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Committee on Environment
and Public Works Washington, D.C.

OVERSIGHT OF LITIGATION AT EPA AND FWS: IMPACTS ON THE U.S. ECONOMY, STATES, LOCAL COMMUNITIES AND THE ENVIRONMENT

TUESDAY, AUGUST 4, 2015

U.S. SENATE

Committee on Environment and Public Works

Subcommittee on

Washington, D.C.

The subcommittee met, pursuant to notice, at 9:34 a.m. in room 406, Dirksen Senate Building, the Honorable Mike Rounds [chairman of the subcommittee] presiding.

Present: Senators Rounds, Markey, Inhofe, Boozman, Wicker, Sullivan.

STATEMENT OF THE HONORABLE MIKE ROUNDS, A UNITED STATES SENATOR FROM THE STATE OF SOUTH DAKOTA

Senator Rounds. The Subcommittee on Superfund, Waste Management and Regulatory Oversight is meeting today to conduct a hearing on oversight of litigation at EPW and Fish and Wildlife Service, impacts on the United States economy, states, local communities and the environment.

Today we are meeting to hear testimony on the impact environmental litigation has on the economy, States and communities. Both the Clean Air Act and the Endangered Species Act contain provisions allowing for citizens to file a citizen suit against a regulatory agency to assure an agency's compliance with federal statutes.

While originally well-intentioned, these citizen suits are being used to perpetuate what is often referred to as a sue-and-settle process that overwhelms regulatory agencies, resulting in settlement agreements and consent decrees requiring agencies to promulgate major regulations within an arbitrarily imposed timeline. These agreements are often negotiated behind closed doors with little or no transparency or public input.

Although the ultimate parties responsible for the regulations are the States and regulated entities, they have been nearly completely cut out of the process and are not consulted about the practical effects of the settlement

agreement. Public comments from the States and industries regarding the feasibility or impact of these regulations are routinely ignored.

Further, these citizen suits allow nongovernmental organizations, or NGOs, and the Administration to advance their own policy agenda while circumventing the entire legislative process and Congress. As a result, major regulations that cost billions of dollars, stifle economic growth and inhibit job creation are being made by unelected bureaucrats in Washington who think they know what is best for everyone.

Under the Clean Air Act, citizen suits have been used to impose major regulations without any input from Congress and have little to no input from States. A study by the U.S. Chamber of Congress found that EPA considered reconsideration of the 2008 Ozone National Ambien Air Quality Standards could cost up to $90 billion annually to comply with, making it the most expensive regulation in history.

Further, States have been so entirely shut out of the process that their opposition is rarely given serious consideration. When the EPA promulgated sulfur dioxide regulations, every single State that commented about the regulation voiced its opposition. Rather than working with the States to address their concerns, the EPA ignored their comments and moved forward with the regulation.

Additionally, the Fish and Wildlife Service is in the middle of potentially listing more than 250 species as endangered or threatened on the Endangered Species List. Called one of the largest Federal land grabs in modern times, this is the result of a mega-settlement between the Fish and Wildlife Service and the NGOs that intentionally overwhelmed the agency with listing petitions simply so that they could sue the Fish and Wildlife Service for failing to meet statutory deadlines.

Because the Fish and Wildlife Service is now bound to court-imposed deadlines to make those listing decisions, the agency is rarely inclined to engage States, industries and landowners in real conservation efforts. As a result, these listings exemplify heavy-handed Federal regulation rather than serious collaborative efforts to conserve and recover species.

The impact of these lawsuits is being especially felt in South Dakota where our only coal plant, the Big Stone plant, is in the midst of a $400 million upgrade to comply with EPA's Regional Haze rule. This project is not even completed yet and now this plant may not even be able to operate at all in order to comply with the Administrations Clean Power Plan. The sue-and-settle process has resulted in regulations that stifle innovation and hurt the future of this Country by crushing the can-do American spirit that founded our Nation, settled the west, won two World Wars and put a man on the Moon.

I would like to thank our witnesses for being here with us today. I look forward to hearing your testimony. Now I would like to recognize my friend Senator Markey for a five minute opening statement.

Senator Markey.

[The prepared statement of Senator Rounds follows:]

STATEMENT OF THE HONORABLE EDWARD MARKEY, A UNITED STATES SENATOR FROM THE STATE OF MASSACHUSETTS

Senator Markey. Thank you, Mr. Chairman, very much.

Today our subcommittee hearing focuses on the effects of litigation on the Environmental Protection Agency and the Fish and Wildlife Service.

Litigation has always shaped public health and our environment. For example, in 1989 when the EPA tried to ban asbestos under the Toxic Substances Control Act, industry sued and ultimately won, effectively rendering the entire law nearly impossible for the EPA to use.

Recently the Supreme Court told the EPA it has to take another look at the cost estimates of its Mercury Air Toxic rule after industries in 20 States sued. Even before yesterday's Clean Power Plan rules were announced, 14 States and Murray Energy Corporation tried to game the legal system by filing a premature legal challenge to them.

If we are going to look at the impact of litigation then we have to look at all participants. In one corner we have multi-billion dollar corporations suing to stall or stop environmental protections from taking effect. They are putting profits above clean air and water. In another corner, we have members of the public using the statutory rights that Congress gave them to

hold agencies accountable and help ensure environmental goals are met.

For more than four decades, citizens sued provisions which are included in many environmental laws, like the Clean Air Act and Endangered Species Act have served as an essential oversight function. Citizen suits provide a mechanism for the public to ensure that agencies meet statutory deadlines and do what Congress has told them to do. The ability to recover reasonable cost and attorney's fees ensures that the little guy can take on the government and deep pocket industries when the law and the public interest have been violated.

Citizen petitions and lawsuits also help to protect the environment. For example, not one species would have been listed under the Endangered Species Act during the Bush Administration without citizen petitions. EPA's deadlines to reduce air pollution in national parks and wilderness where amiss for so many years after EPA first issued the rules in 1999 that litigation brought by environmental groups in 2011 was needed to hold both the States and the EPA accountable.

EPA's Clean Air Act deadlines to control and reduce mercury emissions and other toxic pollutants from coal power plants were supposed to be met by 2002 but implementation of these regulations remains in litigation. Now some critics say these types of lawsuits are only brought by environmental

organizations and that they lead to collusion between environmental groups and the agencies.

But a look at the facts shows this is not the case. According to GAO citizen suits have not had an important effect on environmental rule making. Moreover, during a 16-year period almost half of the lawsuits against the EPA were brought by industry trade associations and private companies, not environmental groups. For example, the petroleum industry sued the EPA in 2013 over its renewable fuel standard and subsequently, happily settled that lawsuit.

Some critics also say that citizen suits let the public or environmental groups dictate agency policy. But safeguards at the Department of Justice and the Courts themselves prevent that from happening. A good case and point relates to the lawsuit filed by industry and the State of Alaska against the Clinton Administration's 2001 Roadless Rule which was designed to protect national forest from logging, mining and road building. The Bush Administration's 2003 settlement exempted millions of acres of land in Alaska from the rule and effectively rolled back the regulation.

Ironically, this case prompted the first use of the phrase sue-and-settle. Just last week the court issued its final conclusion that the Bush Administration had violated the law by changing its policy about whether the Tongass Forest needs

protection from logging in the legal settlement instead of changing the regulation itself.

I look forward to your testimony today. We appreciate all of the witness being here today and we thank you, Mr. Chairman, for holding this hearing.

[The prepared statement of Senator Markey follows:]

Senator Rounds. Thank you

Senator Inhofe. Mr. Chairman, may I make one comment? Four of the five Republicans are also on the Armed Services, which are meeting at the same time. So you are going to have some people going back and forth here including the four of us.

Senator Rounds. Thank you, sir. Senator Wicker, at this time I think you would like introduce our first witness.

Senator Wicker. Thank you, Mr. Chairman and Mr. Ranking Member. I am one of those members of the Armed Services Committee, so we are juggling hearings this morning. But thank you, Mr. Chairman, for holding this important hearing on the sue-and-settle practice and for allowing me to say a word or two about a distinguished member of our panel of witnesses today. I am glad to welcome my fellow Mississippian, Dallas Baker who is Air Director and Chief of Air Division of the Mississippi Department of Environmental Quality.

There are two reasons why Dallas is an outstanding witness for us today. First of all, he served the DEQ as an Environmental Engineer and has done so for some 20 years. He has been a tremendous asset to the State of Mississippi. In this capacity, he has worked closely with Federal Agencies, Local Governments, and members of Industry to navigate the permitting process and enhance DEQ's ability to serve citizens and companies in Mississippi.

There is another role that makes him an outstanding witness today and that is that he serves as president of The Air and Waste Management Association. This gives a full understanding of the regulatory role play by a State agency. So I look forward to hearing his insights and I hope other members of this subcommittee can benefit from his insights on the different nature of the sue-and-settle regulation and the impact this practice has on States, local communities and the environment. Mr. Baker is a graduate of the University of Mississippi and a distinguished public servant and thank you for allowing me to welcome him on behalf of the full committee and the State of Mississippi.

Thank you, sir.

Senator Rounds. Thank you, Senator Wicker. Our other witnesses joining us for today's hearing are Kathleen Segamma, Vice President of Government and Public Affairs, Western Energy Alliance; Andrew M. Grossman, Associate, BakerHostetler LLP, Adjunct Scholar, Cato Institute; Mr. Alfredo Gomez, Director, Natural Resource and Environment, Government Accountability Office; and Justin Pidot, Associate Professor, University of Denver Sturm College of Law.

Now we will turn to our first witness, Mr. Dallas Baker, for five minutes. Mr. Baker, you may begin.

STATEMENT OF DALLAS BAKER, AIR DIRECTOR AND CHIEF OF AIR DIVISION, MISSISSIPPI DEPARTMENT OF ENVIRONMENTAL QUALITY; NATIONAL PRESIDENT, AIR AND WASTE MANAGEMENT ASSOCIATION

Mr. Baker. Thank you, Senator Rounds and Senator Markey, for the invitation to be with you today.

As Air Director of my State's environmental agency, I am responsible for maintaining clean air and the welfare of people back home. As of today, every air monitor we operate in Mississippi indicates we have clean air. This was no accident. Over the years, good planning, good air control technology and until recently good rule making played a part.

My testimony today is meant to shed light on recent process changes but also to express my concerns of unintended consequences of the so-called sue-and-settle approach.

In the past, we had ample time to participate in early rulemaking that reduced air emissions while minimizing the burden on the State and the private sector. Before a final rule was signed, the private sector had a chance to look at the main elements of the rule and in some cases had a seat at the table in the rule making process itself. They saw what was coming and they got prepared.

We had a time to schedule listening sessions and provide comments back to EPA. We heard what would work and what would not work. In the past, I felt the EPA sufficiently considered

our comments and was responsive which I felt strengthened the final product. I am concerned by the recent shift in this dynamic between EPA and the States.

The sue-and-settle method by definition keeps a State out of deliberations, yet it subjects us to the burden of reacting to it, whatever it is. Adding to the frustration and the details in methods used to arrive at the settlement are often sealed by the courts.

One recent example of such a settlement is the Sulfur Dioxide Consent Decree. Back in March, the DEQ received a letter from EPA indicating a settlement agreement was reached between EPA, the Sierra Club, and the Natural Defense Council. The consent decree said the EPA failed to complete designations of containment status with the 2010 one-hour average SO2 standard.

The letter identified a power plant operated by the South Mississippi Electric Power Association or SMEPA called the R.D. Morrow Generating Plant in Lamar County. The Morrow Plant was identified based on a mission threshhold set in the agreement. Lamar County is now in jeopardy of being designated as non-obtainment for SO2. Our only acceptable option of preventing this was to model the emissions as Plant Morrow and submit a recommendation of obtainment by the decree deadline of September 18, 2015. SMEPA agreed to finance the modeling process which

remains on going. Last week we got in early model results and as expected, Lamar County appears to be in attainment for the SO2 standard.

The end result of the EPA sue-and-settle in this case was an expenditure of already stretched resources of the State and no environmental benefit.

What is alarming to me was how quickly we had to react. In the SO2 example affected States were provided only six months to make its recommendations. It took tremendous time and coordination to work it up to this point and we still have work to do.

Now remember, if SMEPA had not agreed to absorb the cost and fast track modeling we likely would have had to accept a non-attainment designation for Lamar County. That would have led to efforts of redesignation and more importantly work to remedy the economic impact even a temporary non-obtainment designation would place on the Lamar County area.

So I am concerned of the presumed guilt here, meaning the area was presumed not in attainment simply by omission of one site. In the SEMPA case, DEQ believed Lamar to be in compliance with the standard and purely based on just experience. We operate two monitors located in that part of the State and much more industrial and more commercial areas than rural Lamar County. Those other monitors currently read well below the

standard and in Lamar there is not much else there. We know Plant Morrow emissions; we did not believe the standards were at risk.

The settlement also limits our abilities to plan and designate resources. Beyond it, EPA seems to have chosen more and more stringent posturing being less flexible to the States. We are asked to do more with less in less time.

So good science, good technology and sufficient resource planning, an affective regulation development takes time. So appropriations and funding are scarce, new regulations such as the Clean Power Plan and the 2008 ozone modification are causing tremendous amounts of attention of our staff and we are limited and we are underfunded and over stretched.

We feel that our planning is being disrupted perhaps by these. Our concern is that this would continue in practice and it makes it very difficult for the State and private sector as well as the agency itself to do proper planning.

Thank you for your time and the invitation.

[The prepared statement of Mr. Baker follows:]

Senator Rounds. Thank you, Mr. Baker. Now we will hear from Ms. Kathleen Sgamma.

STATEMENT OF KATHLEEN SGAMMA, VICE PRESIDENT OF GOVERNMENT AND PUBLIC AFFAIRS, WESTERN ENERGY ALLIANCE

Ms. Sgamma. Thank you Mr. Chairman, Ranking Member Markey, and members of the committee for the opportunity to be here today. I tried to lay out in my testimony how my industry, the oil and natural gas industry in the west, has delivered significant environmental and economic benefits to the Nation.

I would characterize profits as being used for actually delivering environmental benefit, not for standing in the way. We have innovated and we have delivered several different environmental benefits. We produce more per unit of air emissions.

We have shrunk the size of our footprint on the land significantly up to 70 percent with horizontal drilling. We continue to reduce and reuse water. We have been one of the main reasons why the United States has reduced greenhouse gas emissions. I am very proud of our environmental record.

Besides that environmental benefit we have produced huge economic benefits for the Nation. This year alone we are saving customers about $1,800 in lower natural gas and oil prices and we are enabling the United States to use energy as a strategic resource. I am very proud of the record of my industry.

But rather than recognizing that environmental benefit this Administration has doubled down on costly command-and-control

regulation without commensurate environmental benefit. I have been asked to testify today to address the impact of litigation driven regulation on my industry and the economy. And while I cannot fully quantify all the different regulatory efforts against my industry right now just because of the sheer volume that we are handling, I have provided some examples in my testimony.

I think what is really more important is the impact on job creation and economic development for the general citizenry. I am very sympathetic to the States. I know industry is not sympathetic but certainly when States are forced to expend huge resources responding to hundreds of species petitions, for example, or when their State implementation plans are suddenly pulled out from under them, they have to be redone or taken over by EPA. I think that is definitely an abuse of the sue-and-settle method.

Today Western Energy Alliance is releasing an update to our sue-and-settle analysis related to two environmental groups and their settlement agreements with the Department of the Interior in 2011. We show that another year later there was another chance for more bold petitions, more litigation. Those two groups, Wild Earth Guardians and Center for Biological Diversity, certainly were not satisfied with being handed unprecedented power by the Administration to set the agenda and

the resource allocation of the Fish and Wildlife Service. They continue to sue; they continue to increase petitions to historically high levels.

For example, they continue to have the majority of lawsuits related to endangered species and they continue to submit petitions for species listing out of proportion with any other constituency. We have released those numbers today and it is pretty much more of the same.

When the Interior Department hands over that power to those two groups, one special interest, it is really forcing businesses, States, counties to put in place all kinds of different resources to show the Department how they are conserving species That is really not productive, because the best species protection is done on the ground by States and the local governments.

We see the same pattern with EPA. My industry has also been a target of lawsuits that have resulted in sue-and-settles specifically for new source performance standards. It is more of targeting because EPA has failed to do the required reviews for 76 percent of all industry sectors. It is becoming a source use of targeting a specific non-favored industry.

My time is up, I very much appreciate the opportunity today.

[The prepared statement of Ms. Sgamma follows:

Senator Rounds. Thank you for your testimony, Ms. Sgamma.

Our next witness is Mr. Andrew Grossman. Mr. Grossman, you may begin.

STATEMENT OF ANDREW M. GROSSMAN, ASSOCIATE, BAKERHOSTETLE LLP; ADJUNCT SCHOLAR, CATO INSTITUTE

Mr. Grossman. Mr. Chairman, Ranking Member Markey, members of the Subcommittee, thank you for holding this hearing today and inviting me to testify.

My statement today will focus on both the EPA so-called Clean Power Plan, greenhouse gas regulations and the sue-and-settle phenomenon. Not only is the Clean Power Plan a product of collusive settlement with the environmentalist groups and pro-regulation States, but it also illustrates a broader class of problematic agency action that has serious implications for the rule of law in this Country.

Sue-and-settle refers to a particular kind of collusion between agencies and outside groups who evade transparency and accountability mechanisms through friendly litigation and settlements. In a number of instances the Obama Administration has chosen to enter into settlements that committed to taking action, often promulgating new regulations on a set schedule.

Between 2008 and June, 2013, 14 of the 17 major non-discretionary rules issued by the EPA resulted from deadline lawsuits. The most recent example is the Clean Power Plan. EPA committed to regulate Carbon Dioxide emissions from the new and existing power plants under Section 111 of the Clean Air Act and

in 2011 entered into a settlement with environmentalist groups and States. That settlement culminated in the signing of final rules this week.

We are all familiar with the problems that arise when settlements between agencies and special interests are used to set agency priorities and duties. These include lack of transparency, lack of public participation, rushed and sloppy rulemaking, and above all, the evasion of proper accountability and oversight. Fundamentally these are rule of law issues.

When an agency engages in legal chicanery to carry out its policy preferences, it undercuts the usual checks and balances that exist to promote moderation, pluralism and ultimately the public interest. This is not the only way the Clean Power Plan attempts to game the legal system. As many States pointed out after the rule was purposed, the rule's deep emission cuts and aggressive deadlines required State regulators to begin work on accommodating almost immediately. And that was a year ago.

At this moment, utility regulators in every affected State are hard at work evaluating the rule, attempting to mitigate its impact on their electric systems and making irreversible decisions on things like transmission projects and utility retirements and investments. None of these expenditures of time, efforts and money are recoupable. And few of those

decisions can be reversed if and when the rule is ultimately struck down by the courts, which I believe it likely will be.

These concerns were brought to the EPA's attention and its response was to make the final rule's emission targets even more stringent and to place greater emphasis on investment and renewable energy.

One can be forgiven for wondering whether the EPA strategy is to coerce its policy preferences into effect irrespective of its legal authority and before any court has the opportunity to stop it. After all, it was only a month ago that the Supreme Court held the EPA's Mercury Rule was unlawful after it had been in effect for over three years. As EPA Administrator Gina McCarthy explained to a talk show host, the decision would not have much of an impact, because most power plants are already in compliance and the investments required by the rule have already been made. Is it really so unreasonable for State officials and utilities who are being pushed to cut greenhouse gas emissions at breakneck speeds to wonder whether history is repeating itself with the Clean Power Plan?

The common thread that links collusive settlements and this kind of regulation by fiat is that they attempt to shortcut the ordinary give and take of representative government. Agencies use deadline settlements to achieve their policy priorities even

when those priorities might not be shared by other agencies and actors in the Executive Branch or by Congress.

Likewise, the use of bureaucratic fiat can have the same effect, allowing agencies to achieve results that were never approved, in some cases were even specifically prohibited by Congress and to structure their actions to evade review by the courts. The administrative State is not supposed to work this way. But it is encouraging that Congress is paying attention to these issues and holding hearings like this one.

With respect to sue-and-settle, members of this body and the House have worked together to introduce the Sunshine for Regulatory Decrees and Settlements Act, thoughtful legislation that cuts to the heart of that issue. Other hearings and other pieces of legislation focus on the substance of deadline provisions themselves. There is a growing realization, I think, that more work will have to be done to rein in the agencies and to reassert Congress's policymaking primacy. This is a very important effort.

Again, I thank the committee for the opportunity offer these remarks. I look forward to your questions.

[The prepared statement of Mr. Grossman follows:]

Senator Rounds. Thank you, Mr. Grossman. We will now hear from our next witness, Mr. Alfredo Gomez from GAO. Mr. Gomez, you may begin.

STATEMENT OF ALFREDO GOMEZ, DIRECTOR, NATURAL RESOURCES AND ENVIRONMENT, GOVERNMENT ACCOUNTABILITY OFFICE

Mr. Gomez. Chairman Rounds, Ranking Member Markey and members of the subcommittee, good morning. I am pleased to be here today to discuss our work on environmental litigation against the Environmental Protection Agency and the U.S. Fish and Wildlife Service.

As the primary agency charged with implementing many of the Nation's environmental laws such as the Clean Air Act and the Clean Water Act, EPA often faces litigation over its regulations and other actions. As many have already noted, citizens can sue EPA to compel the agency to take required actions such as issuing a rule on time and lawsuits often called Deadline Suits.

The Fish and Wildlife Service also faces litigation over its regulations and actions to carry out the Endangered Species Act. The Department of Justice provides legal defense to both EPA and the Fish and Wildlife Service in court.

So my statement today summarizes the results of reports on environmental litigation against EPA and the Fish and Wildlife Service. I will talk about three key points. First, information on the number of cases, second the legal costs that are available for EPA and the Fish and Wildlife Service, and third, the impact of Deadline Suits on EPA's rulemaking.

The first point is that the number of environmental cases brought against EPA each year varied and showed no discernable trend. On average there were about 155 cases per year. Justice staff defended EPA on a total of about 2,500 cases in the 16-year period ending in 2010. Most of these cases, or 59 percent, were filed under the Clean Air Act, 20 percent under the Clean Water Act, and the cases range from a high of 216 cases in 1997 to a low of 102 cases in 2008.

The plaintiffs filing these suits fell into several categories 25 percent were trade associations, followed by private companies at 23 percent, local environmental groups and citizens groups made up 16 percent and national environmental groups made up 14 percent.

Second, with regard to the cost of litigation against EPA, the cost also varied from year to year with no discernable trend. Specifically, the Department of Justice spent about $47 million or on average $3.6 million annually to defend EPA in court. The Department of Treasury also paid about $14 million or about $2 million per year. As many of you know Treasury has to pay attorney fees and costs from the Department's judgement fund when plaintiffs win. EPA also paid approximately $1.6 million in attorney's fees and cost or about $305,000 per year.

The Fish and Wildlife Service, we reported on the limited information that the agency had available on lawsuits. The

agency does not track cases and cost but pulled together some information showing that it had paid $1.6 million for attorney fees and cost related to 26 cases from physical years 2004 through 2010.

Third, in our report on EPA Deadline Suits we found that EPA issued 32 major rules in a five-year period that we reviewed. Nine of those 32 rules EPA issued were following settlement agreements and deadline suits. These nine rules were all Clean Air Act rules. The terms of the settlements in these deadline suits set up a new schedule to issue the rules.

An additional five of the 32 rules were issued to comply with court orders following deadline suits. The impact of settlements and court orders in deadline suits on EPA's rulemaking priorities was limited primary to one office within EPA. This is the Office of Air Quality Planning and Standards which is responsible for setting standards. Agency officials said that deadline suits affected the timing and order in which rules are issued. In other words, EPA has to priorities the rules that are under settlement agreements and court order first.

In summary, the environmental statutes allow litigation to check the authority of Federal agencies as they carry out or fail to carry out their duties. Available data do not show discernable trends in the number of cases, the cost associated

with litigation against EPA, and there is limited information on the Fish and Wildlife Service. Information on deadline suits we reviewed show that the effect of settlement agreements from these suits was on the timing and the order on which the rules are being issues.

Mr. Chairman, Ranking Member Markey, that completes my statement.

[The prepared statement of Mr. Gomez follows:]

Senator Rounds. Thank you Mr. Gomez. Our next witness is Mr. Justin Pidot. Mr. Pidot, you may begin.

STATEMENT OF JUSTIN PIDOT, ASSOCIATE PROFESSOR, UNIVERSITY OF DENVER STURM COLLEGE OF LAW

Mr. Pidot. Good morning, Mr. Chairman, Ranking Member Markey, members of the subcommittee. Thank you for giving me the opportunity to testify today. My name is Justin Pidot. As you have heard, I am an Associate Professor at the University Of Denver Sturm College Of Law. Prior to joining the faculty I was an appellate lawyer at the U.S. Department of Justice in the Environment Natural Resource Division.

In my testimony today, I will be discussing the importance of environmental litigation brought against Federal agencies and settlements that the United States enters into to resolve such litigation.

Litigation has always been an integral part of enforcing environmental law and administrative Law more generally. Congress created a cause action to challenge agency decisions and the failure of agencies to reach decisions when it enacted The Administrative Procedure Act in 1946. And Congress created more specific citizens provisions in many modern environmental statutes.

The ability of the public to hold Federal agencies accountable has served us well. Environmental litigation is an essential check on the administrative state and holds the Executive branch accountable to legislative decisions made by

Congress and legal commitments made by agencies embodied in their regulations. Due to the deference afforded to Federal agencies, deference that I enjoyed every day when I was representing the Federal Government at the Department of Justice, environmental litigation is hardly carte blanche for courts, activist or businesses to rewrite agency priorities. Instead such litigation enforces legal obligations.

Some environmental litigation terminates in the settlement or consent decree, as we have heard today, and it is to such situations that I will turn. The majority of environmental settlements arise out of lawsuits in which the Federal Government has essentially has no defense to liability. As a result, in my view, the most significant determinant of whether an environment lawsuit ends in a settlement is a simple one, due to lawyers representing the Federal Government at the Department of Justice believing that the Federal Government can prevail. A similar assessment of legal vulnerability is carried out by litigation attorneys, whether public or private, across the United States.

Environmental settlements provide an array of benefits. First, settlements enhance rather than limit the defending agent's discretion in lawsuits the agency is likely to lose, because they allow the agency to participate in crafting a

remedy rather than waiting for a judge to impose a remedy by judicial order.

Second, settlements may save government resources, particularly if entered into early in litigation. Third, a settlement saves taxpayer dollars by reducing the amount of attorneys' fees the Federal Government has to pay. Fourth, settlements conserve judicial resources.

Moreover, I believe that effective mechanisms already exist to guard against improper settlements. Settlements must be approved by high-ranking officials of the Department of Justice and this independent review by lawyers of DOJ distance from the mission of a particular environmental agency guards against improper settlements. DOJ also has internal rules that place limitations on the terms that can be contained within settlements. Courts also play a role and have demonstrated their willingness to intervene where appropriate.

I want to briefly respond to two primary criticisms of environmental settlements. First, some argue that settlements allow agencies to evade public debate. In my view this is generally not true. Most settlements involve either commitment by the agency to make a decision or more rarely to use particular procedures in making a decision. These sorts of decisions, where to invest resources, what procedures to use, do not require public participation under general principle of

administrative law. In other words, there would be no public participation if the agency simply made those decisions even in the absence of a settlement.

On rare occasions agencies enter settlements that involve a commitment to a substantive position. These decisions either regard primarily matters that will be wrapped into a public decision-making process and properly subject to judicial review, or the exceptional case where settlement makes a final substantive decision the Federal Courts already have ample authority and ample willingness to intervene.

A second argument critics make is that environmental settlements allow environmental groups to set the agenda for Federal Agencies. This criticism also fails in my view for the simple reason that it is Congress, not environmental groups, that establish the priorities that are being enforced. Congress has written environmental law to compel agencies to take action. And when agencies fail to take actions so required, litigation from whatever the source, environmental group or industry, simply holds agencies accountable to their statutory mandates.

Environmental settlements make good litigation sense and they do not empower agencies to evade their legal responsibilities. Criticisms of environmental settlements in my view are simply then criticisms of the underlying substantive environmental statutes. The costs of what some would describe

as settlements are really the costs associated with environmental law, not environmental litigation.

There is nothing broken about environmental settlements and there is no legal problem with settlement practices for Congress to fix. If Congress believes that the substance of environmental law needs to be adjusted that is a separate debate and one that should occur forthrightly in full daylight.

Thank you very much.

[The prepared statement of Mr. Pidot follows:]

Senator Rounds. Thank you for you testimony, Mr. Pidot. Senators will now each have five minutes for questioning. I will begin.

Ms. Sgamma, in your testimony, as of October 2014, there have been 88 sue-and-settle cases arising under the Clean Air Act and 43 lawsuits challenging Fish and Wildlife Service decisions. Some of these suits are brought by States and industry groups. You point out that settlement shut out stakeholders and that there are few other options for substantive participation in the process.

Do you believe that States and industry groups are resorting to lawsuits because their participation and comments are being shut out by both normal rule processes and by lawsuits?

Ms. Sgamma. We certainly comment on many, many different regulatory proceedings every year and often feel that our comments are pretty much ignored. So in some case we have been more litigious in the last few years just to defend ourselves.

If you look at the NSPS requirements that were finalized in 2012 that were the result of an environmental lawsuit, really the rules resulting went far beyond what is required in an eight-year review and went into rushing in very complex regulations on a very strict deadline that did not give the

agency the chance to do real deliberative rulemaking. And that has spun several lawsuits and several administrative petitions.

Senator Rounds. Thank you.

Mr. Baker, your testimony focuses on the lack of State involvement and promulgating regulations that stem from lawsuits. Can you explain to us the collaborative making process the EPA previously engaged in with States when promulgating regulations and the quality and feasibility of the regulations coming out of that process, compared to the process that has developed in recent years and the quality of these new regulations?

Mr. Baker. A good example would be the New Source Performance Standards that were promulgated in the 1990s and 2000s. The rule, before it was even promulgated, put on the register, we had an idea they were coming. We saw the writing on the wall that this particular industry, whatever it was, was going to be subject to a potential new rule. So we started looking at our individual facilities, their emissions; we tried to identify which ones would be affected. Then we started early outreach to those individual companies in Mississippi.

Then as the proposed rule was posted on the register we began the comment period along with the private sector. There was stakeholder interaction. We felt that the EPA listened to not just to our comments on implementation of the rule but also

the impacts to the environment and to the companies being regulated.

At the end of the day we felt the controls that were in place minimized the disruptiveness of the operations and took into account costs. The timing was such that it was sometimes over a matter of years in the making and at the end of the day we felt that we were equipped and ready to implement the rule timely.

Mississippi DEQ has a desire to be in compliance. We do not want to circumvent rule. We have seen the pace at which regulations are effecting Mississippi companies seem to be accelerated and our ability to comment to EPA seems to have been responded to with, just wait for the final rule, you will see what we will take into account. Sometimes we do not get the sense that EPA is listening to our concerns as in the past.

But I think that the process up to this point has seen real gains in pollution control and we are proud in Mississippi to have relatively clean air. I am concerned that this approach is going to embolden advocacies that are not exactly healthy for Mississippi.

Senator Rounds. Thank you. Senator Markey.

Senator Markey. Thank you, Mr. Chairman, very much. Mr. Pidot, in 2011 the Fish and Wildlife Service settled litigation involving multiple cases that were consolidated together and

involved the backlog of 250 species listing determinations under the Endangered Species Act. Isn't it true that the settlement merely required the Fish and Wildlife Service to make final decisions by a certain date as to whether or not the candidate species warranted listing?

Mr. Pidot. Yes, Senator, that is true and indeed in a number of cases the Fish and Wildlife Service has decided that listing a species is not warranted under the settlement and so the settlement did not compel the agency to list species.

Senator Markey. Have any courts had the opportunity to consider whether the settlement agreement was an overreach of the agency authority and if so what was the result?

Mr. Pidot. The consent decrees were entered so there would have been public interest review at the time the consent decree was entered by the MDL court. I do not know of any subsequent judicial review, although every decision the Fish and Wildlife Service makes to list or not list a species would be subject to judicial review or a party to seek and search review.

Senator Markey. Are there any, Mr. Pidot, meaningful distinctions between the types of settlements agreements that typically involve litigation between industry and the agency and the types of settlement agreements that typically involve litigation between environmental groups and the agencies?

Mr. Pidot. I think likely not on the defensive side. There is another class of settlements that are not really focused on at the moment which are settlements of enforcement cases where EPA or another Federal agency would be pursuing industry for violation of the law and there are another set of considerations that might arise in enforcement settlement. Although to my mind both are fully compliant with the rule of law.

Senator Markey. Could you share an example of when a proposed settlement agreement was not approved by Department of Justice guidance required or when the court rejected a proposed settlement because it overreached?

Mr. Pidot. I can offer an example of the latter. I do not have an example off-hand of the former when DOJ deliberations on individual settlements or subject to either to decline privilege generally held relatively close. But a good example of a court intervening would be the Conservation Northwest litigation in the Ninth Circuit under which a settlement consent decree was proposed that would have substantively modified the species being monitored under a forest plan to monitor the health of the forest. The Ninth Circuit said that such a modification of the forest plan would need to go through notice and comment rulemaking and therefore it was an abusive discretion for the District Court Judge to enter the consent decree.

Senator Markey. Mr. Gomez, during your investigation of the EPA settlements and the Clean Air Act litigation did you see evidence that EPA agreed to do anything other than just set a new deadline? Did anyone submit public comments about the proposed settlements saying that the settlement was inappropriate?

Mr. Gomez. In our review of the nine rules that resulted in settlement agreements, none of those settlement agreements dealt with anything that was changing the substance or nature of the rule. They were all essentially setting new schedules or interim deadlines. I am sorry, can you repeat your second question?

Senator Markey. Public comments?

Mr. Gomez. So not only did we review the content of the settlement agreements we also reviewed all of the public comments that were received for all of the settlement agreements.

Senator Markey. So in essence they were just saying get your job done, set deadlines, get to work, get finished, right?

Mr. Gomez. In the ones that we reviewed, yes.

Senator Markey. Thank you. Mr. Gomez, critics of citizen suits argue that allowing attorney's fees and other cost to be recovered by the prevailing party is a way for litigants to

profit. Can you tell us what limits there are on how fees can be recovered?

Mr. Gomez. Sure. The Department of Justice is responsible for overseeing those payments, those payments in terms of the amounts of payment and where the payments come from, whether they come from the judgement fund or the agencies are based on the environmental statutes. The Department of Justice does review for example and is in negotiations with the plaintiffs in terms of how much it is going to reimburse. Department of Justice reviews, for example, the submissions of information in terms of attorney hours, the types of work that is being submitted.

Senator Markey. So fees and cost are not awarded if the agency was substantially justified in the action it had taken?

Mr. Gomez. I am sorry, can you repeat that?

Senator Markey. Are fees and costs allowed if the agency is determined to have been substantially justified in the action it had taken? Or not taken?

Mr. Gomez. Yes, that is correct.

Senator Markey. Thank you, Mr. Chairman.

Senator Rounds. Senator Inhofe.

Senator Inhofe. Thank you, Mr. Chairman. Later today, we are going to release the EPW oversight report detailing the problems surrounding sue-and-settlement. There are already so

many legal questions over the rules that I think it is going to be subjected to a lot of lawsuits. I get the impression that the EPA does not really care about that because the damage is already done.

Mr. Grossman, what damage is done even if these rules are overturned so far?

Mr. Grossman. Thank you, Senator. In litigation, not in my personal capacity as I am testifying here today, I represent the great State of Oklahoma. I can tell you the State of Oklahoma has spent an enormous amount of money and manpower and bureaucratic resources to figure out what it needs to do to comply with these rules and how it can keep the power on in the state and maintain electric affordability. It had to do this during the proposal phase of the these rules, because the cuts they require are so aggressive and they are so disruptive to the electric system of the State, as is the case in many other States.

At this point, States and utilities are making decisions that are irreversible in terms of investments and retirements. These are the costs and all of these costs are being borne before any substituent litigation over the rules.

Senator Inofe. Our Attorney General has been very active in working with you and you have one done a great job helping us. Is this kind of a typical outcome of a sue-and-settle case,

that at EPA, they really do not care too much about what happens today the damage is already done?

Mr. Grossman. I think that is right. I think that is right in a very specific sense. When an agency is engaging this kind of legal chicanery there is usually some reason for it. There is a reason that the environmentalist groups bring these suits and there is a reason that the agencies are happy to work with them and collude in settlements and other activities. And the reason is that it works.

Senator Inofe. I am not a lawyer, but it seems to me that this would strength the arguments for impacted parties' request for a judicial stay. Would you agree with that?

Mr. Grossman. I would entirely.

Senator Inofe. Ms. Sgamma, you made the comment how you could really quantify the damage that is done that is done by all of these regulations and it took me about a year and the Obama Administration to realize that there is more and more and more coming, more damage that is coming.

In fact, for the first time the agricultural groups have made the statement that there really is not anything in the Ag Bill that affects them, it is over-regulation of the EPA. How have environmental activists used sue-and-settle to hijack the listing process over the policy priorities of Fish and Wildlife?

Ms. Sgamma. I think a good case in point is the Wild Earth Guardian suit which was 251 species that were on the candidate list. Now, there were hundreds of other ones that the Center for Biological Diversity settled on as well. But those specific to the candidate species list were absolutely setting the priorities of Fish and Wildlife Service. Because they have the option of putting less high priority cases on the candidate list, and here they were being forced to completely put those priorities aside and make decisions on those species list. Resources are diverted away from species that are truly endangered to those that are less high priority.

Senator Inhofe. Yes, I understand that. Mr. Baker, do you believe that the current public comment process for the Clean Air Act settlement agreements provides the States a meaningful opportunity to participate in settlement agreements? You have heard us make the comment about who is involved in these settlement agreements. What do you think about that?

Mr. Baker. We were aware there was a lawsuit in the SO2 data requirements rule example. But we were aware of the settlement in 18 days after the settlement occurred by letter. So, no, we were not afforded a chance to comment, to provide even any input.

Senator Inofe. Yes, that certainly is the case in Oklahoma. They are kind of left out.

Mr. Chairman, my time has expired and as I have mentioned at the very beginning, simultaneously we have SASC Armed Services here during this and I have to go over to that. I appreciate very much the response to the questions and the testimony you have given. Thank you.

Senator Rounds. Thank you, Senator Boozman.

Senator Inhofe. I am sorry, Senator Boozman. I ask consent for my opening statement to be part of the record.

Senator Rounds. Without objection.

[The prepared statement of Senator Inhofe follows:]

Senator Boozman. Mr. Gomez, you mentioned that your statistics come from 2010, is that right?

Mr. Gomez. Sir, the statistics in terms of the number of cases were for a 16-year period ending in 2010.

Senator Boozman. Why are we not ending to 2014?

Mr. Gomez. I am sorry, in terms of the number of cases filed up to 2014 we do not have that information. That information was from a report that we issued a few years ago.

Senator Boozman. So we are like how many years behind?

Mr. Gomez. So the statistics on 2,500 cases that were filed were for a 16-year period ending in 2010 so that was, I believe, from 1995 to 2010.

Senator Boozman. I guess my point is it would be helpful to have somewhat current information and I do not think that is current at all.

Mr. Gomez. We do not have information since then in terms of the number of cases.

Senator Boozman. I do not mean to belabor it, but is there a way of finding out?

Mr. Gomez. What happened to us when we were doing that work is there is no aggregated data that the agencies had. For example, there were four different data sets that we looked at. Department of Justice had two of them, Department of Treasury had one and EPA had another. We had to sort of pull the

information together and from that information we were able to identify who the plaintiffs were and also what statute they were suing under. That was about the extent of the information.

Senator Boozman. In your testimony you stated that the information regarding lawsuits against the FWS is limited. Does GAO recommend that FWS provide more information about information regarding lawsuits against them?

Mr. Gomez. That is really a good question. When we also did that report on Fish and Wildlife, there was not a lot of information. The agency was not collecting that information. However, because of Congressional direction, now EPA and the Department of Interior have been providing information on attorney costs and fees as part of their budget justification. They started doing that in fiscal year 2014, but it goes back to 2011.

There is now information that you can review on what EPA and the Department of Interior is submitting in terms of attorney fees and cost.

Senator Boozman. I know EPA started posting notices to sue on its website in 2013. Does FWS post notices of intent to sue?

Mr. Gomez. That is a good question. I do not know the answer to that. I will have to get back to you on that one.

Senator Boozman. Thank you.

Ms. Sgamma, again, in your testimony and during the course of the discussion, you have expressed support for limiting the ability of litigants to sue and settle behind closed doors without the involvement of the State. So actually you are in a position to having to do these things for States and local officials. You also mention limiting provisions that put the taxpayers on the hook for the cost the frivolous lawsuits. Can you again explain why that is so very, very important?

Ms. Sgamma. Well, I think when you have the Administration pandering to one special interest and then it turns around and reimburses that special interest for setting and expending State and federal resources, it seems like a poor use of taxpayer money. Especially when much of what they are trying to do is stop job creating projects or they are taking resources out of the economy with very expensive environmental regulation, that does not seem like a good use of taxpayer funds.

Senator Boozman. Mr. Grossman, what else can we do to make sure the government is making a good faith effort to defend against these frivolous lawsuits and stand up for the taxpayers?

Mr. Grossman. Thank you, Senator. I think the answer is two-fold and this is really reflected in the Sunshine Legislation that has been proposed. One is for courts to enforce a public interest standard and the second is for affected parties to be able to intervene and participate in the

settlement negotiations to that extent that is viable, as well as in the approval process so that everything is out in the open, to the extent the agency is committing itself to do anything that is really considered in the broader context of the agency's mission.

Senator Boozman. Good.

Mr. Pidot, do you disagree with that, do you think these things ought to be out in the open as was suggested?

Mr. Pidot. I think in general, litigation decisions are vested in the Department of Justice for a reason and that I respect.

Senator Boozman. So what is the reason the public and Congress and everybody else should not know?

Mr. Pidot. I think the reason, as I suggested in my testimony, in my view most of these cases are dead losers for the government. The public interest in such a circumstance is resolving the cases as quickly as possible with the agency having the maximum ability to maintain its discretion in the face of an impending loss.

So dragging out litigation is simply going to increase the cost to the taxpayer through attorney's fees, it is going to increase the cost to the Department of Justice. And the end result, if a settlement is not accomplished, you will have judges all across the Country in hundreds of cases imposing

conflicting injunctions against the Federal Government in a way that is much less organized and feasible than in a settlement.

Senator Boozman. On the other hand, I think Ms. Sgamma and Mr. Baker would feel like in many of the settlements you simply could not have gotten a worse deal. Thank you, Mr. Chairman.

Senator Rounds. Thank you, Senator Sullivan.

Senator Sullivan. Thank you, Mr. Chairman, and I appreciate the witness's testimony today and these are really important issues and I think they are not always well understood.

Let me give you kind of sense of a bit of frustration on some things. I was Attorney General in the State of Alaska, and undertook a number of lawsuits against federal agencies like the EPA when they were acting in a way that I thought was inconsistent with the law.

I actually think that agency acts inconsistently with the law on a very regular basis. It is not just me who thinks that. The Supreme Court in the last two terms that it had, the Michigan case just came down and then the Utility Air Regulators case. Those are both examples where the highest court in the land said, you are either violating the constitution, you are either violating the statute or you are either violating both.

The trouble is that when you undertake lawsuits like that, they challenge EPA's authority, rogue agency action, which I

believe they are doing. This WOTUS Rule of the U.S. regulation is another classic example. They are clearly trying to rewrite the Clean Water Act, they are clearly trying to expand their jurisdiction. I think there are 30 States that are now suing them. I think they are going to win.

We are going to try and stop that because, and it is Democrats and Republicans, by the way, in this Congress who believe they are violating the law with regards to the waters of the U.S.

But here is the challenge. You challenge these actions, they do not listen. The Administrator comes and feeds a line of whatever, says they are abiding by the law. The Supreme Court eventually says, no, you are not. I am sure that will happen with the WOTUS Rule as well.

But they go ahead and do it anyway and it takes years to litigate. By the end of the day, even though you went into the Supreme Court in some ways you are already checkmated by a rogue agency that violates the law. The private sector has to abide by what they have said anyways because litigation took six years to get to the Supreme Court. How do we try and defend against that? Because I think that is part of their strategy.

Knowing that litigation takes five years companies - do not have five years or citizens do not have five years by which to just forget it if I am not going to abide by the regs until the

Supreme Court rules. What is the approach we can take that prevents this kind of checkmate action even though they are losing term after term in the Unites States Supreme Court?

Anyone thought through that? Because I think it is really an important issue and really is a vice that these agencies that act without legislative authority, ignore the Congress, ignore the statute but still the American citizens have to abide by what they are saying. By the time the Supreme Court rules against them it is too late. Any thoughts on that?

Mr. Gomez. Yes, sir, if I could. First of all, I agree with your remarks and your observations. I think this has been a hallmark of some of the more expensive regulatory actions of this Administration's EPA. To a certain extent, a reasonable administration, one that was concerned with the lawfulness and legality of its actions, would be less aggressive in terms of trying to carry them out by fiat and a little bit more concerned about the legal niceties of following the law.

Senator Sullivan. They are not niceties, they are actually requirements.

Mr. Gomez. Right. Making sure that its actions are legally durable, that they will be upheld in the end and thereby not impose unnecessary costs on regulated parties. For Congress, one thing to think about may be potentially the availability of additional relief or a lower standard to obtain

an injunctive relief for injunctions against certain types of major rules recognizing that a particular area such as under the Clean Air Act and otherwise there have been problems in that regard.

So maybe it is more reasonable for courts, given the legal uncertainties in that area, to be a little bit less deferential to the agencies saying, this is very expensive, it is very legally complex. Let's just hold on a minute while we evaluate the legal merits.

Senator Sullivan. Thank you, but do you think we can take action like that in terms of a law that mandates that? Because again, right now, they lose but they win.

Mr. Gomez. Yes, Senator, I think setting standards at the goal particular cause of actions something that Congress has done for over 100 years.

Senator Sullivan. Thank you. Mr. Chairman I have one more final question. I know I have run out of time.

Senator Rounds. Quickly.

Senator Sullivan. Thank you. I just had another question relating to the citizen suits and the special standings status of certain NGOs, whether it is under the Endangered Species Act or Clean Air Act, groups such as the Center for Biological Diversity. My understanding, and I really just need your

thoughts on this, is that they have kind of a special standing status, they get public interest to do a kind of designation.

I guarantee you that in my State of Alaska, these groups are not considered to carry out the public interest. They are viewed oftentimes as going against the public interest.

This is not a partisan issue. In my State, any time there is a responsible resource development activity, most Democrats, Republicans, the vast majority of the citizens of my State desire these groups come in from the outside and sue to stop it. It is constant. It happens all the time. That is why we cannot build roads in Alaska.

Senator Rounds. Sir, I am going to have to ask you to get to your question.

Senator Sullivan. Sorry. So the question is, what is the status in the Federal law and do you think it actually represents public interest? Should other entities such as citizens who aren't NGOs, businesses who live in the States also have special standing ability? Or should these groups be given special treatment under the Federal Law when, at least in the example of Alaska they certainly do not represent the public interest?

Mr. Gomez. Senator, if I may, I think your question raises a broader point about how it is that the government comes to recognize and carry out what the public interest is. Think

about how bizarre it is that we have a Congress that is the representative body of the people, we have executive agencies that are accountable to the President nominally, and yet we are relying on litigation by just random private parties who think they know what is best to go and sue agencies and say, we want you to do this before that.

It is a very strange way to do things. I think it is perfectly appropriate for Congress to consider rather that is the best way for agencies to organize their priories and determine what in fact is the most pressing public interest.

Senator Rounds. With that I want to thank all the members of this panel for taking your time to come in and participate with us. We most certainly appreciate your input into this process. You have taken time away from everything else to come in and be a part of today.

I also want to take this time to thank our Senator Markey, our Ranking Member and all of our other colleagues who attended this hearing. The record for this hearing will be open for two weeks which brings us to Tuesday, August 18.

With that, once again, thank you for your time and participation. This hearing is adjourned.

[Whereupon, at 10:40 a.m., the hearing was adjourned.]