed to do so. In many circumstances, the EPA’s failure is a failure to act when states themselves miss deadlines imposed by the varying environmental statutes.\(^7\) After the state fails, various statutes require the EPA to impose a federal implementation plan (FIP) that states must follow.\(^8\) At other times though, and a major point of this paper, it is the EPA’s failings—completely independent of the states—that leads to a consent decree.\(^9\) The EPA and the

---

\(^6\) A. David Reynolds, *The Mechanics of Institutional Reform Litigation*, 8 FORDHAM URBAN L.J. 695, 695 (1979) (“[I]nstitutional reform litigation [is] directed at state or local governmental bodies to insure their compliance with the growing number of constitutional and statutory rights every individual enjoys.”). Note that some scholars question the legitimacy of institutional reform litigation altogether. See, e.g., William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 696 (1982) (“Political bodies and courts respond to different institutional imperatives. They overlap in many ways, and may be equally capable of performing a number of functions, albeit in their characteristic institutional fashions. Devising remedies for constitutional violations in institutional suits, however, is not such a function. Legal standards for devising institutional remedies are absent because the problems they pose are, and inevitably must be, polycentric and non-legal in nature.”); Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1307 (“Whether the courts have done more good than harm [with institutional reform litigation] is a question begging an answer at the moment. That they mean to do good is beyond doubt. But, as Peter de Vries has observed, ‘The road to good intentions is paved with hell.’”).

\(^7\) However, see *Florida Wildlife Fed’n, Inc. v. Jackson* as an example of the EPA being sued when it is questionable whether the state had actually failed to meet the EPA’s requirements. 2009 WL 5217062 (N.D. Fla. Dec. 30, 2009) (No. 408CV0324). Also note that the EPA does not always wait until states have had their statutorily guaranteed opportunity to issue their own environmental programs. In *Homer City*—scheduled to be argued before the U.S. Supreme Court in this October’s term—the EPA imposed an FIP before allowing the state to impose its own standard. 696 F.3d at 11.

\(^8\) *E.g.*, Clean Air Act § 110(c)(1), 42 U.S.C. § 7410(c)(2); see also Bruce Ackerman & William Hassler, *Clean Coal/Dirty Air: Or How the Clean Air Act Became a Multibillion-Dollar Bail-Out for High-Sulfur Coal Producers and What Should Be Done About It* 104 (1981) (classifying this as an “agency-forcing statute”).

advocacy group then settle the lawsuit—without any input from the states that were responsible in the first place and are now responsible for implementing the terms of the settlement. In the settlement agreement, the EPA is required to implement its own standard if the states fail to develop a standard by a deadline imposed by the settlement. The standard, or at least the nature of the standard, is also frequently established by the settlement agreement. The settlement is then entered as a consent decree\textsuperscript{10} and the EPA is bound by the terms under court order. After the consent decree is entered, the EPA issues an FIP because the states were unable to meet the settlement’s deadlines, standards, or both. Just like that, states—statutorily charged with implementing pollution controls themselves—are circumvented and the EPA takes over and imposes FIPs.

Paradoxically, the EPA’s “surrendering” of its discretionary authority to work cooperatively with the states leads to more, not less, control at the federal level. Thus, as a result of being sued, the agency actually has more power relative to the states. Instead of allowing the states the flexibility to continually experiment with different approaches, standards, implementation plans, and so forth, the settlement agreements between the advocacy group and the EPA increase direct EPA control over the states. Of course, the advocacy groups that bring these suits are generally pleased with the result. The fact that both parties get what they want as a result of the filing of the lawsuit should raise some suspicion about what is actually going on.

\textsuperscript{10} A consent decree is a settlement entered by the court as a court order, which means it has the force of law. Instead of a breach of contract action to enforce agreements, as in a normal settlement, consent decrees are enforced by filing contempt of court charges. See infra § II.
Consider the case of *Defenders of Wildlife v. Perciasepe*. On November 8, 2010, two events occurred: (1) Defenders of Wildlife filed its complaint against EPA; and (2) EPA and Defenders of Wildlife filed a consent decree and a joint motion to enter the consent decree with the court. Although simultaneously filing a lawsuit and a consent decree do not necessarily imply foul play, it does illustrate how little impact states may have in the consent decree process that may ultimately dictate what and when a state is required to do by statute.

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

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

Third, defenders of the current statutory framework based on cooperative federalism should view sue-and-settle as a major assault on the administrative integrity of a cooperative system. Sue-and-settle effectively shuts the states out of the decision-making process and

---

11 No. 12-5122, slip op. at 6 (D.C. Cir. Apr. 23, 2013).
forces them into a subservient role as enforcer of a federal court order. Normally, states have a statutory right to establish their own regulations and come up with their own solutions before the federal regulator heavy-handedly imposes standards for the states to follow.\footnote{Infra \S\ I(a) (citing several statutes as examples of states having an express statutory role in regulation).} At a minimum, states should be able to participate in notice-and-comment rulemaking as federal regulators implement new standards.\footnote{Infra \S\ III(b).} However, the sue-and-settle procedure circumvents this process by forcing states to implement federal regulations in place of their existing standards or before they are given a full opportunity to solve their own problems.\footnote{E.g., Florida Wildlife Fed’n, Inc. v. Jackson, 4:08CV324-RHWCS, 2009 WL 5217062, at * 2 (N.D. Fla. 2009).} Consent orders also modify the normal notice-and-comment rulemakings by eliminating proper state involvement.\footnote{Am. Nurses Ass’n v. Jackson, CIV.A. 08-2198 (RMC), 2010 WL 1506913 (D.D.C. Apr. 15, 2010).} Thus, the recent windfall of sue-and-settle consent decrees has created a structure of environmental regulations that excludes essential participants. The most important excluded participants in the United States’ supposed system of cooperative federalism are the states themselves. As explained in more detail below, ever since the seminal Toxics Consent Decree in 1976,\footnote{Natural Resources Defense Council v. Train, 6 ELR 20588 (D.D.C. June 9, 1976).} federal regulators and advocacy groups have broadly used consent decrees to impose standards on states that cost billions of dollars to implement, decrease jobs, and increase energy costs.\footnote{Federal Consent Decree Fairness Act, and the Sunshine for Regulatory Decrees and Settlements Act of 2012, Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary, 112th Cong. 96 (2012) (statement of Congressman Dennis Ross, Florida) [hereinafter Ross]; Federal Consent Decree Fairness Act, and the Sunshine for Regulatory Decrees and Settlements Act of 2012, Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary, 112th Cong. 89 (2012) (statement of Congressman Quayle, Arizona) [hereinafter Quayle].} And all this...
is done without the states having any opportunity to interject or influence the decrees’ terms—effectively trading statutorily mandated federalism for perpetual regulation.

Fourth, proponents of greater reliance on state regulation—especially when the regulated activity has primarily local or state impacts—view some of the sue-and-settle cases as a dramatic expansion of federal regulation into areas that should be regulated by local or state governments. Removing states from the environmental regulatory formula is problematic because it is inconsistent with a rational allocation of regulatory authority. For example, the matching principle is “a guide to determining the most efficient governmental level for regulation of different types of environmental concerns” and states that “the size of the geographic area affected by a specific pollution source should determine the appropriate governmental level for responding to the pollution.” U.S. environmental policy does not strictly observe the matching principle as the federal government is frequently involved in exclusively intrastate problems, but it does partially recognize the matching principle by granting states an express statutory role in federal policy and by allowing states to participate in notice-and-comment rulemaking. Unfortunately, consent decrees undermine and even eliminate both these state roles—further removing the U.S. system from a rational allocation of authority and inserting additional inefficiencies into the system.

The purpose of this paper is to first, elaborate on how the sue-and-settle process in environmental institutional reform litigation distorts the regulatory process and harms states, and

---

19 *Infra* § III(b).
second, to propose solutions. Prior work has almost exclusively analyzed how consent decrees generally harm third parties, but the issue of how consent decrees harm states in the environmental context has been underanalyzed. Also, given the timeliness of E.P.A. v. EME Homer City Generation, L.P. before the Supreme Court this term, this paper also briefly discusses the implications of the Homer City disposition on consent decrees.

Section II discusses the legal background of sue-and-settle, including third-party rights to intervene in the initial suit and to challenge the consent decree after it is entered. Section II also includes a review of the difficult legal standards for agencies to modify their consent decrees, even if they want to. Section III examines sue-and-settle’s impact on environmental law and policy—including specific examples of environmental consent decrees. Section IV analyzes the matching principle, explains why it should be a benchmark for evaluating the appropriate level of government regulation, and argues that sue-and-settle is undermining the benefits of the matching principle. Section V proposes two relatively minor changes that should alleviate some of the current problems caused by sue-and-settle. First, judges should be much more skeptical in reviewing cases such as Defenders of Wildlife v. Perciasepe where it appears the parties colluded in filing the suit. Second, the Federal Judicial Conference of the United States should consider modifying the standard for states intervening under Rule 24 of the Federal Rules of Civil Procedure (F.R.C.P.) in environmental institutional reform litigation. Section VI offers some concluding comments.

\[22 \text{Infra note 59.}\]
II. THE BACKGROUND AND LEGAL STANDARD FOR SUE-AND-SETTLE CONSENT ORDERS

Sue-and-settle or suit and settlement\(^{23}\) normally begins when a private party such as an environmental advocacy group sues federal regulators, alleging failure to comply with nondiscretionary duties. These types of lawsuits are commonly called institutional reform litigation.\(^ {24}\) Whether the duties are actually discretionary or not, the regulator settles the case and agrees to impose new standards on states and other parties.\(^ {25}\) The settlement is entered by a court as a consent decree, and then the regulator proceeds to enforce the standard.\(^ {26}\) Frequently, both the advocacy groups suing the regulators and the regulators themselves appear to seek a settlement without any intention of litigating the case.\(^ {27}\)

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

\(^ {25}\) Id.
\(^ {27}\) There is an excellent possibility that some of the governmental defendants agree with the arguments advanced by the plaintiffs—or, more properly, since these are often lawyer-controlled cases with merely nominal plaintiffs, agree with the arguments advanced by the plaintiffs’ lawyers and their expert witnesses. Among lawyers and experts, there may well be elements of a professional consensus at work on both sides. There is commonly also a desire on the part of some officials to use a decree entered against them as a weapon in the political struggle to vindicate their view of the appropriate treatment, rehabilitation, or other policy goal for the institution.

This is one reason why so many consent decrees are entered in institutional reform cases. Nominal defendants are sometimes happy to be sued and happier still to lose.

Horowitz, supra note 6, at 1294–95; see also Horne v. Flores, 557 U.S. 433, 448 (2009) (“[T]he dynamics of institutional reform litigation differ from those of other cases. Scholars have noted that public officials sometimes consent to, or refrain from vigorously opposing, decrees that go well beyond what is required by federal law.”).
environmental problems. The Clean Water Act of 1972 (CWA) required the EPA to regulate “toxic pollutants.” These regulations had to “fully protect[] public health”—an onerous standard the EPA was unable to meet. As a result, the EPA did not issue any regulations and “toxic pollutants” continued to be emitted. The Natural Resources Defense Council (NRDC) sued the EPA in 1976 for failing to issue standards required by the CWA. Rather than litigate a certain losing battle under a standard the EPA knew it could not meet, the EPA settled the case with the NRDC and had the settlement entered as a consent decree. Under the terms of the decree, the EPA proposed regulations based on a feasibility standard instead of the much more stringent “fully protected public health” standard. Just like that, the NRDC and the EPA amended a congressionally created standard, a far cry from bicameralism and presentment.

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

---


29 Schoenbrod, supra note 26, at 41.

30 Id.


32 Id.

33 Id.

34 Bicameralism and presentment is the process required by art. I of the U.S. Constitution in order for a law to be created or amended. U.S. CONST. art. I § 7 cl. 2. Bicameralism means that laws must be approved by a majority of both the Senate and the House and presentment means the law is sent to and signed by the President. Id.
A. General Consent Decree Doctrine

Consent decrees provide a means for litigants to settle disputes and enjoy the benefits of a court order or judgment. Procedurally, litigants who enter a settlement agreement file a motion with a federal or state court to convert the settlement into a court order. A normal settlement agreement is essentially a contract and is enforceable under normal contract procedures, while a consent decree is a hybrid of a contract and a court judgment. Edwin Meese, then Attorney General under President Reagan, described consent decrees as

negotiated agreements that are given judicial imprimatur when entered as an order of the court. Because of their unique status as both contract and judicial act, consent decrees serve as a useful device for ending litigation without trial, providing the plaintiff with an enforceable order and insulating the defendant from the ramifications of an adverse judgment.

Consent decrees are judicially created, and settling parties can agree to file a motion asking a court to enter their settlement as a consent decree. However, the Supreme Court has emphasized that courts are not just “a recorder of contracts” and has imposed legal standards stating when a court may grant the motion. In Local No. 93, International Association of Firefighters v. City of Cleveland, the Court held that, to be issued, a consent decree must (1) “resolve a dispute within the court’s subject matter jurisdiction,” (2) be “within the general scope of the case made by the pleadings,” and (3) “further the objectives of the law upon which

37 Practical Consideration in Litigating Cases Under the National Environmental Policy Act, 427 ALI-ABA 283, 377 (Meese Memo).
38 Local No. 93, International Ass’n of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986) (quoting 1B J. Moore, J. Lucas, & T. Currier, Moore’s Federal Practice ¶ 0.409[5], p. 331 (1984)).
39 Id. at 525.
40 Id. (quoting Pacific R. Co. v. Ketchum, 101 U.S. 289, 297 (1880)).
the complaint was based."\footnote{41} These three requirements are quite liberally construed, and courts are free to enter decrees that bind the parties to actions that the court could not have imposed if the case had been litigated.\footnote{42}

Consent decrees are preferred over normal settlement agreements because of the enforcement mechanisms available for each. If a party to an ordinary settlement fails to comply with the settlement agreement, then the other parties must bring an ordinary breach of contract case against the breaching party.\footnote{43} This is a costly and onerous process. However, if a party breaches a consent decree, then the other party may file contempt sanctions against the breaching party.\footnote{44} The parties are then able to resolve the dispute without the delays or costs of litigation.\footnote{45} Furthermore, “the court may provide additional assistance (such as appointing a monitor to oversee implementation) and will interpret the decree to help the parties resolve disputes before they reach the point of formal litigation.”\footnote{46}

\textbf{B. Consent Decree Procedure for Government Entities}

Procedure changes when a federal environmental agency is a party to a proposed consent decree. The Code of Federal Regulations requires proposed settlements to be forwarded to the respective Deputy Attorney General or Associate Attorney General in the Department of Justice (DOJ) whenever a settlement converts discretionary authority into a mandatory duty, requires the

\footnotesize
\begin{itemize}
\item \footnote{41} \textit{Id.}
\item \footnote{42} \textit{See id. at 525–26.}
\item \footnote{43} \textit{See Kramer, supra note 34, at 325 (explaining that without a consent decree, parties are limited to normal contract law suits to enforce the agreement).}
\item \footnote{44} \textit{Id.}
\item \footnote{45} \textit{Id.}
\item \footnote{46} \textit{Id. at 325–26.}
\end{itemize}
government to spend funds Congress has not appropriated, or “limits the discretion” of an agency. The general view is that the DOJ complies with this regulation.

Under DOJ policy, if a consent decree results in “an action to enjoin discharges of pollutants,” then the DOJ must provide notice and an opportunity to comment. The goal is for the DOJ to seek advice from the public about whether it should ask the court to enter the decree. The DOJ must lodge the consent order with the court at least 30 days before the court enters judgment. During this time period, the DOJ will receive and consider all comments and forward them on to the court. The DOJ is free to amend—and sometimes does—the consent decree based on comments received. The DOJ also reserves the right to oppose all attempts by third parties to intervene in the proposed consent decree to change its terms. It is not explicit in the Code of Federal Regulations how the DOJ should give notice, but it appears that notice is published in the Federal Register. “[E]njoin[ing] discharges of pollutants” seems to be interpreted broadly to include, not just violations of the CWA and Clean Air Act (CAA), but also the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Resource Conservation and Recovery Act. This requirement does not apply to consent decrees that do not result in pollution enjoinder.

---

47 28 C.F.R. §§ 0.160–0.163.
49 28 C.F.R. § 50.7(a).
50 See id.
51 28 C.F.R. § 50.7(b).
52 Id.
53 Id.
54 Id.
55 A WestlawNext search of the Federal Register reveals that the DOJ has cited 28 C.F.R. 50.7 over 1,300 times as it grants notice to parties that they are about to enter a consent decree. See, e.g., Notice of Lodging Proposed Consent Decree, 78 Fed. Reg. 2283-04 (“In accordance with Departmental Policy, 28 CFR § 50.7, notice is hereby given that a proposed Consent Decree in United States v. DMH Partners North, LLC, et al., Civil Action No. 12-cv-3203 (RHK/LIB), was lodged with the United States District Court for the District of Minnesota on January 2, 2013.”).
Congress provided broader notice requirements for consent decrees relating to air pollution. Notice must be published in the Federal Register thirty days before a consent order “of any kind” that regards air pollution is finalized or filed with a court. The agency or the Attorney General responsible for the consent decree must review all written comments and make changes if anything highlighted by the comments violates the federal air pollution statutes. The language “of any kind” is important because notice must be provided even for institutional reform consent decrees, and not just enjoinment actions. How this notice-and-comment rulemaking compares to traditional, informal rulemaking under the Administrative Procedure Act (APA) will be discussed in Section IV.

C. Intervention under Rule 24 and Joinder under Rules 19 and 21

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

Under Rule 24(a), the parties may be granted intervention of right, for which there are three requirements. First, the party seeking to intervene must have “an interest relating to the property or transaction.” Second, the party must be “so situated that disposing of the action

---

57 Id.
58 See Kramer, supra note 34, at 322.
59 F.R.C.P 24.
60 Id.
may as a practical matter impair or impede the movant’s ability to protect its interest.”61 Finally, the movant must show that his interest is otherwise not adequately represented.62

The Supreme Court has required “a significantly protectable interest” in order to satisfy the first requirement.63 Miller and Wright’s treatise describes the interest requirement as broad and permissive.64 The second requirement, that disposing of the action without the party would “as a practical matter impair or impede the movant’s ability to protect his interest,” eliminates the requirement that the third party be legally bound by the decision.65 In fact, the “stare decisis effect”66 of rulings is sufficient to meet the second requirement.67 Under the third requirement, the movant bears the burden of showing that “representation of his interest ‘may be’ inadequate” and the burden “should be treated as minimal.”68 Essentially, the movant must establish that his rights are not fully represented unless he intervenes in the motion for a consent decree.69 Intervention is required if the interests present are adverse to the party, or not represented at all, or are inadequately represented.70 If the interests are identical, the presumption is toward adequacy of representation and the movant bears the “minimal” burden of proof.71

There is also a timeliness requirement for intervention that is based on the circumstances. The court will consider how long “the intervenor knew or reasonably should have known of its

61 Id.
62 F.R.C.P. 24(a)(2).
64 CHARLES WRIGHT & ARTHUR MILLER, 7C FEDERAL PRACTICE AND PROCEDURE § 1908.1 (3d. 2012).
65 Id.
66 “The doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.” BLACK’S LAW DICTIONARY (9th ed. 2009).
67 Id. (citing Chiles v. Thornburgh, 865 F.2d 1197 (11th Cir. 1989), U.S. v. State of Or., 839 F.2d 635 (9th Cir. 1988), Oneida Indian Nation of Wisconsin v. State of N.Y., 732 F.2d 261 (2d Cir. 1984), and Corby Recreation, Inc. v. General Elec. Co., 581 F.2d 175 (8th Cir. 1978)).
69 WRIGHT & MILLER, supra note 62, § 1909 Adequacy of Representation.
70 Id.
71 Id.
interest before it moved to intervene; prejudice to the existing parties due to failure to move promptly; the prejudice the intervenor would suffer if not allowed to intervene; and the existence of unusual circumstances mitigating either for or against intervention.”

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

(1) On timely motion, the court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact.

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

(3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.

The main difference between F.R.C.P. 24(a) and (b) is that (b) allows the court to deny a motion to intervene if it would “unduly delay or prejudice the adjudication of the original parties’ rights.” This means the court can weigh in the fact that whenever an intervention is granted, it will necessarily cause additional delays to the parties. Thus, the court balances the requirement to provide a “just” and “speedy” determination against the fact that a proposed intervenor may not be able to find adequate justice elsewhere. For the most part, the “thrust of the amendment is in the direction of allowing intervention liberally to governmental agencies and officers seeking to speak for the public interest.”

F.R.C.P. Rules 19 and 21 provide another way parties not included in a dispute may be granted the right to participate in the litigation. Rule 19 defines a required party as (A) a party

72 WRIGHT & MILLER, supra note 62, § 1916 nn.19–24 (citing Culbreath v. Dukakis, 630 F.2d 15, 20 (1st Cir. 1980), and Stallworth v. Monsanto Co., 558 F.2d 257, 264–266 (5th Cir. 1977)).
73 F.R.C.P. 24(b).
74 WRIGHT & MILLER, supra note 62, § 1913.
75 Id.
76 WRIGHT & MILLER, supra note 62, § 1912.
that must be joined in order for the court to “accord complete relief among existing parties, or (B) a party whose ability to protect itself will be impaired or impeded if not joined or would be subject to multiple, inconsistent obligations.” If a party constitutes a required party, the court must order that the party be joined to the suit. Joinder may occur by motion or sua sponte by the court.

The Supreme Court has provided additional guidance to joinder beyond that in the rules. The Court explained that “the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.” Furthermore, a goal of the joinder rules is to aid in judicial administration and avoid duplicity of litigation.

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

---

77 F.R.C.P. 19(1)(A)–(B).
78 F.R.C.P. 19(B).
79 Without prompting or suggestion; on its own motion. BLACK'S LAW DICTIONARY (9th ed. 2009)
80 F.R.C.P. 21.
82 WRIGHT & MILLER, supra note 62, § 1602 (citing Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968)).
83 However, note that in at least one circumstance—hazard cleanup—states have the statutory right to intervene in consent decrees if they disagree with the remedial standard being imposed. 42 U.S.C.A. § 9621 (West) (“If the State does not concur in such selection, and the State desires to have the remedial action conform to such standard, requirement, criteria, or limitation, the State shall intervene in the action under section 9606 of this title before entry of the consent decree, to seek to have the remedial action so conform. Such intervention shall be a matter of right.”).
84 Note that there are valid arguments that suit-and-settlement violates a third party’s constitutional right to due process. See Douglas Laycock, Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties, 1987 U. CHI. LEGAL F. 103 (2012); Charles J. Cooper, The Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincers Movement on Due Process, 1987 U. CHI. LEGAL F. 155; but see Kramer, supra note 34, 324. Furthermore, there are potentially valid separation of power arguments that this sudden wave of consent decrees
All recommendations to provide third parties with broader rights to shape or block consent decrees—including lifting the collateral attack bar and legislatively lowering the burden for intervention of right—have been brushed aside for three reasons. First, consent decrees substantially lower dispute resolution costs because they provide the same benefits as settlement with a much less costly enforcement mechanism (filing contempt charges instead of breach of contract litigation). Second, if third parties are allowed to attack consent decrees after they have been entered, there will be no finality, and disputes could drag on indefinitely. And, third (which relates specifically to institutional reform consent decrees) whatever harms are attributed to consent decrees are allegedly overcome by the fact that third parties are protected by and can challenge, under the Administrative Procedure Act, rulemakings that result from consent decrees. The validity of this third recommendation will be discussed in Section IV.
D. Modification

Despite limited opportunity for third parties to impact a consent decree, parties to the decree can modify it under Rule 60 of the F.R.C.P.. The Supreme Court has imposed a specific modification standard for consent decrees that arise from institutional reform litigation. Institutional reform litigation includes cases where private parties sue government entities, seeking to have the government change its conduct or policy. Such litigation includes inmates suing a city on constitutional grounds to get better prison conditions, and private parties suing the EPA to force them to impose regulations by a certain date in order to comply with a statute. In Rufo v. Inmates of Suffolk County Jail, the Supreme Court set forth a two-part test for modifying a consent decree stemming from institutional reform litigation.

First, modification requires a substantial change in either the law or factual circumstances that make the modification necessary. This is established when “the decree proves to be unworkable because of unforeseen obstacles, or when enforcement of the decree without modification would be detrimental to the public interest.” However, a party cannot rely on a change that was foreseeable when the consent decree was entered. Second, the modification sought must be “suitably tailored” to resolve the new circumstances. Primarily, courts modify

---

92 Wright & Miller, supra note 62, § 2961 (citing Rufo, 502 U.S. at 383). In addition to the two-part test in Rufo, it is important to note that judges entering consent decrees retain jurisdiction to modify the decrees under certain circumstances. Barcia v. Sitkin, 367 F.3d 87, 94 (2d Cir. 2004) (“[T]he Consent Judgment stated that the District Court retained jurisdiction to, ‘among other things, entertain any motion or application involving any alleged violation of the consent judgment’s terms, entertain any application involving the interpretation or implementation of any provision of the consent judgment, or entertain such other motions or applications that may be made regarding the consent judgment.’”).
93 Wright & Miller, supra note 62, § 2961.
94 Id.
95 Id.
96 Id.
consent decrees when there are changes in the operative facts or when there has been a change in law.\textsuperscript{97} For example, in \textit{Small v. Hunt}, the original consent decree required a jail expansion in order to comply with the Constitution’s Eighth Amendment prohibiting cruel and unusual punishment.\textsuperscript{98} While a new jail was being constructed, inmate population increased more quickly than the state had anticipated, causing the demand for prison space to outpace the agreement in the consent decree.\textsuperscript{99} Given this change of fact and the suitably tailored modification, the motion for modification was granted.\textsuperscript{100}

More recently, in \textit{Horne v. Flores},\textsuperscript{101} the Supreme Court has again addressed the standard for modifying orders. The Court begins its analysis of Rule 60 by highlighting some of the concerns from consent decrees, including the fact that public officials may not vigorously defend institutional reform litigation and may allow decrees to go beyond federal law.\textsuperscript{102} The Court then emphasizes that modification should be a flexible standard—a concern deriving from the overbreadth of some consent decrees, including being beyond federal law.\textsuperscript{103} The lower court’s refusal to modify the decree was reversed for misapplying the standard.\textsuperscript{104} The main criticism was that the lower court failed to be adequately flexible when applying the standard.\textsuperscript{105}

\textsuperscript{97} Id.
\textsuperscript{98} Small v. Hunt, 98 F.3d 789, 792 (4th Cir. 1996).
\textsuperscript{99} Id. at 792–93.
\textsuperscript{100} Id. at 799.
\textsuperscript{101} 557 U.S. 433 (2009).
\textsuperscript{103} Id. at 450.
\textsuperscript{104} Id. at 469–70.
\textsuperscript{105} Id. at 455.
III. THE EFFECT OF SUE-AND-SETTLE ON ENVIRONMENTAL POLICY

Sue-and-settle arising from institutional reform litigation has become an important part of federal environmental policy. This section discusses how sue-and-settle consent decrees generally function in the environmental context and how apathetic government regulators approach consent decrees. Then this section provides five examples of the use of consent decrees in the environmental context.\(^{106}\)

A. General Application to the Environmental Context and Regulator Incentives

Congress or state legislatures pass environmental laws that include deadlines and quotas that must be met. Because of resource constraints, very few agencies are able to meet these standards by the date imposed.\(^{107}\) Thus, many agencies operate outside statutory limits by failing to meet deadlines.\(^{108}\) In 1991, the EPA met only 14% of the hundreds of congressional deadlines.\(^{109}\) These numbers have not changed in recent years.\(^{110}\) This opens up government agencies to legions of lawsuits from private parties seeking compliance.

---

\(^{106}\) Note that consent decrees also impact other aspects of natural resource law. For example, consent decrees have extended into the realm of the Endangered Species Act. Under the Act, the U.S. Fish and Wildlife Service (FWS) has specific listing requirements that it must meet whenever it receives a petition from citizens requesting that an animal be added to the list of endangered species. 16 U.S.C.A. § 1533 (2013). The Center for Biological Diversity and WildEarth Guardians sued the FWS for failing to meet requirements, and in May 2011, FWS entered into a consent decree with the Center for Biological Diversity and the WildEarth Guardians. Press Release, U.S. Fish and Wildlife Service, *Fish and Wildlife Service Strengthens Work Plan to Restore Biological Priorities and Certainty to Endangered Species Listing Process* (2010), https://us.vocuspr.com/Newsroom/Query.aspx?SiteName=fws&Entity=PRAsset&SF_PRAsset_PRAssetID_EQ=127722&XSL=PressRelease&Cache=True. Under the consent decree, FWS is required to expedite its review process and make announcements on some 250 species. *Id.* The impact of listing these species can be astronomical on industry, agriculture, and recreation because of the significant restrictions placed on the habitats of endangered species. Pat Parenteau & Dan Niedzwiecki, *Landmark Settlement Under the Endangered Species Act,* VERMONT LAW TOP 10 ENVIRONMENTAL WATCH LIST 2013, http://watchlist.vermontlaw.edu/esa-settlement/. As with the other environmental law--specific consent decrees, states and third parties were cut out of the decision-making process.

\(^{107}\) Schoenbrod, *supra* note 26, at 42.

\(^{108}\) *Id.*

In a typical case, an environmental advocacy group or other private entity sues a federal environmental agency, seeking an injunction to force the agency to comply with a specific interpretation of a statutory standard.\textsuperscript{111} The government frequently agrees to settle the case to avoid litigation costs. The terms of the settlement usually include new dates and new deadlines by which the agency will comply with the statutory standard. The court enters a consent decree and the agency is bound to act in order to avoid contempt charges. The agency reallocates resources, making the terms of the consent decree its priority. This, of course, means that other priorities are superseded by the new consent decree.\textsuperscript{112} In some circumstances, the consent decree can actually impose new substantive regulatory standards on an agency, not just the requirement to expedite.\textsuperscript{113} And the compliance costs imposed on private businesses can differ greatly across states depending on the geographic locations and industry mix.

Government agencies have substantial incentives to embrace sue-and-settle consent decrees and liberally accept whatever terms are imposed by the environmental interest groups without objection.\textsuperscript{114} These incentives derive from two sources. First, litigation is costly and time consuming for government agencies, so any opportunity to settle a case and avoid litigation will

\begin{flushleft}
\textsuperscript{10}Schoenbrod, \textit{supra} note 26, at 24.
\end{flushleft}

\begin{flushleft}
\textsuperscript{11}Percival, \textit{supra} note 24 (“These laws impose increasingly explicit duties on administrative agencies, and they authorize citizen suits against agency officials who fail to perform their statutory duties and against private parties who violate environmental regulations.”).
\end{flushleft}

\begin{flushleft}
\textsuperscript{12}Illinois v. Costle, 9 Envtl. L. Rep. (Envtl. L. Inst.) 20243 (D.D.C. 1979) (“The Court cannot and should not ignore the fact that not only does EPA have other responsibilities in the regulatory area, but that it is presently under exacting demands in other proceedings to accomplish its regulatory functions.”).
\end{flushleft}

\begin{flushleft}
\textsuperscript{13}Martella, \textit{supra} note 85, at 103 (explaining that consent decrees frequently include substantive provisions, including the New Source Performance Standards consent decrees with the EPA).
\end{flushleft}

\begin{flushleft}
\textsuperscript{14}Schoenbrod, \textit{supra} note 26, at 41 (“At both the politically-appointee level and the career level, the agency welcomed the suit rather than fight it.”).
\end{flushleft}
decrease the workload and help the agency stay within its litigation budget. Many times, “the hard work of managing consent decrees] often gets downstreamed to plaintiffs and federal district court judges who labor without advice from or the presence of the expert federal agency.” Agencies also avoid expending costly political capital when they enter consent decrees: traditional APA rulemaking results in publicity and public scrutiny, whereas consent decrees tend to receive much less attention, less public criticism, and less congressional oversight.

The second reason a government agency would accept sue-and-settle consent decrees is that it recognizes its tenure is limited and any policies or initiatives it works to obtain can be promptly overruled by a subsequent administration. Thus an agency has the incentive to enter sue-and-settle consent decrees that “dictate the policies of [its] successor.”

Professor (now Judge) Frank Easterbrook argues that liberal administrations will enter consent decrees with litigants that want more stringent standards and conservatives will enter consent decrees with the opposite. To be clear, both environmental activists and business groups have used sue-and-

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

116 SANDLER & SCHOFENBROD, supra note 105, at 135. For example, the Department of Education never made a court appearance regarding a consent decree litigation that “drove the special education programs in the largest school district in the country.” SANDLER & SCHOFENBROD, supra note 105, at 135 (citing Jose P. v. Ambach, No. 79 Civ. 270 (E.D.N.Y. Feb. 1979)). The Department of Education was not the defendant in the case, but the litigation was between private litigants and a state agency that was implementing the Department of Education’s regulations. Id. at 135–36.

117 Frank Easterbrook, Justice and Contract in Consent Judgments, 1987 U. CHI. L. FORUM 19, 33–34; See also Grossman, supra note 80, at 47 (“And as with consent decrees in institutional reform litigation, previous administrations have, in several instances, abused such consent decrees in an attempt to bind their successors and limit their policy discretion.”).

118 Easterbrook, supra note 113, at 33.
settle in the past. Regardless, political leaders of government agencies will use sue-and-settle to immortalize their mark on regulation—especially if their moment of direct influence is short lived.

B. Specific Application to the Environmental Context

This subsection provides specific examples of environmental consent decrees. This includes evidence that the defendant agencies lack incentives to litigate as an adverse party against the plaintiff environmental advocacy groups—opportunistically seeking settlements instead.

1. Toxics Consent Decree

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

It is possible to infer that the EPA welcomed or even encouraged the suit-and-settlement regarding the standards for toxic pollutants because the alternative was litigation, an easy victory  

119 CHAMBER 2013, supra note 5, at 14 (“[O]ur research found that business groups have also taken advantage of the sue and settle approach to influence the outcome of EPA action. While advocacy groups have used sue and settle much more often in recent years, both interest groups and industry have taken advantage of the tactic.”).
120 An agency’s apathy may be inferred by its specific conduct in handling consent decrees, including the consent decrees discussed in section III. The sheer numbers of consent decrees that agencies have entered into during the last three years alone implies some level of apathy. From 2009 to 2012, there have been 71 sue-and-settle lawsuits—a number that is higher than in any previous equivalent time period. CHAMBER 2013, supra note 5, at 12, 14. Defenders of Wildlife v. Perciasepe provides potential evidence of agency apathy. No. 12-5122, slip op. at 6 (D.C. Cir. Apr. 23, 2013). In this consent decree, although not dispositive of apathy, the agency and environmental advocacy group filed and moved for a consent decree on the same day the suit was filed. Id.
for the plaintiffs given the statutory requirements. Professor Schoenbrod goes so far as to describe the agreement as “[t]he plaintiffs and EPA [coming] up with a solution.”122 The consent decree significantly broadened the EPA’s authority and power.123 This action is also consistent with Easterbrook’s argument that agencies will seek to preserve their tenure of regulations and breadth of power.124

Thirty former EPA lawyers were asked what decision had the greatest impact on environmental regulation.125 Twenty-eight of the thirty said that it was the judge’s decision to enter the Toxics Consent Decree.126 This sue-and-settle continued to shape the EPA’s water policy under the CWA for over 35 years.127 It is exceptionally troubling because the EPA threw aside an existing federal statute and created new substantive standards without any congressional involvement. This rejects the notions of bicameralism and presentment that create the basis for legislative authority in the United States.128

2. Regional Haze Consent Decrees

The Clean Air Act contains provisions that are designed to improve the visibility in national parks and wilderness areas by decreasing pollution—a purely aesthetic goal unrelated to health.129 These provisions are called the Regional Haze provisions.130 One unique aspect of the

122 Schoenbrod, supra note 26, at 41.
124 Easterbrook, supra note 113.
126 Id.
127 Id.
128 U.S. CONST. art. I, § 7 cl. 2.
129 Mandate Madness: When Sue-and-Settle Just Isn’t Enough, Hearing Before the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform of the Committee on Oversight and
Regional Haze requirements is that states are responsible for establishing and setting the standards. 131 Both the EPA—in its own guidelines—and the courts have recognized that the states are the primary decision makers under these provisions. 132 The EPA retains the authority to veto a state plan for emission controls that was derived by a faulty process. This does not mean that the EPA is free to impose its own emissions standards to benefit visibility. 133

In 2009, several environmental advocacy groups, including the Sierra Club and National Parks Conservation Association, sued the EPA for failing to effectively govern the states’ emissions standards under the Regional Haze provisions. 134 Rather than litigate, the EPA settled and entered into five consent decrees for different national parks. The decrees required the EPA to review the state emissions standards by a certain date, and if the state’s process for determining its own standards was inadequate, then the EPA must implement its own emissions standards for the state. 135 Each of these decrees was entered without providing notice to the state. 136

After the consent decrees were entered, the EPA found very creative ways to reject the state implementation plans and then concluded that it was legally required by court order (the consent decrees) to establish its own federally implemented emissions standards. For example,

Government Reform of the House of Representatives, 112th Cong. 78 (June 28, 2012) (statement of William Yeatman, Competitive Enterprise Institute) [hereinafter Yeatman].

130 Id.

131 42 U.S.C. § 7491(b)(2)(A) (2012) (requiring that all standards are to be “determined by the State”). The statutory history and floor statements further establish that it is the state that is the primary actor under the Regional Haze provisions of the CAA. Yeatman, supra note 125, at 83 n.6, citing Congressional Record-1977-0804-26854.

132 Yeatman, supra note 125, at 78 (citing American Corn Growers v. EPA).

133 Id.

134 Id. at 79.

135 Id.

the EPA rejected New Mexico’s plan because New Mexico submitted its plan to the EPA only one month before the EPA had to either approve the state plan or impose its own standards under the consent decree.\textsuperscript{137} Thus, the consent decree imposed a deadline on the EPA, which it in turn used to reject a state plan for “process reasons” even though the state was not a party to the consent decree and was not bound to act under it.

In North Dakota, the EPA was even more inventive. North Dakota submitted its plan for approval six months in advance of the consent decree–imposed deadline, so the EPA could not claim that it had inadequate time to review the proposal.\textsuperscript{138} Instead, the EPA reasoned that it needed twelve months to determine whether a state plan was adequate under the CAA and that by the time the EPA is required to make its determination, the deadline would have passed so the EPA could reject the state plan and impose its own standards instead.\textsuperscript{139}

3. Florida Water Pollution Consent Decree

The goal of the Clean Water Act was to eliminate “the discharge of pollutants into the navigable waters” by 1985.\textsuperscript{140} The states held the primary responsibility for meeting these standards; if a state failed to meet the standards, the EPA could step in and establish new standards for the state.\textsuperscript{141} In 1998, after years of alleged failure, the EPA made a determination that Florida’s standards—non-numeric standards, called narrative standards—were inadequate and encouraged Florida to implement numeric standards by the end of 2003. Florida did not do

\textsuperscript{138} \textit{Id.} at 10 n.14.
\textsuperscript{139} 76 Fed. Reg. 58570-01.
\textsuperscript{140} 33 U.S.C. § 1251(a)(1).
\textsuperscript{141} \textit{Id.} § 1251(b), § 1313(c)(4).
this, and the Florida Wildlife Federation, the Sierra Club, and other plaintiffs sued the EPA administrator for failing to ensure that Florida imposed numeric standards. The authority to sue derived from the citizen suit provisions of the CWA. The plaintiffs argued that the 1998 determination imposed a nondiscretionary duty on the EPA. The EPA alleged, in its motion for summary judgment, that the 1998 statement was not a determination resulting in a nondiscretionary duty, consequently preventing the court’s jurisdiction. Thus, the principle issue of the litigation was whether the 1998 EPA statement imposed a nondiscretionary duty on the EPA.

However, the litigation took an interesting turn. In early 2009, the EPA issued a new and explicit determination that Florida’s pollution standards were deficient and had to be remedied through numeric standards (2009 Determination)—a determination that the EPA classified as a nondiscretionary duty to make certain Florida imposed numeric standards. Shortly thereafter, the EPA abandoned its argument that it was not bound by the 1998 statement, settled with the plaintiffs under the 2009 Determination in August, and moved for the entry of a consent decree. The terms of the consent decree required the EPA to propose and adopt new standards within ten months after the decree was entered. The consent decree did allow the state to create the standards so long as the state proposed standards within the consent decrees’ strict deadline and met the 2009 Determination’s numeric requirement. The consent order was

---

146 Id. at * 3.
147 Id.
148 Id.
entered absent state involvement and without regard to the intervenors’ attempts to object—a topic discussed at greater length in Section III. This agreement again shows that the EPA does not necessarily strongly oppose these institutional reform suits, and may even welcome them.

4. Green House Gas Consent Decree

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

The Federal District Court for the District of Columbia granted one industry group (Utility Air Regulatory Group) leave to intervene on the litigation, but the EPA and the plaintiffs settled the suit and moved for the entry of a consent decree without consulting the intervenor. The proposed consent decree required the EPA to enter a proposed rule setting emissions standards for power plants in less than a year and then to enter the final rule eight months after that. The intervenor objected to the proposed decree because it was not consulted on the consent decree and the proposed time frames were too short for the EPA to issue quality regulations. The court rejected both of these contentions and entered the consent decree. After the proposed rule was issued and over 20,000 parties issued comments on the proposed

---

149 Id. at * 6; Ross, supra note 16, at 96–97.
150 Grossman, supra note 80, at 56–58.
152 Id.
153 Grossman, supra note 80, at 56.
155 Id.
rule, the intervenor filed a motion to modify the consent decree pursuant to Rule 60(b)(5).\textsuperscript{156} Twenty-five states and the Territory of Guam filed a brief supporting the intervenor’s motion to modify the decree.\textsuperscript{157} The court has still not ruled on the motion, but the EPA proceeded anyway and issued a final rule in December 2011.\textsuperscript{158}

Throughout the litigation of the case, the EPA’s position seemed to be aligned with the plaintiffs’ and completely opposed to the intervenor’s. This is evident from the parties’ refusal to include the intervenor in the settlement discussion—in fact, there was no consultation with the intervenor until the parties had filed their motion to enter the settlement as a consent decree.\textsuperscript{159} The plaintiffs and the EPA went to great lengths to argue that the intervenor had no right to participate in the consent decree, an argument that was ultimately successful before the D.C. District Court.\textsuperscript{160} Furthermore, the EPA entered into an agreement that imposed an onerous burden on itself to propose and finalize rules at a record pace, regardless of the likelihood of error\textsuperscript{161} and the costs required to complete the action—again supporting Easterbrook’s theory that agencies seek to preserve their regulations.\textsuperscript{162}

\textsuperscript{156} Defendant-Intervenor Utility Air Regulatory Group’s Motion for Equitable Relief from Judgment or Order Pursuant to Fed. R. Civ. P. 60(b)(5), Am. Nurses Ass’n v. Jackson, CIV.A. 08-2198 (RMC), 2010 WL 1506913 (D.D.C. Apr. 15, 2010).
\textsuperscript{157} Brief of the states of Michigan, Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Commonwealth of Kentucky, Louisiana, Mississippi, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Commonwealth of Virginia, West Virginia, and Wyoming, Terry E. Branstad, Governor of the State of Iowa, on behalf of the people of Iowa, and the Territory of Guam as amici curiae in support of Defendant-Intervenor Utility Air Regulatory Group’s Motion for Equitable Relief from Judgment or Order Pursuant to Fed. R. Civ. P. 60(b)(5), Am. Nurses Ass’n v. Jackson, CIV.A. 08-2198 (RMC), 2010 WL 1506913 (D.D.C. Apr. 15, 2010) [hereinafter State Brief to Modify Am. Nurses Ass’n v. Jackson].
\textsuperscript{158} Grossman, supra note 80, at 58. Professor Schoenbrod argues that this sort of delay is unfortunately common.\textsuperscript{159} Am. Nurses Ass’n v. Jackson, CIV.A. 08-2198 (RMC), 2010 WL 1506913 (D.D.C. Apr. 15, 2010).
\textsuperscript{160} Id.
\textsuperscript{161} As will be discussed in the next section, when agencies hastily enter consent decrees imposing onerous time restraints, the outcome is typically low-quality regulations. \textit{See}, \textit{e.g.}, Defendant-Intervenor Utility Air Regulatory Group’s Motion for Equitable Relief from Judgment or Order Pursuant to Fed. R. Civ. P. 60(b)(5) at 11–12, Am. Nurses Ass’n v. Jackson, CIV.A. 08-2198 (RMC), 2010 WL 1506913 (D.D.C. Apr. 15, 2010).
\textsuperscript{162} Easterbrook, supra note 113, at 33–34.
EME Homer City Generation, L.P. v. E.P.A. highlights recent EPA action that may substantially change the landscape of cooperative federalism. This case stems from the “good neighbor” provision of the CAA. Under the good neighbor provision, states are required to implement their own plans to prevent excessive intrastate pollution from crossing state lines. In this circumstance, the EPA issued the new emission standard under the provision and simultaneously issued its FIP without providing the states their statutory right to first attempt to implement their own plans to meet the new standards. The D.C. Circuit found that this was contrary to statute and vacated the FIPs (and vacated the new standards on other grounds). The EPA appealed, and the case is scheduled to be argued during the Supreme Court’s October term of court. Though potentially drastic, the full impact of the EPA’s practice is not the purpose of this paper; thus, this section only discusses how the disposition of this case may impact consent decrees.

The disposition of Homer City may substantially alter the use of consent decrees. If the Supreme Court agrees with the D.C. Circuit that the EPA may not issue an FIP before providing states the opportunity to implement a plan, then the impact will be minimal. However, if the Supreme Court allows the EPA to issue FIPs before giving states their own opportunity, there will be a substantial change in the consent decree landscape.

---

163 696 F.3d 7 (D.C. Cir. 2012) cert. granted in part, 133 S. Ct. 2857 (U.S. 2013) and cert. granted in part, 133 S. Ct. 2857 (U.S. 2013).
164 Id. at 11.
165 Id.; see also 42 U.S.C. §§ 7407(a), 7410(a)(1).
166 Id. at 11–12. There were other issues decided by the D.C. Circuit that are also being reviewed by the Supreme Court, but the other issues are not important to the impact on consent decrees.
167 Id. at 28, 38.
Allowing FIPs before states have the opportunity to implement their own plans broadens the scope of permissible consent decrees and increases the likelihood of abuse. Suppose an advocacy group is disconcerted by the permissible levels of pollution. The advocacy group sues the EPA for failing to meet standards. Under the current law, the advocacy group could get the EPA to agree to set new standards on a truncated time frame or even get new standards set. Then the states would be charged with entering the standards derived from the decree. If the state fails to implement the plan, the advocacy group cannot sue the EPA to enter a FIP until the state has adequate time under the relevant statute (usually three years) to implement its own plan.

Contrast this time line with what would occur if the D.C. Circuit is reversed in Homer City. The terms of a consent decree could require the EPA to enter a new standard and simultaneously establish an FIP—never giving the states an opportunity to implement the new standard. Thus, instead of a state just having its ability to impact standards diminished by consent decrees, states would also be shut out from their statutory right to implement standards. This scenario does rely on the assumption that the EPA would enter a decree that eliminates the opportunity for states to implement standards. But this assumption is certainly plausible, given that the EPA has already done this in Homer City without the added incentive of ending litigation and appeasing an advocacy group. The Supreme Court should grapple with Homer City’s impact on consent decrees when deciding this case.

The cases discussed in this section illustrate the potential sea change in administrative law and environmental policy should the trend on sue-and-settle be allowed to continue. Indeed,

---

169 E.g., id.
it is reasonable to conclude that all cooperation will be removed from the concept of cooperative federalism should the trend continue.

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

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

A. Federalism Can Improve Environmental Policy

A centralized approach to environmental policy was favored by many environmentalists in the early years of the federal environmental law. One reason for this was a concern that the states would engage in a “race to the bottom” of environmental quality. However, growing dissatisfaction with the centralized command-and-control policies eventually caused some

---

170 Supra note 80.
171 The reason for brevity here is that others have fully elaborated and argued this issue. See Henry N. Butler & Jonathan R. Macey, Using Federalism to Improve Environmental Policy (1993); Butler & Macey, supra note 19, 25; Jonathan H. Adler, Jurisdictional Mismatch in Environmental Federalism, 14 N.Y.U. ENVTL. L.J. 130 (2006); Adler, supra note 4; see also Henry N. Butler, A Defense of Common Law Environmentalism: The Discovery of Better Environmental Policy, 58 CASE W. RES. L. REV. 705 (2008).
scholars to question the reliance on top-down regulation. Eventually, scholars began to recognize that federalism could be used to improve the environmental policy. Strong federalism in the environmental context promotes superior environmental policy because it prompts what economists call the matching principle. The matching principle states that “the size of the geographic area affected by a specific pollution source should determine the appropriate governmental level for responding to the pollution.” This implies that whenever pollution or the effects of pollution is limited to a single state, there is little if any justification for federal regulation. This also implies that the more authority states are given to determine policy environmental policy when the pollution is solely intrastate, the better the environmental policy.

Applying the matching principle can improve environmental policy in three ways. First, it allows each state to experiment with different ways of regulating pollution. This dynamic process allows the states to adopt effective policies and quickly amend or reverse ineffective policies. Second, decentralized decision making can be more efficient than a centralized environmental policy, which prompts lobbying and environmental advocacy groups to dominate policy making that ignores economic consequences at the state and local levels. Third, application of the matching principle can create jurisdictional competition—resulting in higher-quality regulation.

---

173 Esty, supra note 18, 592 (tailoring policies to local needs and desires reduces abilities to protect property rights and to limit transjurisdictional pollution to an efficient level); see also Richard L. Revesz, Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation, 67 N.Y.U. L. REV. 1210 (1992); Butler & Macey, supra note 19.
174 Butler & Macey, supra note 19, at 25.
175 Id.
176 Id. at 28.
177 Id.
178 Id. at 31.
The current structure of U.S. environmental law does not follow the matching principle. Many federal programs are contrary to these principles, including the CAA, CWA, and CERCLA. This aside, the U.S. framework for environmental regulation does exhibit some matching principle elements. In particular, the statutory schemes for the various environmental laws frequently give states authority for regulation ranging from “primary enforcement responsibility” to authority with federal approval. Regardless of the level of authority, federal review is usually required before federal funding is provided. The CWA, CAA, CERCLA, and others expressly require that states be involved in the regulatory policy. As one example, the CAA requires the state to establish a state implementation plan to address air pollution and limits the EPA’s enforcement authority to circumstances when the state has violated the CAA and then has not remedied the violation in an adequate time frame with a new state plan. Furthermore, states enjoy an indirect role in federal notice-and-comment rulemakings, where they can provide influential guidance for regulators. This guidance is given when a state submits comments to federal regulators regarding rules that will impact the state.

179 See Butler & Macey, supra note 19, at 27 (“We conclude that, in every area of pollution, environmental regulation has been centralized beyond any possible justification, resulting in tremendous costs.”).
180 Id. at 54–65 (explaining that the matching principle and principles of federalism are violated by the federal government’s approach to air, water, and land pollution).
182 Id.
183 E.g., 42 U.S.C. § 9628 (2012) (providing that under CERCLA, state response programs are entitled to federal funding and support so long as they meet the requirement of certain elements set forth in the statute); 42 U.S.C. § 9621(f) (2012) (providing an entire section on the lengths and means of state involvement); 33 U.S.C. § 1296 (2012) (Under the CWA, “the determination of the priority to be given each category of projects . . . within each State shall be made solely by that State, except that if the Administrator, after a public hearing, determines that a specific project will not result in compliance with the enforceable requirements of this chapter, such project shall be removed from the State’s priority list and such State shall submit a revised priority list.”).
184 42 U.S.C. § 7410(a)(1) (2012); 42 U.S.C. § 7401(b)(3) (“The purpose[] of [The CAA is] . . . to provide technical and financial assistance to State and Local Governments in the connection with the Development and execution of their air pollution prevention and control programs.”).
B. Sue-and-Settle Undermines the Principles of Federalism That Currently Exist in the United States

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

1. Sue-and-Settle Diminishes the States’ Granted Role in Setting Environmental Standards and Regulations

The procedure by which FIPs supplement state implementation plans by sue-and-settle consent decrees is described in the introduction. Recall that advocacy groups sue the EPA or others when the state misses statutory deadlines or when the EPA itself allegedly fails to meet statutory requirements. The resulting settlement and consent decrees require the agency to enter FIPs if a state fails to meet the time frame or even the standards set in the consent decree. This result occurs in each of the consent decrees discussed in Section III; however, it is especially troubling in the Regional Haze consent decrees.

In the five Regional Haze consent decrees, recall that the EPA settled suits with environmental advocacy groups that imposed a new deadline for the states to present their new

---

185 See Cruden, supra note 46, at 69–72.
186 Supra notes 5 and 6.
emissions standards. However, the Regional Haze provisions of the CAA give states primary authority over setting standards with the sole goal of improving aesthetics. The EPA was only allowed to implement an FIP if the state implementation plan failed to “satisfy minimum criteria,” which are set by the EPA Administrator and essentially require a demonstration of adequate process in the state’s proposal. After the consent decrees, the EPA reasoned that failure to provide the EPA adequate time to review the state plan before the deadlines constituted insufficient process; then the EPA issued FIPs, contravening § 7491 of the CAA.

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

Sue-and-settle is also used to prevent states from participating in the rulemaking process established by the APA. Normally, whenever the EPA chooses to implement a new or amended standard, rule, or deadline, it must proceed through notice-and-comment rulemaking. However, through sue-and-settle consent decrees, the EPA is able to implement new, legally binding rules and deadlines with the force of law. Sometimes, consent decrees are able to impose new deadlines that force the EPA to issue new rules on a truncated time scale, which it would not have have done so quickly—if at all. The state benefits from the normal notice-and-comment rulemaking because it may submit comments, and the EPA must address the state’s concerns by either implementing the proposed changes or explaining why they are not using them. If the

---

190 Id.
191 Id.
EPA proceeds without adequately addressing the comments, the states may sue the EPA under § 706 of the APA because the EPA acted arbitrarily and capriciously.\textsuperscript{192}

The Toxics Consent Decree provides an excellent example of how sue-and-settle has removed the states’ right to participate in standard-setting under the APA. Recall that in the original sue-and-settle consent decree, the environmental advocacy groups and the EPA agreed to set standards for toxic pollutants based on “feasibility” instead of “fully protected public health,” a standard that the EPA found too onerous to meet.\textsuperscript{193} Not only did the consent decree change the statute, it also changed the standard on which the states could have commented if it had proceeded to rulemaking.\textsuperscript{194} The decree limited the grounds on which the states could change a final rule in court. Challengers now had to show that the EPA was arbitrary and capricious in meeting the “feasibility” standard instead of arbitrary and capricious in meeting the “fully protected public health” standard.

The American Nurses Association and EPA settlement provides an example where a sue-and-settle consent decree was used to impose unrealistic deadlines that indirectly harmed the states’ interest in participating in federal rulemaking. Recall that the consent decree required the EPA to propose new rules for greenhouse gas emissions in less than a year and then to finalize the rule in less than eight months after that. States were not directly cut out of the notice-and-comment rulemaking because the EPA still went through the rulemaking process. However, the

\textsuperscript{192} 5 U.S.C. § 706
\textsuperscript{193} Schoenbrod, supra note 26, at 41.
\textsuperscript{194} A similar situation occurred in the Greenhouse Gases Performance Standards consent decree that derived from Massachusetts v. EPA. Martella, supra note 85, at 28; 549 U.S. 497 (2007) (citing Massachusetts v. E.P.A., 549 U.S. 497 (2007) (holding that an agency’s refusal to institute a rulemaking proceeding regarding tailpipe emissions was reviewable and remanding to the EPA to reconsider standards)). The resulting consent decree imposed a schedule for creating new regulations and imposed a requirement for the EPA to enter into its “first ever New Source Performance Standards for greenhouse gases.” Settlement Agreement between EPA and Sierra Club (2010), http://www.epa.gov/airquality/cps/pdfs/boilerghgsettlement.pdf; Martella, supra note 85, at 28. The decision to impose the standards on both new and existing greenhouse gas emitters constitutes a substantive decision that normally could not have been made absent notice-and-comment rulemaking. Martella, supra note 85, at 28.
truncated time frame resulted in each comment receiving less consideration than it normally would. The EPA received over 20,000 comments for the rulemaking, 500 of which were technical in nature. It was impossible for the EPA to get through all the comments, give the states’ comments appropriate weight, and implement a high-quality rule. In fact, the proposed and final rules were full of errors that so concerned the Federal Energy Regulatory Commission and twenty-five states that they sought to correct the errors after a final rule was imposed.

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

(a) Allowing Comments Is Ineffective

Allowing comments on a sue-and-settle consent decree is not an adequate substitute for normal notice-and-comment rulemaking. First and foremost, when the EPA—and likely others—receives public comments on proposed decrees, the EPA “rarely alters the consent agreement—

195 Grossman, supra note 80, at 56.
196 Grossman, supra note 80, at 57–58.
197 See Cruden, supra note 62, at 69–72.
even after it receives adverse comments.” The biggest difference between commenting on a consent decree and commenting on a proposed rule is that interested parties can sue the EPA if relevant comments are ignored on a final rulemaking under the APA, but they cannot sue the EPA if it ignores comments on a proposed consent decree. Thus, there is no check on the EPA and no penalty for completely ignoring comments regarding a proposed consent decree.

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

---

198 CHAMBER 2013, supra note 5, at 24.
199 A potential example of this would be the Toxics Consent Decree, where the terms of the decree itself set new standards. Natural Resources Defense Council v. Train, 6 ELR 20588 (D.D.C. June 9, 1976). Though this was actually usurping statutory language and not just the rulemaking process, it is feasible that the same could be done to eliminate the rulemaking process. At a minimum, some of the consent decrees can truncate the rulemaking to the extent that rulemaking is ineffective. Defendant-Intervenor Utility Air Regulatory Group’s Motion for Equitable Relief from Judgment or Order Pursuant to Fed. R. Civ. P. 60(b)(5) 11–12, Am. Nurses Ass’n v. Jackson, CIV.A. 08-2198 (RMC), 2010 WL 1506913 (D.D.C. Apr. 15, 2010), http://op.bna.com/env/nsf/id/jsml-8mjnu9/$File/utilmact.uarg.pdf.
200 28 C.F.R. § 50.7(b).
202 The nine steps are initiating events, determining whether a rule is needed, preparing the proposed rule, obtaining Office of Management and Budget (OMB) approval, publishing the proposal, receiving public comments, preparing the final rule, receiving OMB review of the final rule, and publishing the rule. Id.
203 Id.; Connecticut Light & Power Co. v. Nuclear Regulatory Comm’n, 673 F.2d 525, 533 (D.C. Cir. 1982) (“An agency adopting final rules that differ from its proposed rules is required to renotice when the changes are so major that the original notice did not adequately frame the subjects for discussion.”)

39
the Office of Management and Budget must approve the rule, and then it is published. Consequently, the thought and effort an agency puts into comments received for a rulemaking is not even remotely comparable to the effort it puts into comments received for proposed consent decrees. It is no wonder that agencies prefer a regime where they can simply ignore comments.

(b) State Intervention Is Thwarted

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

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

Furthermore, judges and existing parties have an interest in preventing intervenors from joining the suit. Judges are likely to deny motions to intervene because an intervenor signifies a large obstacle to a case that was about to settle and be removed from the judge’s already overcrowded docket. Parties attempting to intervene and block consent decrees are likely able to satisfy the three elements imposed by Rule 24. However, the overarching requirement of timeliness is a difficult obstacle for these intervenors to overcome, especially for skeptical judges. For suits between federal agencies and environmental advocacy groups, the federal government does not

---

205 SANDLER & SCHOENBROD, supra note 105, at 133 (citing Cooper, supra note 80, at 156 n.4 and Harris v. Reeves, 946 F.2d 214 (3d Cir. 1991)).
206 SANDLER & SCHOENBROD, supra note 105, at 133.
207 See id. at 134.
208 Supra notes 58–60 and accompanying text.
publish notice of the suit in the Federal Register until it has already settled the case and is moving to have the settlement entered as a consent decree. 209 At this point, the case is likely very mature, having gone through discovery and other onerous litigation processes, 210 and a court is likely to deny the motion to intervene because it would prejudice the other parties that had already undergone costly tasks. 211 On the other hand, as mentioned in the introduction, simultaneous filing and settlement suggests the possibility of collusion between the ostensible adversaries and raises serious concerns about the existence of a real case or controversy.

Even when the right to intervene is granted, a court is not likely to be sympathetic to a state intervenor seeking to block a consent decree. In American Nurses Association v. Jackson, recall that the court had allowed one party to intervene in the action but then rejected all its attempts to modify the settlement and entered the consent decree. 212 The court dismissed the intervenor’s motion without really considering the validity of the argument, citing the Supreme Court’s holding that “an intervenor is entitled to . . . have its objections heard at the hearings on whether to approve a consent decree, [but] it does not have power to block the decree merely by withholding its consent.” 213

---

209 Supra note 47.
210 SANDLER & SCHOPENBROD, supra note 105, at 134.
211 WRIGHT & MILLER, supra note 62, at § 1916 nn.19–24 (citing Culbreath v. Dukakis, 630 F.2d 15, 20 (1st Cir. 1980), and Stallworth v. Monsanto Co., 558 F.2d 257, 264–266 (5th Cir. 1977). Also note that for many of these same reasons, the existing parties to the suit will be as adamantly opposed to allowing a party to intervene. Existing parties have borne the costs of litigation and settlement and are ready to conclude the case; an intervenor is an obstacle to that goal.
212 CIV. A. 08-2198 (RMC), 2010 WL 1506913 (D.D.C. Apr. 15, 2010).
213 Id. at * 2 (citing Local Number 93, International Association of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland, 478 U.S. 501, 528 (1986)). See also Florida Wildlife Fed’n, Inc. v. Johnson, 72 Fed. R. Serv. 3d 917 (N.D. Fla. 2009), where the court granted permissive intervention in an action between an environmental interest group and the EPA only to completely disregard the intervenors in the order that entered the consent decree. Florida Wildlife Fed’n, Inc. v. Jackson, 4:08CV324-RHWCS, 2009 WL 5217062 (N.D. Fla. Dec. 30, 2009).
(c) Modification Is Not a Serious Option

States seeking to modify a consent decree under Rule 60(b) face severe obstacles. First, a state must be a party to the suit in order to move to modify a consent decree. This will only occur if the party is granted the right to intervene, which, as mentioned, is difficult and unlikely. As an alternative, some states have tried to file amicus briefs supporting modification of an institutional reform consent decree, as in American Nurses Association v. Jackson. Though the court has not ruled on this motion in the eighteen months since its filing, it is still seen as unsuccessful because the EPA’s final rules derived from the consent decree have been in place and affecting these states for nearly fifteen months.

Second, even if a state is granted the right to intervene, it will be unable to modify a consent decree unless the decree is unworkable due to unforeseen circumstances and the modification sought is “suitably tailored” to resolve the new circumstances. Showing that a consent decree is unworkable is possible, but demonstrating that it is unworkable due to unforeseen circumstances is a difficult obstacle to overcome. Claiming that the time frames are burdensome is unlikely to meet this requirement because the agency entering the agreement should, if anyone, know whether a consent decree is too onerous, thus defeating the foreseeability prong. Furthermore, merely alleging that a new policy is superior is unlikely to work. Thus, modification a consent decree cannot be seen as a substitute for what normally

---

214 Grossman, supra note 80, at 49 (“Based on this assumption, courts typically require a strong showing of changed circumstances to justify revision of a consent decree. They also typically disfavor challenges by third parties. The result is that the public’s rights and interests may go unrepresented in legal proceedings that incorrectly assume an adversarial posture and only minor externalities.”).
215 State Brief to Modify Am. Nurses Ass’n v. Jackson, supra note 129.
216 See Schoenbrod, supra note 26, at 38 (explaining that a motion to modify “is a time consuming process”).
217 WRIGHT & MILLER, supra note 62, § 2961 (citing Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 383 (1992)).
218 Schoenbrod, supra note 26, at 37 (explaining that under Rufo, modification is unlikely on the theory that “new policy is thought to be better policy”).
occurs under notice-and-comment rulemaking when there has not been a consent decree—leaving challenging the final rulemaking as the only viable option for third parties seeking to protect their interest, a similarly problematic outcome.

(d) State Challenges in Federal Court Are Not Adequate

States are not provided an adequate substitute from the defects of consent decrees merely because they can challenge a final rulemaking that resulted from a consent decree under the APA. First, sometimes consent decrees themselves impose new standards, and these standards are completely unalterable under the APA. Second, a burdensome, arbitrary, and capricious standard coupled with Chevron deference for rulemakings blocks any reasonable expectation that the states will be able to successfully challenge a regulation after it has been implemented. As rationale or justification for any agency action, the agency can always allege that it was merely acting under court order. Furthermore, full litigation is much more costly than participating in normal notice-and-comment rulemaking. A more costly and likely ineffective suit under the APA is not an adequate substitute for notice-and-comment rulemaking.

Third, subsequent challenges of rules after a consent decree contravene the purposes and benefits of the APA. A consent decree sets the limits and bounds of permissible rules and thereby limits the field of possibilities for final rules to something much narrower than Congress

220 William L. Kovacs, EPA’s New Regulatory Front: Regional Haze and the Takeover of State Programs, U.S. Chamber of Commerce (2012), available at http://www.uschamber.com/sites/default/files/reports/1207_ETRA_HazeReport_lr.pdf (“[Challenging a rulemaking in court] is of little value, though, since the court typically gives great deference to the agency’s decision and upholds it unless the party challenging can establish that the agency’s action was arbitrary and capricious, a very difficult standard to meet.”).
221 Id.
intended.\textsuperscript{222} In other words, even though the APA provides a way to challenge the result of a consent decree, the challenge is limited by the confines of the decree.\textsuperscript{223} This is problematic because consent decrees are secret rulemakings, contrary to the APA’s goal of creating transparent agency action.\textsuperscript{224} Instead of crafting a rule based on communications with many stakeholders, agencies craft rules based on the needs and requests of a single party.\textsuperscript{225} Substituting the APA’s procedure for something done in secret behind closed doors cannot be justified merely because an APA review can be conducted way down the road for a by-product of a secretive action that contravenes the APA.\textsuperscript{226}

\textbf{C. Direct Impact of Leaving States Out: Low-Quality and Harmful Regulations}

As discussed above, the matching principle identifies circumstances where strong state or local involvement is likely to improve environmental policy. Even though U.S. environmental policy is not a model of the matching principle, it still provides for state involvement in a number of regulatory schemes, most of which are consistent with the matching principle. Unfortunately, the use of sue-and-settle has diminished both the states’ involvement in statutorily created roles and the states’ right to participate in notice-and-comment rulemaking. These consent decrees have not just caused theoretical harm to state involvement; they have actually resulted in real

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{222} CHAMBER 2013, supra note 5, at 25 (“In effect, the ‘cement’ of the agency action is set and has already hardened by the time the rule is proposed, and it is very difficult to change it. Once an agency proposes a regulation, the agency is restricted in how much it can change the rule before it becomes final.”).
\item \textsuperscript{223} Id.
\item \textsuperscript{224} Id. at 6.
\item \textsuperscript{225} Id. at 25.
\item \textsuperscript{226} Id. Furthermore, note that final agency rulemakings are entitled to \textit{Chevron} deference. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). Under \textit{Chevron}, if Congress leaves an issue silent or ambiguous, then the agency’s definition is granted deference and all the court does is determine if the agency’s interpretation is permissible, even if the court disagrees with the interpretation. \textit{Id.} A final rulemaking, even if derived from a consent decree, regarding an ambiguous statutory term will likely receive \textit{Chevron} deference. However, an agency will not be entitled to this deference in court when an intervenor disputes a proposed consent decree.
\end{itemize}
\end{footnotesize}
harm to society. The vitality of the matching principle is affirmed by the harms caused to society when it is not followed. The actual societal harm is illustrated by three sue-and-settle consent decrees: the Florida water pollution consent decree, the American Nurses Association consent decree, and the Regional Haze consent decree as applied in Arizona.

The Florida water pollution decree required the state to implement numeric standards in an extremely short time period or else be forced to accept federal regulations. Not only did this requirement usurp statutory delegation to the state and hamper the state’s right to participate in notice-and-comment rulemaking, it resulted in bad policy that financially harmed Florida and its citizens. The new consent decree’s requirements are estimated to cost the state 14,000 jobs.\footnote{Ross, supra note 16, at 96.} It is also estimated that the decree will cost municipal wastewater plants $21 billion dollars—an onerous burden for a state to bear.\footnote{Id.} Furthermore, it is estimated that compliance over the next thirty years will cost somewhere between $3.1 billion and $8.4 billion.\footnote{Id.} These costs are substantial, given that before the consent decree Florida had already implemented its own plan that was arguably resolving the problem.\footnote{See id. at 96–97.}

The American Nurses Association consent decree resulted in regulation flaws. The rushed proposed rule arising from the consent decree had many errors.\footnote{Grossman, supra note 80, at 57.} More specifically, the court ignored evidence that an emission standard was off by a factor of 1,000—setting the pollution limit so low that monitoring equipment did not detect it.\footnote{Id.; Defendant-Intervenor Utility Air Regulatory Group’s Motion for Equitable Relief from Judgment or Order Pursuant to Fed. R. Civ. P. 60(b)(5) 11–12, Am. Nurses Ass’n v. Jackson, CIV.A. 08-2198 (RMC), 2010 WL 1506913 (D.D.C. Apr. 15, 2010), http://op.bna.com/env.nsf/id/jsml-8mjnu9/$File/utilmact.uarg.pdf [hereinafter UARG’s Motion for Equitable Relief].} When this error was pointed...
out to the EPA, it admitted the mistake but refused to propose a new rule to correct the error.\textsuperscript{233} The intervenor also explained that the EPA had failed to disclose what it relied on to create its standards.\textsuperscript{234} Furthermore, the EPA failed to consider the impact on “electric reliability” as required by the Federal Power Act.\textsuperscript{235} It is estimated that this failure under the Federal Power Act would result in power plant shutdowns that would threaten electric reliability.\textsuperscript{236} All these harms are the likely by-product of the overly restrictive time frame imposed by the consent decree.

More specific harm to states resulted from the Regional Haze consent decrees as implemented in Arizona. Under the EPA’s consent decree with the National Parks Conservation Association,\textsuperscript{237} the Navajo Generating Station is being forced to invest $1.1 billion in emission control equipment.\textsuperscript{238} This investment is estimated to cost hundreds of jobs for Navajos and members of other tribes.\textsuperscript{239} These new regulations imposed by the consent decree are also likely to increase energy prices in Arizona by 20%.\textsuperscript{240} Unfortunately, the harms in Arizona are analogous to the harms other states suffer under the Regional Haze consent decrees and it is possible that these societal harms could spread throughout the nation.\textsuperscript{241}

The societal harms from each of these consent decrees indicate that harm derived from consent decrees goes beyond a mere decrease in state involvement in environmental policy. It

\textsuperscript{233} UARG’s Motion for Equitable Relief, \textit{supra} note 229, at 12.
\textsuperscript{234} \textit{Id.} at 14.
\textsuperscript{235} \textit{Id.}
\textsuperscript{236} \textit{Id.} (citing FERC, Office of Electric Reliability, \textit{Potential Retirement of Coal Fired Generation and Its Effects on System Reliability}, Oct 27, 2010 and NERC, \textit{2011 Long-Term Reliability Assessment} 73, 76 (2011)).
\textsuperscript{237} National Parks Conservation Ass’n v. Jackson, Civil Action No. 1: 11-cv-01548 (D.D.C. Dec. 2, 2011)
\textsuperscript{238} Quayle, \textit{supra} note 16, at 89.
\textsuperscript{239} \textit{Id.;} Ironically, Cruden, \textit{supra} note 62, at 77, argues that that consent decrees protect Native Americans.
\textsuperscript{240} Quayle, \textit{supra} note 16, at 89.
\textsuperscript{241} Yeatman, \textit{supra} note 125, at 4 (“Already, EPA has used [the five consent decrees] to impose almost $375 million in annual costs on six coal-fired power plants in New Mexico, Oklahoma, and North Dakota. It has similarly proposed $24 million in annual costs on a coal-fired power plant in Nebraska. Unfortunately, the agency is only getting started. In the near term, EPA is poised to act in Wyoming, Minnesota, Arizona, Utah, and Arkansas. Its real goal is to impose another costly regulation on electric utilities and force them to shut down their coal-fired generating units. Ultimately, all states could be subject to EPA’s Regional Haze power grab.”)
shows that any action that moves environmental policy further from the ideals of the matching principle will harm society—which is exactly what has happened because of these consent decrees.

V. PROPOSED SOLUTIONS

The solution to the sue-and-settle consent decree problem must involve policy trade-offs because consent decrees are generally “valuable settlement tools that promote expeditious resolution of cases, save transaction costs for all parties and the court, and achieve finality while protecting the parties to the agreement.”

The policy challenge arises in those circumstances where third parties, including states, are harmed. The goal is to keep the benefits of consent decrees while decreasing the costs imposed on other parties. Two relatively minor changes in approach could ameliorate this problem. First, judges need to more diligently monitor sue-and-settle consent decrees. Second, the Federal Judicial Conference should make recommendations to the Supreme Court to modify the intervention standards to make it significantly easier for states to intervene.

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

Judges must refrain from adopting a blind presumption that consent decrees result in efficient dispute resolutions when it comes to institutional reform litigation. Rather, judges should pause a moment on each of the consent decrees in this rather narrow subset and determine whether the decree truly comports with their views about how an adversarial process is supposed

---

242 Cruden, supra note 62, at 79.
to function. In cases such as *Defenders of Wildlife v. Perciasepe*, where the parties to the suit move for the consent decree to be entered the same day as the suit is filed and in a 2009 EPA settlement regarding Florida water pollution, a diligent judge should at least consider that something may be awry.

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

A judge that diligently applies the case or controversy requirement to institutional reform consent decrees will remedy a substantial amount of the problems discussed in this paper. If the case or controversy standard had been applied to the *Perciasepe* case, a judge could have found the dispute nonjusticiable. When two parties come before a court to file a suit and move for a consent decree on the same day, it is questionable whether the parties have “adverse legal interests.” Judges should be particularly wary when the effect of the prepackaged deal is to shut out states and other potential interested parties.

Furthermore, in the 2009 EPA settlement regarding Florida water pollution, a court similarly should have been able to determine that the EPA was not adverse to the plaintiffs. After

---

243 No. 12-5122, slip op. at 6 (D.C. Cir. Apr. 23, 2013).
244 *Wright & Miller, supra* note 62, § 3529 Justiciability.
245 *Wright & Miller, supra* note 62, § 3529 Justiciability.
247 *Wright & Miller, supra* note 62, § 3529 Justiciability.
defending the case on lack of jurisdiction, the EPA issued a new policy that undercut its jurisdiction defense and settled the case. Conduct such as this should alert a judge to the possibility that the parties are not adverse—and, perhaps, lead the judge to deny a motion to enter the settlement as a decree. A court could also reasonably conclude that a sue-and-settle consent decree that usurps traditional state authority is ill suited for judicial ratification. Of course, it is not likely that all sue-and-settle consent decrees resulting in problematic outcomes can be summarily dismissed on case or controversy grounds.

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

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

---

248 Additional research is required before this solution can be definitively supported as the way to proceed. It is known that states are shut out in important ways, and it is known that bad outcomes are occurring. It is also known that scholars are skeptical of intervention as an adequate substitute. SANDLER & SCHOENBROD, supra note 105, at 133 (citing Cooper, supra note 80, at 156 n.4 and Harris v. Reeves, 946 F.2d 214 (3d Cir. 1991)). However, additional evidence is needed to show why intervention currently fails to protect the states’ interest. Rather than the intervention standard being the sole problem, it very well may be that the methods of notice or the methods of receiving the notice are deficient as well.

249 The Federal Consent Decree Fairness Act, and the Sunshine for Regulatory Decrees and Settlements Act of 2012. H.R. 3041; H.R. 3862. These two bills would have implemented sweeping changes in the notice, intervenor, and modification standards relating to consent decrees. In terms of notice, the bills proposed that for any consent decree that compels agency action, the parties must publish the settlement, the consent decree, the fee and cost arrangements, and the complaint. The agency also must publish notice of a settlement before it is lodged with the court for entry as a consent decree; further, the agency must respond to all the comments and provide an administrative record to the court. For the intervenors, the bills created a rebuttable presumption that any party seeking to intervene does not have its interests adequately represented by the existing parties. The bills changed the
right to intervene in institutional reform suits against federal environmental enforcers is appropriate because, procedurally, the problems with sue-and-settle consent decrees are relatively narrow. The states’ right to intervene could be rebutted by showing that the proposed settlement in no way diminishes the states’ right to participate in notice-and-comment rulemaking and in no way diminishes any statutorily granted authority to regulate an aspect of environmental policy. This includes the requirement that the federal agencies provide notice to a state as soon as it is sued for institutional reform, an easy task for the regulators.

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

The immediate benefit of this change would be the states’ ability to assert and defend their interests, ensuring the preservation of any cooperative federalism that exists in current U.S. policy. States would no longer be limited to participating in consent decrees through filing comments after the settlement is already entered. They could act as a party to the suit where the modification standard by putting the burden on the party that is opposed to the modification instead of on the party seeking modification and set the standard of review for the court as de novo. As expansive as these highlighted changes appear to be, they are only a small portion of what the bills would have required. Without surprise, these bills faced substantial opposition, especially from the political left, because it limited the government’s ability to use consent decrees to expansively solve problems. See, e.g., Cruden supra note 22; Federal Consent Decree Fairness Act, and the Sunshine for Regulatory Decrees and Settlements Act of 2012, Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary, 112th Cong. 91–92 (2012) (statement of Representative Henry Johnson, Georgia); see also John Walke, Republican Bills Would Obstruct Enforcement of Environmental Laws, REGBLOG, May 20, 2013, https://www.law.upenn.edu/blogs/regblog/2013/05/20-walke-republican-bills.html?utm_source=RegBlog+Subscribers&utm_campaign=47956bc678-RegBlog_Weekly_Email_May28_2013&utm_medium=email&utm_term=0_0a49715a7e-47956bc678-288740341. The essential concern was that these bills would deter parties, especially on the margin, from settling cases and entering consent decrees. As a result, there would be more litigation than the government’s limited resources could handle. This would also discourage citizen suits and citizen-initiated enforcement actions, a beneficial way to detect misconduct.
states’ voices must be heard, and if the states’ interests are ignored and a decree is entered anyway, the states would have the right to appeal the court’s decision to enter a decree.

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

VI. Conclusion

Sue-and-settle consent decrees are being used in institutional reform cases to drastically modify the environmental policy landscape. Though many parties may be negatively affected by this trend, the harms to states and state authority are the most problematic. Environmental policy is most efficient and effective when it is governed by the matching principle, i.e., when the authority for environmental regulation is matched to the party that is harmed. Despite the fact that the United States does not strictly adhere to the matching principle, it recognizes the importance of state involvement in environmental regulatory policy. This includes granting both decision-making and enforcement authority to the states under key environmental statutes such as the CAA and CWA. The structure of federal regulatory law also includes notice-and-comment

---

250 E.g., Grossman, supra note 80, at 57–58 (explaining that after the decree was entered, twenty-five states sought to modify it, given the harms they were likely to bear if the decree proceeded as entered).
procedures for federal rulemaking, where the state is allowed to participate in the federal agencies’ decisions. Unfortunately, institutional reform consent decrees have severely limited the states’ roles in environmental policy. Sue-and-settle erodes both statutory enforcement authority and the states’ ability to participate in notice-and-comment rulemaking.

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

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

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