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

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Mr. Chairman and Members of the Subcommittee, thank you for giving me the opportunity to testify before the Subcommittee today on environmental litigation and in particular settlements entered into by the government related to such litigation.

I am an associate professor at the University of Denver Sturm College of Law and my primary expertise is environmental law and administrative law. Before joining the faculty at the University of Denver, I was an appellate attorney in the Environment and Natural Resources Division of the U.S. Department of Justice.

In my testimony today, I will begin by discussing the importance of environmental litigation to achieving the goals that Congress has established in federal environmental laws. Litigation has always integral to enforcing environmental law, and administrative law more generally. Congress created a cause of action to challenge agency decisions—and the failure of agencies to make decisions—when it enacted the Administrative Procedure Act in 1946. In many environmental statutes, Congress created more specialized provisions to govern judicial review, which are more suited to particular legal contexts.

The ability of the public to hold federal agencies accountable has served us well. Litigation keeps agencies honest and accountable to the mandates that Congress has established. Environmental litigation itself does not negatively affects the economy, states, or local communities. Litigation merely enforces the legal rules that Congress has established by statute, or implementing agencies have established by regulation. Litigation that holds federal agencies accountable is appropriately encouraged by existing provisions that require the federal government in certain circumstances to pay the legal fees of a party that successfully sues the federal government.

The second portion of my testimony will focus on settlements and consent decrees that the federal government enters into to reach a negotiated resolution to environmental litigation. I will refer to both settlements and consent decree in environmental cases simply as environmental settlements.

All the evidence shows that environmental settlements are a good thing. In all areas of law, settlements dominate the American legal landscape. They are favored by courts, attorneys, and parties because they reduce legal costs and allow the parties, where possible, to negotiate a resolution that eliminates the uncertainty about the outcome of a case and allows the parties, rather than a judge or jury, to find a resolution that all sides can live with.

My comments regarding environmental settlements will proceed in three parts. First, I will discuss the benefits provided by environmental settlements. Second, I will discuss existing mechanisms that ensure that agencies do not enter into settlements that circumvent their legal obligations. And third, I will respond to some criticisms of environmental settlements.

I. THE IMPORTANT ROLE OF ENVIRONMENTAL LITIGATION

In the 1970s and early 1980s, Congress systematically enacted modern environmental law.¹ Almost every modern environmental laws includes a provision that allows citizens to file lawsuits against either private parties or the federal government for violating the provisions of those laws.² Where environmental laws lack specific citizen suit provisions, the administrative procedure act (commonly called the APA) authorizes lawsuits challenging many actions taken by the federal government.³ It is lawsuits brought against the federal government—either pursuant

¹ See Barton H. Thompson, Jr. *The Continuing Innovation of Citizen Enforcement*, 2000 UNIVERSITY OF ILLINOIS LAW REVIEW, 185 (2000). For a detailed discussion of the history of U.S. environmental law, see RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* (2004).

² See generally Thompson, *supra* note 1.

³ See 5 U.S.C. 704. The APA authorizes judicial review of “final agency action for which there is no adequate remedy in a court.” *Id.* Where an environmental statute contains specific judicial review provisions, those provisions will govern rather than the APA.

to the specialized provisions that Congress created in specific environmental statutes, or pursuant to the general judicial review provisions of the APA—that are the focus of my testimony today.

Congress’s innovations, first in the APA and later through environmental citizen suit provisions, promote important values. First and foremost they hold the executive branch accountable to legislative decisions made by Congress. Environmental citizen suits or APA lawsuits against federal agencies only succeed when those agencies have failed to fulfill the obligations imposed upon them through laws passed by Congress. These provisions are widely used by a diverse array of parties. In a 2011 report, the Government Accountability Office found that EPA faced approximately 150 cases a year. About half of those cases were filed by private companies or trade associations and about 30 percent were filed by either local or national environmental organizations.⁴

Second, citizen suits serve n important democratic values by providing an avenue by which the people can haul government agencies before the courts when those agencies have acted in an unlawful manner.⁵ Providing such an avenue enhances fairness by allowing anyone effected by an agency decision, or failure to act, to bring a lawsuit seeking to hold that agency accountable.

Importantly, citizen suits do not authorize citizens or courts to substitute their judgment for the judgment of Congress or federal agencies. To be successful, environmental litigation must be anchored in the legal obligations established through by Congress through legislation or by agencies through regulation. Moreover, the standard of review applied by courts is very deferential to the executive branch. As a former lawyer for the DOJ, I witnessed and benefitted

⁴ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-11-650, ENVIRONMENTAL LITIGATION: CASES AGAINST EPA AND ASSOCIATED COSTS OVER TIME 13 (2011) (hereinafter “GAO EPA STUDY”).

⁵ See Thompson, *supra* note 1, at 188.

from this deference on a consistent basis. So long as a federal agency has a decent argument that its actions conformed to the will of Congress and also accorded with the regulations established by the agency itself, the federal agencies is very likely to prevail. In other words, while aggrieved parties have many opportunities to sue the federal government to prevail they must overcome a substantial thumb on the scale in favor of the government.

Before I turn to environmental settlements, let me briefly address an additional aspect of environmental litigation. Fee shifting provisions are a crucial tool in facilitating such litigation and evening the playing field. In the absence of such provisions, environmental organizations and concerned citizens would face substantial economic barriers to bringing lawsuits, even in circumstances where the federal government acted in clear violation of the law. Such a situation would cause an imbalance in the legal landscape because private businesses and trade groups, who already file half of lawsuits against EPA, have the financial resources to pay for lawsuits that advance their viewpoint.

Some environmental statutes, like the Endangered Species Act,⁶ contain their own fee-shifting provisions. Otherwise, the Equal Access to Justice Act (or EAJA) allows a court to award attorneys fees to the prevailing party so long as the position of the United States is not “substantially justified.”⁷ While fee-shifting provisions have come under attack in recent years,⁸ available information suggests that, overall, attorneys fees in environmental litigation impose a relatively slight burden to the taxpayer. In its 2011 report, the Government Accountability Office study found that between 1995 and 2010, EPA paid approximately \$1.8 million a year in attorneys fees,⁹ which is just over two hundredths of a percent of EPA’s budget. Moreover, fee-

⁶ 16 U.S.C. § 1540(g)(4).

⁷ 28 U.S.C. § 2412(d)(1)(A).

⁸ See, e.g., The Government Litigation Savings Act, H.R. 3037, 113th Congress.

⁹ GAO EPA STUDY, *supra* note 4, at 19.

shifting provisions do not create incentives for frivolous litigation. A party only receives a fee award if that party prevails in the litigation, and if the party seeks fees under EAJA they must further demonstrate that the government's position is not "substantially justified."¹⁰

II. ENVIRONMENTAL SETTLEMENTS COMPLY WITH THE LAW AND ARE SOUND POLICY

Some environmental lawsuits end in settlements between the federal government and the plaintiff. In recent years, such environmental settlements have been termed the "sue and settle" phenomenon and have generated substantial attention, which was first instigated when the U.S. Chamber of Commerce released a report released criticizing the practice in 2013.¹¹

I think the term "sue and settle" is inapt. Settlements virtually always follow the filing of lawsuits, and the vast majority of lawsuits in the American justice system settle—by some estimates, between eighty and ninety-two percent of all cases.¹² Moreover, this is widely viewed as a good thing. Settlements preserve judicial resources and allow the parties to reach an agreement, rather than have a resolution imposed by a judge or jury.¹³ Given the frequency of settlements, and the strong public policy favoring settlement, it should come as no surprise that the federal government, like any party in civil litigation, sometimes reaches a settlement. The so-called "sue and settle" phenomenon, then, is simply the ordinary course of litigation in the

¹⁰ See Brian Korpics, et al, *Shifting the Debate: In Defense of the Equal Access to Justice Act*, 43 ENVIRONMENTAL LAW REPORTER 10,985, 10,991 (2013).

¹¹ See WILLIAM L. KOVACS ET AL., U.S. CHAMBER OF COMMERCE, A REPORT ON SUE AND SETTLE: REGULATING BEHIND CLOSED DOORS (2013) (hereinafter "CHAMBER OF COMMERCE REPORT"). Shortly after the Chamber of Commerce released its report, the American Legislative Exchange Council and the Center for Regulatory solutions released their own criticisms of environmental settlements. CENTER FOR REGULATORY SOLUTIONS, SUE-AND-SETTLE: REGULATION WITHOUT REPRESENTATION (2014); WILLIAM YEATMAN, AMERICAN LEGISLATIVE EXCHANGE COUNCIL, THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S ASSAULT ON STATE SOVEREIGNTY (2013) (hereinafter "ALEC REPORT").

¹² See Jonathan D. Glater, *Study Finds Settling Is Better Than Going to Trial*, NEW YORK TIMES, Aug. 7, 2008 (citing the author of an empirical study on settlement for the proposition that "[t]he vast majority of cases do settle – from 80 to 92 percent by some estimates").

¹³ See, e.g., *In re Deepwater Horizon*, 739 F.3d 790, 807 (5th Cir. 2014) (rejecting a rule that "would thwart the 'overriding public interest in favor of settlement' that we have recognized"); *Bradley v. Sebelius*, 621 F.3d 1330, 1339 (11th Cir. 2010) ("Historically, there is a strong public interest in expeditious resolution of lawsuits through settlement.").

American legal system. As a result, those that seek to curb or cabin settlement opportunities in this single context should have to demonstrate that environmental settlements involve decidedly different considerations than other types of litigation. And, as I will explain, that case has not been made.

Before I turn to the benefits that environmental settlements can secure, let me provide an overview of the typical environmental case that leads to settlement. Unsurprisingly, most environmental settlements fall into a category of litigation that is particularly likely to settle: Circumstances where a defendant has essentially no defense to liability. The circumstance I am referring to is the deadline lawsuit, including deadline lawsuits under the Endangered Species Act and the Clean Air Act, which have stirred some controversy. Of the settlements criticized by the Chamber of Commerce report, more than 80 percent involved deadline lawsuits.¹⁴

Deadline lawsuits involve the following situation: Congress imposes a strict deadline on certain agency decisions. For example, under the Clean Air Act, EPA has one year to approve a state implementation plan,¹⁵ and under the Endangered Species Act, the Fish and Wildlife Service has one year to render a decision on a petition to list a species under the act if that petition includes substantial information indicating that a listing may be warranted.¹⁶ An agency charged with acting within one of these strict deadlines fails to meet its legal obligations.

Someone then files a lawsuit challenging the agency's failure to act.¹⁷

¹⁴ See Courtney R. McVean & Justin R. Pidot, *Environmental Settlements and Administrative Law*, HARVARD ENVIRONMENTAL LAW REVIEW 192, 217 (2015); Stephen M. Johnson, *Sue and Settle: Demonizing the Environmental Citizen Suit*, 37 SEATTLE UNIVERSITY LAW REVIEW 891, 913 (2014).

¹⁵ See 42 U.S.C. § 7410(k)(2).

¹⁶ See 16 U.S.C. 1533(3)(B).

¹⁷ See, e.g., 5 U.S.C. § 706(1) (authoring courts to “compel agency action unlawfully withheld or unreasonably delayed”); 16 U.S.C. § 1540(g)(1)(C) (authoring citizen suits under the Endangered Species Act “where there is alleged a failure of the Secretary to perform any act or duty . . . which is not discretionary with the Secretary”).

A lawyer for the government in such a situation—where an agency has violated a clear deadline by which the agency must act—has no good defense to liability.¹⁸ When these lawsuits don't settle, the government loses them.¹⁹ A judge will then be in a position to impose on the agency a timeline for the agency to meet its legal obligations. And because the government lacks a substantially justified defense, the government will often be obligated to pay the attorneys fees of the party bringing the lawsuit.²⁰

I provide this overview of the legal backdrop to the typical environmental settlement because it highlights how ordinary these settlements truly are. Notwithstanding theories that the federal government is engaging in some form of collusion with plaintiffs,²¹ in my view the most significant determinant of whether an environmental lawsuit ends in a settlement is a simple one: Do the lawyers representing the federal government believe that the federal government can prevail? Where those lawyers believe that a loss is virtually inevitable, attempting to settle the case is a no brainer.

A. BENEFITS OF ENVIRONMENTAL SETTLEMENTS

Environmental settlements offer numerous benefits. First, such settlements enhance—rather than limit—the agency's discretion. In the face of a deadline lawsuit the agency is certain to lose, an agency faces the following choice: Either it can negotiate with the opposing party to establish a mutual agreed upon timeline for the agency's action, or it can wait for judgment and

¹⁸ See McVean & Pidot, *supra* note 14, at 202-03.

¹⁹ See Biodiversity Legal Foundation v. Badgley, 309 F.3d 1166 (9th Cir. 2001); Daniel J. Rohlf, *Section 4 of the Endangered Species Act: Top Ten Issues for the Next Thirty Years*, 34 ENVIRONMENTAL LAW 493, 495 (2004).

²⁰ See 28 U.S.C. § 2412(d)(1)(A).

²¹ See CHAMBER OF COMMERCE REPORT, *supra* note 11, at 3. The Chamber of Commerce Report implies that evidence of such collusion can be found in the fact that in some circumstances a settlement or consent decree is filed alongside the complaint initiating suit against the agency. See *id.* at 11. This is, however, entirely unsurprising because environmental citizen suit provisions require a party intending to file a lawsuit to provide notice of that lawsuit sixty days before filing. See Johnson, *supra* note 14, at 912. In other words, by the time the complaint is filed, the federal government has been on notice of the impending lawsuit for two months and negotiations can occur during that period.

have a judge impose such a deadline.²² The agency maintains more control over its agenda by entering into settlement negotiations, rather than allowing a judge to enter an injunction compelling the agency to act within a certain timeframe. This rule—that agencies increase their discretion by settling, rather than litigation—holds true in most cases where an agency is likely to lose. Agencies simply have more control over the terms of settlements than over the terms of a judge’s order.

Second, settlements save government resources. These resources largely take the form of staff time at both the Department of Justice, which represents environmental agencies in federal court, and the agency being sued.²³ This savings will be particularly significant where a settlement can be reached early in the life of a lawsuit, and in appropriate circumstances, settlement negotiations can begin even before the filing of a complaint because parties suing the federal government under most environmental statutes must provide notice of their intent to file a lawsuit sixty days before filing their complaint.²⁴

Third, settlements save taxpayer dollars by reducing the amount of attorneys fees the federal government has to pay. This savings occurs because, just as settlements reduce the amount of time required by government attorneys, they also reduce the amount of time required by plaintiffs’ attorneys. The fewer hours plaintiffs’ attorneys spend on a case, the lower the amount of attorneys fees they can demand.

Fourth, settlements conserve judicial resources by resolving cases without a judge having to rule on liability and craft a remedy. This frees judges to spend time on more controversial matters.

²² See McVean & Pidot, *supra* note 14, at 231-32.

²³ See Johnson, *supra* note 14, at 934.

²⁴ 42 U.S.C. § 7604(b) (Clean Air Act sixty day notice requirement); 16 U.S.C. § 1540 (g)(2)(C) (Endangered Species Act sixty day notice requirement); 33 U.S.C. § 1365(b) (Clean Water Act sixty day notice requirement).

B. LIMITATIONS ON ENVIRONMENTAL SETTLEMENTS

In reaching environmental settlements, the government secures the benefits I have discussed, but it does not have *carte blanche* to do so. There are three sources of safeguards that apply to environmental settlements that I will discuss, and to my mind, these safeguards address any concern that settlements could be used to circumvent agency procedural obligations.

First, agencies do not themselves possess authority to enter into a settlement. Rather, only appointed and confirmed officials within the Department of Justice can approve a settlement.²⁵ This independent review by lawyers charged with representing the United States limits an agency's ability to enter into settlements. An agency has to not want to enter a settlement, but the agency has to convince lawyers at the Department of Justice that settlement is both appropriate and desirable. Because Department of Justice lawyers will not be driven by the agency's mission, but rather by legal considerations, vesting settlement authority at the Department of Justice significantly limits agencies ability to enter into collusive settlements.

Second, the Department of Justice has internal rules that place limitations on the terms that can be contained within settlements. A 1999 memorandum produced by Randolph D. Moss, the Acting Assistant Attorney General overseeing the Office of Legal Counsel, currently guides settlement policy, and that memorandum acknowledges that the Administrative Procedure Act, and other limits on agency decisionmaking processes, limits the Department of Justice's authority to enter into settlements that would appear to circumvent "restrictions on the manner in which the executive branch may adopt and revise regulatory rules and procedures."²⁶

²⁵ See 28 C.F.R. § 0.160(d); see also McVean & Pidot, *supra* note 14, at 202. Settlements must either be approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or an Assistant Attorney General. All of these positions are subject to Senate confirmation.

²⁶ Memorandum from Randolph D. Moss, Acting Assistant Attorney Gen., Office of Legal Counsel, to Raymond C. Fischer, Assoc. Attorney Gen., 23 OPINIONS OF THE OFFICE OF LEGAL COUNSEL 126, 128 (June 15, 1999); see also McVean & Pidot, *supra* note 14, at 208.

Third, courts must approve and enforce settlements, and courts have demonstrated their willingness to intervene when a settlement oversteps legal bounds. Judicial intervention can take two forms. First, a court can simply refuse to approve a settlement. For example, in *Conservation Northwest v. Sherman*, the Ninth Circuit refused to allow a consent decree that the Court found substantively modified the terms of a Forest Plan.²⁷ Such modification, the Court reasoned, required the agency to proceed through the ordinary administrative process for Forest Plan amendments. Second, after a settlement has been entered, a later court can vacate the settlement in litigation challenging the settlement's terms. For example, in *Minard Run Oil Co. v. U.S. Forest Service*, the Third Circuit vacated a settlement under which the Forest Service had agreed to perform environmental review before allowing certain activities within a national forest.²⁸ The court again found that the decision to perform such review, which departed significantly from past practices, needed to be made through a notice-and-comment rulemaking.

C. MISPLACED CRITICISM OF ENVIRONMENTAL SETTLEMENTS

Environmental settlements provide significant benefits and there already exist numerous safeguards to prevent agencies from misusing this litigation device. Nonetheless, some argue for new and aggressive limits on the government's ability to enter environmental settlements. Such limits will surely increase the cost to taxpayers because they will prolong litigation and result in higher fee awards. Moreover, I believe the concerns are misplaced. I'd like to explain why the two most common arguments against environmental settlements are not cause for concern.

First, the most potentially significant argument against environmental settlements, to my mind, is the claim that such settlements allow agencies to make decisions in secret without soliciting public input. If environmental settlements truly allowed circumvention of

²⁷ *Conservation Northwest v. Sherman*, 715 F.3d 1181 (9th Cir. 2013).

²⁸ *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236 (3d Cir. 2011).

administrative law, this would be a concern. However, as I will explain, environmental settlements involve decisions that would not be subject to public participation even if the decision was made outside of a settlement.²⁹ And where agencies do make decisions in environmental settlements that evade requirements for public participation, courts can, and do, intervene.³⁰

The vast majority of environmental settlements involve decisions that agencies may freely make without engaging in any public process.³¹ As I've discussed, most environmental settlements resolve deadline litigation, and through the settlement, the agency commits to making a decision—one that Congress has already mandated that the agency make. Such settlements involve an agency making a decision to allocate resources to complete a specified decisionmaking process. Agency decisions to allocate resources and set priorities do not require public participation. Indeed, courts refer to resource allocation decisions as a quintessential matter of agency discretion.³² As a result, an agency making such a decision through a settlement evades no public participation requirement.

The same is true for other, rarer categories of settlements. On occasion, agencies enter settlements that commit to engaging in particular procedures in making a decision.³³ For example, in *California Resource Agency v. U.S. Department of Agriculture*, a state agency and environmental groups filed a lawsuit alleging that the Forest Service had violated its procedural obligations in finalizing a forest plan.³⁴ After the district court ruled that the Forest Service had

²⁹ See McVean & Pidot, *supra* note 14, at 230-38.

³⁰ See *id.* at 236.

³¹ See *id.* at 230-33.

³² See, e.g., *Oil, Chemical & Atomic Workers Union v. Occupational Safety & Health Administration*, 145 F.3d 120, 123 (3d Cir. 1998).

³³ See McVean & Pidot, *supra* note 14, at 233-35.

³⁴ *California Resources Agency v. U.S. Department of Agriculture*, Nos. 08-1185, 08-3884, 2009 W.L. 6006102 (N.D. Cal. Sept. 29, 2009).

violated the law, the federal government entered into a settlement with the plaintiffs agreeing to engage in certain procedures. To be clear, the Forest Service could always have made the decision, without any public input whatsoever, to engage in those procedures. The APA explicitly exempts rules of agency procedure from public participation requirements,³⁵ and such procedural decisions are generally a preliminary aspect to an agency's decisionmaking process that is not independently subject to judicial review.³⁶ Moreover, as the *Minard Run* case demonstrates,³⁷ where an agency makes a procedural rule that a court believes should have been subjected to notice-and-comment rulemaking procedures, courts have ample authority to override the terms of the settlement.

Finally, agencies occasionally enter settlements that involve a commitment to a substantive position.³⁸ Often, these commitments regard preliminary matters that will become part of an agency decision subject to notice and comment rulemaking and eventually judicial review. In such a case, a reviewing court would consider the propriety and legality of the settlement at the time that the agency reaches a final decision.³⁹ In rare situations an agency may attempt to enter a settlement that makes a final substantive decision that will not become part of another decisionmaking process.⁴⁰ Where such substantive decisions require public participation, the *Conservation Northwest* court demonstrates that courts are already well-equipped to detect and address the problem.

³⁵ 5 U.S.C. § 553(b)(A).

³⁶ See, e.g., 5 U.S.C. 704 (authorizing judicial review of "final agency action").

³⁷ *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236 (3d Cir. 2011).

³⁸ See *McVean & Pidot*, *supra* note 14, at 235-38.

³⁹ The multi-species settlements between the Fish and Wildlife Service and the Center for Biological Diversity and Wildearth Guardians contained such a commitment. In those settlements, the agency agreed not to conclude that a listing of the species at issue was warranted by precluded by other priorities. See James J. Tutchton, *Getting Species on Board the Ark One Lawsuit at a Time: How the Failure to List Deserving Species Has Undercut the Effectiveness of the Endangered Species Act*, 20 ANIMAL LAW 401 426

⁴⁰ See *McVean & Pidot*, *supra* note 14, at 238.

Because most settlements do not evade any public participation requirement and because courts already have ample authority to intervene in the rare circumstance where such evasion occurs, this critique of environmental settlements is unfounded.

A second argument critics make is that environmental settlements allow environmental groups to set the agenda for federal agencies.⁴¹ This criticism also fails for the simple reason that it is Congress, not environmental groups, that have established 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—simply holds agencies accountable to their statutory mandates.

CONCLUSION

Environmental settlements make good litigation sense. They make good policy sense. And they do not empower agencies to evade their legal responsibilities. Criticisms of environmental settlements, in my view, are simply criticism of the underlying substantive environmental statutes. Complaints about the Fish and Wildlife Service's settlement of deadline litigation about listing endangered species are not at core complaints about the settlement, but rather, complaints by certain interest groups who object to a particular species being listed, even if the scientific evidence demonstrates that a listing is warranted. Similarly, complaints about the EPA's settlement of Clean Air Act litigation are not at core complaints about the settlements, but rather, complaints that certain interest groups object to aspects of the Clean Air Act.

In other words, there is nothing broken about environmental settlements. There is no problem with settlement practices for Congress to fix. There is no record to substantiate claims that they are collusive. There is no record to substantiate claims that they enable agencies to

⁴¹ See ALEC REPORT, *supra* note 11, at 5.

avoid public participation. There is no record to substantiate claims that they enable private parties—environmental groups or industrial groups—to take over agencies.

The Department of Justice and the federal environmental agencies should retain discretion to settle litigation brought against the federal government, in just the way that any other party in civil litigation can settle a case if settlement is a better option than litigation. If Congress believes that the substance of environmental law needs to be adjusted, that is a debate that should occur in full daylight. Environmental litigation and environmental settlements should not be used as an underhanded attempt to remake the substance of environmental law.