

NOTE

AN EMPIRICAL ANALYSIS OF SUE-AND-SETTLE IN ENVIRONMENTAL LITIGATION

*Ben Tyson**

INTRODUCTION

INDUSTRY advocacy groups, national publications, and Congress have recently focused attention on the citizen suit¹ practice of “sue-and-settle” in environmental litigation. Sue-and-settle is a process whereby an advocacy group sues a regulatory agency, charging the agency with violations of a non-discretionary statutory duty. The agency, rather than defend itself at trial, settles with the advocacy group. The resulting settlement agreement or consent decree (hereinafter both types of resolution are referred to as consent decrees)² binds the agency to take action to resolve the plaintiffs’ claims.³

* J.D. 2014, University of Virginia School of Law. Many thanks to all who helped with this Note, in particular: Professors Jon Cannon and John Duffy, Alex Wyman, Jacob Gutwilig, Danny Evens, Katherine Tyson, and the student editors at the *Virginia Law Review*.

¹ Citizen suit provisions allow private-citizen plaintiffs (including advocacy groups and industry associations) access to federal courts to force agencies to perform non-discretionary duties, including informal rulemaking. See generally Matthew D. Zinn, Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits, 21 *Stan. Envtl. L.J.* 81, 119 (2002) (discussing the role of citizen suits in regulatory enforcement). Provisions for these suits are included in the Clean Air Act, 42 U.S.C. § 7604(a)(2) (2012), the Clean Water Act, 33 U.S.C. § 1365(a)(2) (2012), and the Endangered Species Act, 16 U.S.C. § 1540(g)(1)(C) (2012).

² In practice, consent decrees are settlement agreements given the force of law by order of a court. The principal difference between the two is that the court reviews the consent decree for validity (including, for example, fairness) before entry and can force compliance by the parties. Settlement agreements take their force from the law of contracts and require no ex ante court approval. For purposes of this Note, they are functionally the same. See Peter M. Shane, Federal Policy Making by Consent Decree: An Analysis of Agency and Judicial Discretion, 1987 *U. Chi. Legal F.* 241, 266 n.98 (“Given that settlement agreements are enforceable contracts, the primary practical difference between settlement agreements and consent decrees is that settlement agreements permit the executive to breach and be sued (but not risk contempt as a sanction), while departures from consent decrees risk contempt, among other remedies, unless based on previous judicial modifications.”).

³ William Kovacs, Keith Holman & Jonathan Jackson, U.S. Chamber of Commerce, Sue-and-Settle: Regulating Behind Closed Doors 3–4 (2013) [hereinafter Chamber Report].

The practice has exploded under President Barack Obama's administration.⁴ What is controversial is not *if* but *why* this has occurred—and *what*, if anything, should be done about it. Is something nefarious driving the process? Or are there more benign reasons behind it? If the practice is deleterious, does it need to be scrapped in whole? Or are there beneficial parts that should be salvaged?

This Note aims to expand understanding of the sue-and-settle controversy by providing useful data, analytics, and commentary from which courts, policymakers, and academics may further their exploration of sue-and-settle. The U.S. Chamber of Commerce ("Chamber") currently leads the efforts to answer those questions.⁵ In its analysis ("Chamber Report"),⁶ the Chamber tells an intuitively persuasive story: The pro-green Obama Environmental Protection Agency ("EPA") has a close relationship with environmental advocacy groups. This close relationship goes beyond the permissible: It moves from collaboration to collusion. EPA and green groups motivated by the same ideological agenda collude to push green regulations through "rulemaking in secret."⁷ Sue-and-settle, the Chamber claims, is designed to create restrictive regulations outside the public eye—the process "Skirts Procedural Safeguards On the Rulemaking Process"⁸ by denying or substantially impairing the ability of the public, the regulated community, and state officials to comment before an agency commits (via consent decree) to substantive rulemaking.⁹

This Note applies empirical analysis to sue-and-settle under the Obama administration to further explicate the story that the Chamber only begins to tell. This Note's analysis examines sue-and-settle in the context of three main environmental statutes: the Clean Air Act ("CAA"),¹⁰ Clean Water Act ("CWA"),¹¹ and Endangered Species Act ("ESA").¹²

⁴ Id. at 14.

⁵ See id.; see also Judith Lewis Mernit, *The Environmental Lawsuit Sue-and-Settle Spin Cycle*, High Country News (Aug. 19, 2013), <http://www.hcn.org/issues/45.14/the-environmental-lawsuit-sue-and-settle-spin-cycle> ("In recent years, House Republicans, aided by the U.S. Chamber of Commerce, have likened 'sue-and-settle' agreements to mob tactics.").

⁶ Chamber Report, *supra* note 3.

⁷ Id. at 7.

⁸ Id. at 6.

⁹ Id.

¹⁰ 42 U.S.C. §§ 7401–7671q (2012).

¹¹ 33 U.S.C. §§ 1251–1387 (2012).

¹² 16 U.S.C. §§ 1531–1544 (2012).

Part I gives a brief overview of the sue-and-settle process and then identifies the main thrust of the Chamber's attack: that sue-and-settle operates as secret rulemaking. Part II then evaluates the validity of that claim. First, Part II defines two functionally very different types of consent decrees: decision-forcing consent decrees and substantive consent decrees. Part II then shows that a more nuanced analysis than the one conducted by the Chamber should properly distinguish between sue-and-settle cases that use each of these types of consent decrees, concluding that when the differences between the two are taken into account, there is far less actual rulemaking outside the public eye than alleged. Accordingly, Part II dismisses the "secret rulemaking effects" argument as a major cause for alarm, though it notes that in certain cases some residual concern is still valid. Part III follows this discussion by proposing targeted remedies to the residual concerns identified and discussed in Part II, primarily arguing that substantive (but not decision-forcing) consent decrees should be abandoned.

The analysis does much to cast doubt upon the Chamber's claim that sue-and-settle is principally about secret rulemaking. Yet if secret rulemaking is not driving the process, what is behind the explosive growth of sue-and-settle in recent years? Part IV begins a discussion of other possible hypotheses for the recent proliferation of sue-and-settle suits. Part IV proposes and discusses potential empirical analyses of these hypotheses as areas for future study.

The issue has taken on national salience: Legislation has been introduced in the House and the Senate to reform the process, and the issue has found its way into the headlines of major national publications.¹³ This Note aims to better inform the ongoing debate over sue-and-settle.

¹³ See, e.g., Sunshine for Regulatory Decrees and Settlements Act of 2013, H.R. 1493, 113th Cong. (2013) (proposed legislation to change sue-and-settle process); Sunshine for Regulatory Decrees and Settlements Act of 2013, S. 714, 113th Cong. (2013) (same); see also Stephen Moore, Editorial, Cross Country: Using 'Sue and Settle' to Thwart Oil and Gas Drillers, *Wall St. J.*, Oct. 5–6, 2013, at A11 (example of national news coverage); EPA's Back-Room 'Sue and Settle' Deals Require Reform, *Wash. Examiner* (May 24, 2013), <http://washingtonexaminer.com/article/2530505> (same).

I. A BRIEF OVERVIEW OF SUE-AND-SETTLE UNDER ENVIRONMENTAL
STATUTES AND ATTACKS ON THE PRACTICE

A. *Sue-and-Settle Defined*

Sue-and-settle is not a legal term, but rather a descriptive term commentators employ to describe a particular administrative law litigation practice. The Chamber provides a workable overview. First, an outside group sues a federal agency in a citizen suit, arguing that the agency has neglected its statutory obligation to issue a regulation or otherwise perform a non-discretionary act.¹⁴ Second, the outside group and the regulatory agency agree on a settlement, whereby further litigation is avoided. Third, the outside group and the regulatory agency take the settlement to the court where the suit is pending. Fourth, the court approves (or disapproves) of the consent decree.¹⁵ In reviewing a consent decree, the court must determine that it is “fair, reasonable, adequate, and consistent with applicable law.”¹⁶ Moreover, “the underlying purpose of this review is to determine whether the decree adequately protects and is consistent with the public interest.”¹⁷ To agree to entry of a consent decree, the presiding judge must determine that a consent decree is not “illegal, a product of collusion, inequitable, or contrary to the public good.”¹⁸

The sue-and-settle process is common under three environmental statutes: the CAA,¹⁹ the CWA,²⁰ and the ESA.²¹

B. *The Explosive Growth of Sue-and-Settle and Resulting Controversy*

Sue-and-settle is more prevalent now than at any point in the last fifteen years; for example, while President Bill Clinton’s second term saw twenty-seven CAA cases disposed of under sue-and-settle, and President George W. Bush’s (hereinafter Bush) entire presidency saw only sixty-

¹⁴ Chamber Report, *supra* note 3, at 4.

¹⁵ *Id.*

¹⁶ *United States v. BP Exploration & Oil Co.*, 167 F. Supp. 2d 1045, 1049 (N.D. Ind. 2001) (citing, *inter alia*, *United States v. Union Elec. Co.*, 132 F.3d 422, 430 (8th Cir. 1997)).

¹⁷ *Id.* (citing *United States v. Seymour Recycling Corp.*, 554 F. Supp. 1334, 1337 (S.D. Ind. 1982)).

¹⁸ *Kelley v. Thomas Solvent Co.*, 717 F. Supp. 507, 515 (W.D. Mich. 1989) (citing, *inter alia*, *United States v. City of Jackson*, 519 F.2d 1147, 1151 (5th Cir. 1975)).

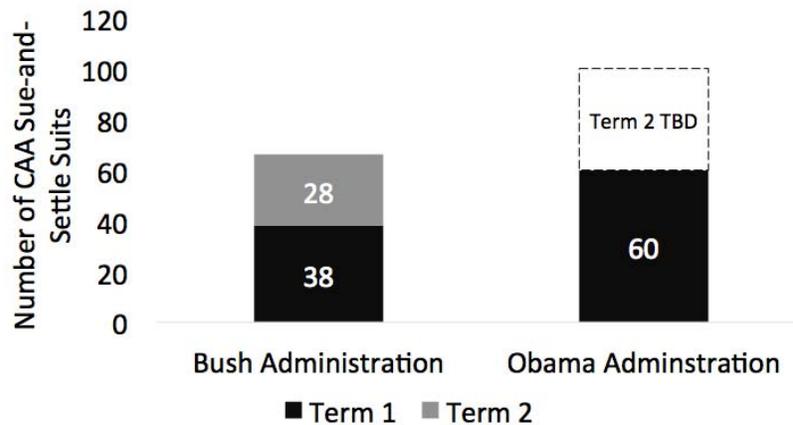
¹⁹ Clean Air Act, 42 U.S.C. §§ 7401–7671q (2012).

²⁰ Clean Water Act, 33 U.S.C. §§ 1251–1387 (2012).

²¹ Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2012).

six sue-and-settle CAA cases, President Barack Obama’s EPA had already engaged in the practice sixty times under the CAA through May 2013—on pace for well over one hundred CAA sue-and-settle cases during his two terms.²² As a *Wall Street Journal* op-ed reported in the fall of 2013, “The Obama administration didn’t invent sue and settle, but the pace has increased dramatically since 2009—an era that Oklahoma Attorney General Scott Pruitt calls ‘sue and settle on steroids.’”²³

Figure 1: Sue-and-Settle Clean Air Act Cases



The regulated community denounces the process. One commentator alleges, “Because the federal agencies include former employees of green organizations, sue and settle can be a collaborative, not adversarial, process.”²⁴ Sue-and-settle tactics “make[] it more challenging for employers to invest, to innovate and move forward,” declared Steve Roberts, president of the West Virginia State Chamber of Commerce.²⁵ “[S]ue and settle cuts the public entirely out of the rule-making process,”

²² See *infra* Figure 1. Figure 1 is reproduced in part from Chamber Report, *supra* note 3, at 14.

²³ Moore, *supra* note 13.

²⁴ *Id.*

²⁵ Linda Harris, ‘Sue-and-Settle’ Becoming ‘Significant,’ *St. J.* (Dec. 22, 2013), <http://www.statejournal.com/story/24045366/sue-and-settle-becoming-significant>.

asserts the *Washington Examiner*.²⁶ “[T]hese [consent] decrees appear to be the result of collusion, where an agency shares the goals of those suing it and takes advantage of litigation to achieve those shared goals,” a witness from the Heritage Foundation testified in front of the House Judiciary Committee.²⁷

Typical arguments against sue-and-settle are couched in terms of a broader public interest: the right of the public to notice-and-comment²⁸ proceedings before the promulgation of regulations. The main thrust of the Chamber’s and other critics’ assault on sue-and-settle is that the process “avoid[s] the normal protections built into the rulemaking process,”²⁹ which leads to “[r]ulemaking in secret”³⁰ from settlements that give “no opportunity to weigh in”³¹ for those “state and [i]ndustry officials directly affected by the settlements”³² before “the outcome of the rulemaking is essentially set.”³³ In essence, the Chamber makes the following key assertion: Environmental groups use the sue-and-settle process to engage in secret, backroom rulemaking away from the protections of public notice-and-comment processes to bind regulated entities in ways favorable to the environmental agenda—an end-run around public notice-and-comment.³⁴ One congressional sponsor of reform legislation summed up the argument succinctly: “The Obama Administration[] . . . has . . . opened the door to pro-regulation environmental and other interest groups to use sue-and-settle agreements to impose even

²⁶ EPA’s Back-Room ‘Sue-and-Settle’ Deals Require Reform, *Wash. Examiner* (May 24, 2013, 5:20 PM), <http://washingtonexaminer.com/article/2530505>.

²⁷ Sunshine for Regulatory Decrees and Settlements Act of 2013: Hearing on H.R. 1493 Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary, 113th Cong. 113 (2013) (statement of John Walke, Clean Air Director and Senior Attorney, Natural Resources Defense Council) (quoting Federal Consent Decree Fairness Act and the Sunshine for Regulatory Decrees Settlements Act of 2012: Hearing on H.R. 3041 and H.R. 3862 Before the Subcomm. on Courts, Commercial & Admin. Law, H. Comm. on the Judiciary, 112th Cong. 47 (2012) [hereinafter *Rulemaking Testimony*] (testimony of Andrew M. Grossman, Visiting Legal Fellow, Heritage Foundation), available at <http://www.heritage.org/research/testimony/2012/02/use-and-abuse-of-consent-decrees-in-federal-rulemaking>).

²⁸ “Notice-and-comment” refers to rulemaking following the procedures dictated in 5 U.S.C. § 553, also known as “informal rulemaking.” See *United States v. Mead Corp.*, 533 U.S. 218, 242 (2001) (Scalia, J., dissenting) (describing the informal rulemaking process).

²⁹ Chamber Report, *supra* note 3, at 3.

³⁰ *Id.* at 7.

³¹ Moore, *supra* note 13.

³² *Id.*

³³ Chamber Report, *supra* note 3, at 6.

³⁴ See Moore, *supra* note 13.

more, and harsher rules. To make matters worse, this is being done behind closed doors with little or no public input.”³⁵

The Chamber Report is full of useful data and substantively furthers exploration of this important topic. It is impressively researched and intuitively persuasive—but its allegations must be tested. In the following Part of this Note, the Chamber Report’s main claim is evaluated and at times is found wanting. Yet one observation is undoubtedly true: “After many years of being ignored by the news media, the ‘sue and settle’ strategy employed by anti-development groups to make changes in federal regulations . . . is . . . beginning to attract attention.”³⁶ No longer on the backburner, sue-and-settle is ripe for exploration with robust empirical analysis.

II. SUE-AND-SETTLE AS AN END-RUN AROUND NOTICE-AND-COMMENT RULEMAKING?

To evaluate the claim that sue-and-settle serves as an end-run around public participation in rulemaking (with such participation typically enabled via public notice-and-comment rulemaking provisions),³⁷ this Note argues that there are two fundamentally different types of sue-and-settle, with the difference turning on the relief sought—and that the two types should be evaluated separately. One must draw a line between two types of consent decrees: decision-forcing consent decrees and substantive consent decrees.³⁸ Decision-forcing consent decrees have no negative impacts on public participation in the rulemaking process; only substantive consent decrees are deleterious to public notice-and-comment.

³⁵ Ben Quayle Legislation to Fight Excessive Regulations, W. Free Press (March 28, 2012), <http://www.westernfreepress.com/2012/03/28/ben-quayle-legislation-to-fight-excessive-regulations/> (quoting a press release issued by former Congressman Ben Quayle).

³⁶ David Blackmon, The “Sue and Settle” Racket, *Forbes* (May 27, 2013, 5:30 PM), <http://www.forbes.com/sites/davidblackmon/2013/05/27/the-sue-and-settle-racket/>.

³⁷ See, e.g., 5 U.S.C. § 553 (2012).

³⁸ For another classification scheme, see Jeffrey M. Gaba, *Informal Rulemaking by Settlement Agreement*, 73 *Geo. L.J.* 1241, 1243–48 (1985), which divides rulemaking settlement agreements into three categories: scheduling agreements, process agreements, and substantive agreements. For purposes of this Note, the former two types of agreements would be categorized as decision-forcing agreements, while the latter type, which is typically used to “specify the substantive content—even the precise language—of regulations,” *id.* at 1245, retains the author’s designation. The decision-forcing consent decrees contained in the sue-and-settle dataset used for this Note are overwhelmingly scheduling agreements, to use Professor Gaba’s terminology.

A. Decision-Forcing Consent Decrees

The first form of relief sought in sue-and-settle is the decision-forcing consent decree. This Note derives that name from the purpose of the consent decree. Rather than seeking substantive relief, this consent decree only asks for an agency to make some sort of decision under normal rulemaking procedures, including *any* notice-and-comment requirements of the applicable statutory scheme. In essence, the only action sought from the agency is to engage in *any* course of action on the topic, not achieve any particular result. Examples include consent decrees whereby EPA agrees to determine whether a local area has achieved National Ambient Air Quality Standards (“NAAQS”) attainment, whether a State Implementation Plan (“SIP”) meets the federal standards of the CAA, or whether the CWA requires effluent limitations for a particular class of point sources. A decision-forcing consent decree does not specify that EPA reach any particular answer, and further requires that EPA engage in normally applicable notice-and-comment processes to reach the answer.

The consent decree entered in *Center for Biological Diversity v. Jackson* provides an illustrative example:

EPA shall sign for publication in the Federal Register no later than January 31, 2011, a notice of the Agency’s final determination under 42 U.S.C. §§ 7509(c)(1) and 7513(b)(2) as to whether Eagle River, Alaska attained the 24-hour PM-10 NAAQS by the applicable attainment date, December 31, 1994, based on the area’s air quality as of that attainment date.³⁹

This consent decree requires only that EPA make *any* decision (that is, that Eagle River is or is not in attainment); it does not require EPA to deliver a particular answer (for example, that Eagle River is in non-attainment).⁴⁰ This type of consent decree in no way impinges on EPA’s discretion or the effective use of the public notice-and-comment re-

³⁹ Settlement Agreement ¶ 1, *Ctr. for Biological Diversity v. Jackson*, No. cv-10-1846-MMC (N.D. Cal. 2010).

⁴⁰ Note, of course, that Eagle River industry groups would prefer that no finding at all be made because if a finding of non-attainment is made, the area will be subject to more draconian regulations under the CAA. We can at least presume that the Center for Biological Diversity is bringing the suit because it has good reason to believe that the facts bear out that Eagle River, Alaska is in non-attainment, and now this consent decree has the effect of requiring that a finding (any finding) be made.

2014]

Empirical Analysis of Sue-and-Settle

1553

quirements of the CAA—no attempt has been made to dictate the substance of EPA’s decision. Accordingly, it qualifies as decision forcing. This is in sharp contrast with the other type of consent decree.

B. Substantive Consent Decrees

The second form of relief sought in sue-and-settle is the substantive consent decree. As with the decision-forcing consent decree, this Note derives that name from the purpose of the consent decree. In contrast with decision-forcing consent decrees, substantive consent decrees do not simply seek *any* action from the regulatory agencies; rather, they demand a particular type of result. With substantive consent decrees, the consent decree commits the agency to propose a rule incorporating or dropping certain substantive aspects. Examples include consent decrees whereby EPA agrees to determine that a local area has achieved NAAQS attainment, that a state SIP meets the federal standards of the CAA or that the CWA requires effluent limitations for a particular class of point sources.

The consent decree entered in *American Forest & Paper Ass’n v. EPA* provides an illustrative example:

If and when EPA promulgates in final form an amendment to the GHG Reporting Rule that includes changes that are substantially the same substance as set forth in Attachment A, Table C-2 and Table AA-1, to this Agreement, then Petitioners shall promptly file a stipulation of dismissal of No. 12-1452.⁴¹

The table referenced in the above passage goes on to specify precise numerical default emission factors for various types of fuel (for example, it provides that “wood and wood residuals” shall have a “[d]efault CH₄ emission factor” of 7.2×10^{-3} kg CH₄/mmBtu).⁴² This consent decree thus commits EPA to enact a regulation of a particular substance in order for the suit to be dismissed. Only if EPA incorporates into regulation *these specific numerical values* will the case be dismissed under the decree. We therefore classify it as substantive.

⁴¹ Settlement Agreement ¶ 1, *Am. Forest & Paper Ass’n v. EPA*, No. 12-1452 (D.C. Cir. 2013).

⁴² *Id.* at Attachment A tbl.C-2.

C. The Value of Decision-Forcing Consent Decrees; The Danger of Substantive Consent Decrees

The fundamental difference between substantive and decision-forcing consent decrees is crucial. While in both cases, “[s]ettlement negotiations are . . . conducted in unpublicized, secret meetings among a limited number of parties,”⁴³ in the case of decision-forcing consent decrees, all impacted parties are given a meaningful opportunity to be heard through the applicable public notice-and-comment rulemaking requirements. That opportunity is lost in the case of substantive consent decrees. Sue-and-settle poses a threat to the notice-and-comment process when substantive consent decrees are sought and granted.

By law, the opportunity to be heard after sue-and-settle proceedings is possible no matter the type of the consent decree. Settlement agreements and consent decrees of general applicability do not generate regulations of their own force. Rather, they still require the agency to go through a rulemaking process as required by the authorizing statute.⁴⁴ For example, even if a consent decree commits EPA to propose and adopt certain numerical water quality criteria for a pollutant under the CWA, EPA still must propose the criteria as a proposed rule, take comments, and finalize the rule in line with the requirements of the Administrative Procedure Act (“APA”). EPA’s action would be open to the full suite of judicial review available under the APA and applicable organic statutes,⁴⁵ including the charge that EPA contravened the “arbitrary and capricious stand-

⁴³ Shane, *supra* note 2, at 271.

⁴⁴ In the case where a settlement agreement or consent decree commits the agency to withdraw a regulation, courts may (or may not) require notice-and-comment depending on the court and the statute. See Jacob E. Gersen & Anne Joseph O’Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. Chi. L. Rev. 1157, 1187–97 (2009).

⁴⁵ The CAA goes even further to ensure public participation in rulemaking. For example, CAA § 307 includes rather exhaustive rulemaking requirements. The CAA § 307 rulemaking process begins with the establishment of a rulemaking docket, 42 U.S.C. § 7607(d)(2) (2012), and publication of notice of proposed rulemaking in the Federal Register, requiring the inclusion of, *inter alia*, “the factual data on which the proposed rule is based,” as well as “the methodology used in obtaining the data and analyzing the data and the major legal interpretations and policy considerations underlying the proposed rule.” *Id.* § 7607(d)(3)(A)–(C). Throughout the rulemaking process, all information relevant to the rulemaking, including any public comments, must be kept in the docket. *Id.* § 7607(d)(4)(B)(i). When promulgated, the rule must be accompanied by a response to *each* of the “significant comments, criticisms, and new data submitted . . . during the comment period.” *Id.* § 7607(d)(6)(B). Rulemaking under the CWA and the ESA is subject to similar notice-and-comment requirements, applied through the APA. See 5 U.S.C. § 553 (2012).

ard” by not responding to comments—thus affording an opportunity to be heard, by law.⁴⁶

Those protections notwithstanding, substantive consent decrees mean that, in practice, the substance of the rule is already set when the settlement is agreed. Even if substantive consent decrees are worded such that EPA cannot be enjoined from proposing another rule,⁴⁷ EPA is likely to propose rules along the substance already contained in the consent decree—if for no other reason than to avoid continuing litigation. Commentators have observed that an agency’s incentive to avoid the hassle of future litigation arising from a breached consent decree often leads the agency to adopt the substance of the consent decree—“[a] disturbing aspect of rulemaking by settlement agreement.”⁴⁸ Notice-and-comment, after substance is set by a substantive consent decree, is, in effect, no notice-and-comment at all. The agency staff has made “a substantial intellectual commitment to the rule and [is] naturally reluctant to tinker with it in response to comments from people that they tend to believe are much less informed.”⁴⁹ Furthermore, the agency may refuse changes on the grounds that deviations “could disappoint reliance interests or cause confusion among regulated parties or the enforcement staff.”⁵⁰ A crucial point is that agency staff are often “reluctant to make changes in both proposed and interim-final rules.”⁵¹ In both situations, “[t]he staff may respond defensively, dismissing all but the most compelling (or the most trivial) comments as not worth the price of trying to fix the rule.”⁵²

In light of the ability of some consent decrees to subvert the intent (though admittedly not the law) of notice-and-comment rulemaking, the difference between these two types of decrees is of crucial importance. With decision-forcing consent decrees, no substantive action is required by or expected of the agency. With substantive consent decrees, the agency must propose and adopt certain substantive rules to comply with

⁴⁶ See, e.g., *Allied Local & Reg’l Mfrs. Caucus v. EPA*, 215 F.3d 61, 80 (D.C. Cir. 2000) (“For an agency’s decisionmaking to be rational, it must respond to significant points raised during the public comment period.”).

⁴⁷ For example, consent decrees often contain provisions that agree that the sole remedy afforded to the plaintiff is the ability to re-open litigation. See, e.g., *Settlement Agreement ¶ 3, Am. Forest & Paper Ass’n v. EPA*, No. 12-1452 (D.C. Cir. 2013).

⁴⁸ Gaba, *supra* note 38, at 1256.

⁴⁹ Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 *Admin. L. Rev.* 703, 716 (1999).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

the consent decree. In short, decision-forcing sue-and-settle is a valuable tool by which to “reduce[] the demands placed on the judicial system and free[] environmental agencies to concentrate on the performance of their statutory duties.”⁵³ Indeed, decision-forcing sue-and-settle furthers the will of Congress by holding agencies to statutory deadlines and non-discretionary actions. Yet substantive sue-and-settle, while offering some of the same benefits, produces a net negative on the process because it threatens effective public participation in the rulemaking process. The use of substantive sue-and-settle must be reformed to protect public notice-and-comment. With this distinction between decision-forcing and substantive sue-and-settle in hand, empirical analysis of use of the sue-and-settle process is better informed.

D. Empirical Analysis Reveals Public Participation Is Rarely Subverted by Sue-and-Settle

1. Overview of the Dataset

To empirically evaluate the claim that sue-and-settle is an end-run around public participation, this Note has assembled a dataset of eighty-eight sue-and-settle cases arising under the CAA, the CWA, and the ESA during the Obama administration.⁵⁴ The Chamber Report in its analysis identified sixty of these cases;⁵⁵ additional analysis for this Note revealed twenty-eight cases missed by the Chamber. The cases consist of sixty-eight arising under the CAA, eleven arising under the CWA, and nine arising under the ESA.⁵⁶ Of the sixty-eight cases arising under the CAA, industry groups brought seven;⁵⁷ of the eleven cases arising under the CWA, industry groups brought two; of the nine cases arising under the ESA, industry groups brought zero.⁵⁸ In total, industry groups brought nine of the eighty-eight suits.⁵⁹

⁵³ Robert V. Percival, *The Bounds of Consent Decrees: Consent Decrees, Settlements and Federal Environmental Policy Making*, 1987 U. Chi. Legal F. 327, 333.

⁵⁴ See *infra* Appendix A for a list of the cases.

⁵⁵ See *infra* Appendix A.

⁵⁶ See *infra* Figure 2.

⁵⁷ For purposes of this analysis, “industry groups” is broadly defined to mean those opposed to the positions of environmental advocacy groups and includes state or local governments challenging EPA regulatory actions to seek less restrictive regulations.

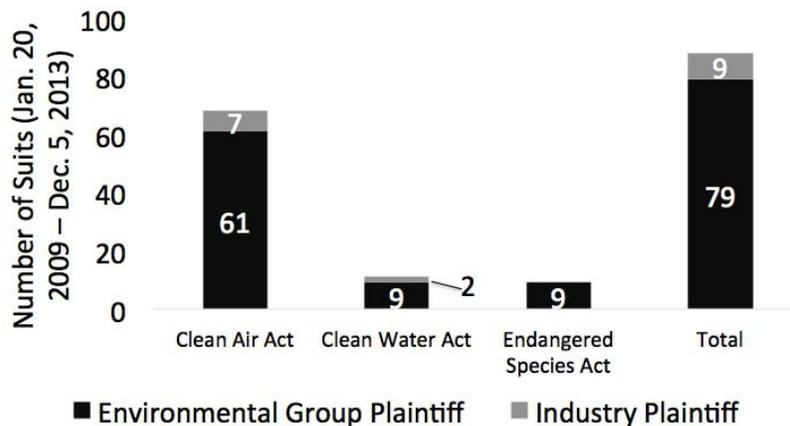
⁵⁸ See *infra* Figure 2.

⁵⁹ See *infra* Figure 2.

2. A Definition of When Sue-and-Settle Threatens Public Participation in Rulemaking

As discussed in Section II.C, when the substance of regulations quickens before an opportunity for public notice-and-comment, public participation in the rulemaking process is threatened. Based on the distinction drawn above between decision-forcing and substantive consent decrees, this Note considers substantive consent decrees to work an end-run around public participation. Decision-forcing consent decrees do not trigger this concern.

Figure 2: Sue-and-Settle by Statute and Plaintiff Classification



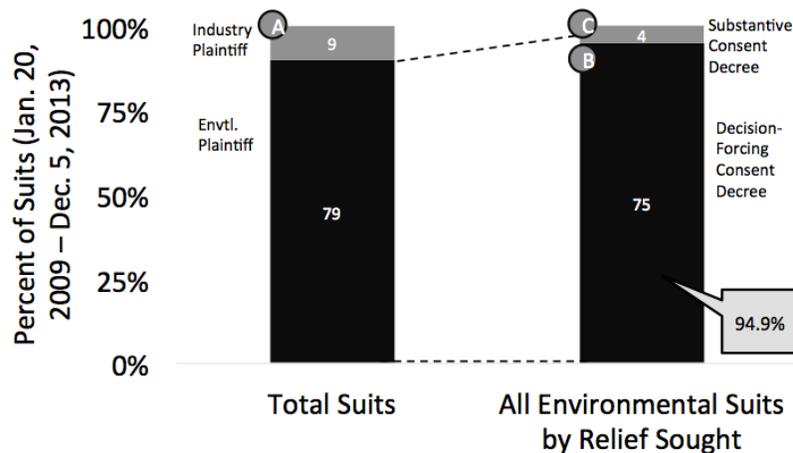
3. Environmental Group Plaintiffs’ Use of Sue-and-Settle

Figure 3 examines environmental advocates’ use of sue-and-settle and analyzes whether there is merit to industry’s claim that environmental groups’ use of sue-and-settle undermines public participation in rulemaking. Simply put, it generally does not.

Beginning with the left bar in Figure 3, of the eighty-eight total suits analyzed, environmental groups brought seventy-nine (Area A in Figure 3). The right bar breaks out those seventy-nine suits in detail. Of those seventy-nine suits, seventy-five sought decision-forcing consent decrees (Area B in Figure 3). Due to the nature of decision-forcing consent decrees, industry interests receive ample opportunity to participate in the

public notice-and-comment period as part of the rulemaking process with these seventy-five suits. Only four of the seventy-nine suits sought substantive relief (Area C in Figure 3), where public participation would be threatened. For a full list of substantive consent decrees classified for this analysis, see Appendix C.

Figure 3: Detailed Breakdown of Suits Brought by Environmental Plaintiffs



With this crucial understanding of the distinction between substantive and decision-forcing consent decrees in hand, this empirical analysis hotly contests the claim that environmental groups widely use sue-and-settle as a process by which to impose substantive regulations on industry without industry participation. Area C in Figure 3, or 5.1% of cases brought by environmental plaintiffs, represents all instances where industry lacked an opportunity to be heard as a percentage of sue-and-settle suits brought by environmental groups. This represents only 4.5% of *all* sue-and-settle cases.⁶⁰

Of course, 4.5% is not 0%. The use of any consent decree that undermines public participation in the rulemaking process is rightfully cause for concern. Yet 4.5% (or even 5.1%) does not make the sue-and-

⁶⁰ When an industry group brings the original suit, it is difficult to claim that industry lacked an opportunity to be heard in the suit. In the event industry is seeking a substantive consent decree, this would raise concerns about industry use of the process.

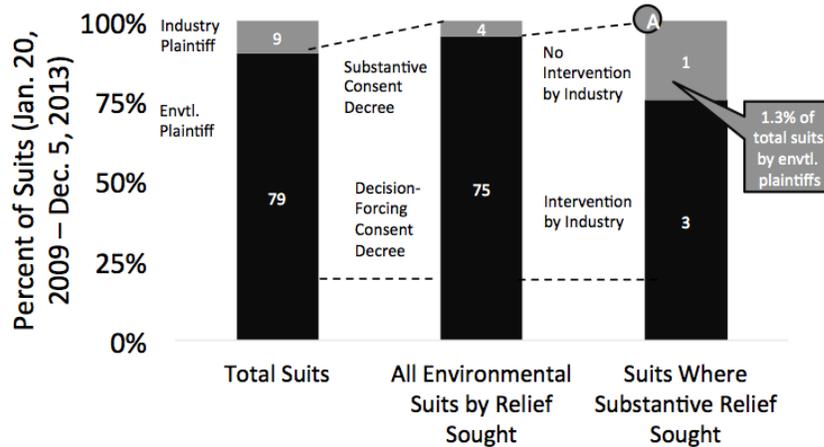
settle process the widespread derogation of public participation that the Chamber alleges. Furthermore, an even deeper dive into the data reveals another mitigating factor: intervention under Rule 24 of the Federal Rules of Civil Procedure.⁶¹

The Special Case of Intervention. An intervenor typically assumes the rights and responsibilities of a plaintiff or defendant; this includes, *inter alia*, the right to contest the entry of any settlement agreement or consent decree.⁶² Intervention therefore gives the intervening party some ability to have its view heard in the process. To the extent that the intervenor represents the views of other concerned adversarial parties (for example, the American Automobile Association might proxy for all industry groups wanting less restrictive fuel emission standards, such as the Ford Motor Company), industry as a whole can be said to have had an opportunity to be heard—a fair assumption if we simplify the world into two broad camps: those opposed to the proposed regulatory action and those in favor of it. Figure 4 further breaks down the sue-and-settle suits brought by environmental plaintiffs that resulted in substantive consent decrees. Of the four substantive consent decrees that environmental groups sought, industry parties intervened in three of the cases. Thus, after accounting for intervention, it can really only be said that industry groups (as a whole) lacked an opportunity to be heard in one of the seventy-nine cases (or 1.3% of cases) brought by environmental plaintiffs (Area A in Figure 4).

⁶¹ Fed. R. Civ. P. 24(a)–(b).

⁶² See *United States v. Metro. St. Louis Sewer Dist.*, 952 F.2d 1040, 1044 (8th Cir. 1992). Note that on appeal, an intervenor may lack standing to contest a district court's entry of a consent decree if no harm was suffered by the intervenor. See, e.g., *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1323 (D.C. Cir. 2013).

Figure 4: Detailed Breakdown of Suits Brought by Environmental Plaintiffs, Including Intervention



Intervention, it is important to note, does not serve as a fully adequate substitute for public notice-and-comment rulemaking; it should only serve to lessen the Chamber’s concern that the sue-and-settle process is used to the great detriment of proper airing of industry views with EPA before the quickening of any regulations. While intervention may allow an interested party to register its views with the agency before the entry of a consent decree, it nevertheless cannot serve as a complete substitute for notice-and-comment. First, while the intervenor has the right to contest the entry of a consent decree, it does not necessarily have the right to participate in the negotiation of that decree.⁶³ Accordingly, the substance of the decree may have quickened before the intervenor ever makes its views heard. During negotiations even without the intervenor’s presence, the agency will perhaps consider the intervenor’s position to at least a certain extent (at the very least by anticipating a challenge to the court if the intervenor is not satisfied), but the agency is not required to do so. Second, intervention does not address many of the goals and effects of the public nature of notice-and-comment rulemaking. Intervention may allow a private party to be heard, but it requires sophistication and money—not all parties can or do participate. It large-

⁶³ See, e.g., *United States v. U.S. Steel Corp.*, 87 F.R.D. 709, 711 (W.D. Pa. 1980); see also Chamber Report, *supra* note 3, at 29 (noting the difficulty of intervention).

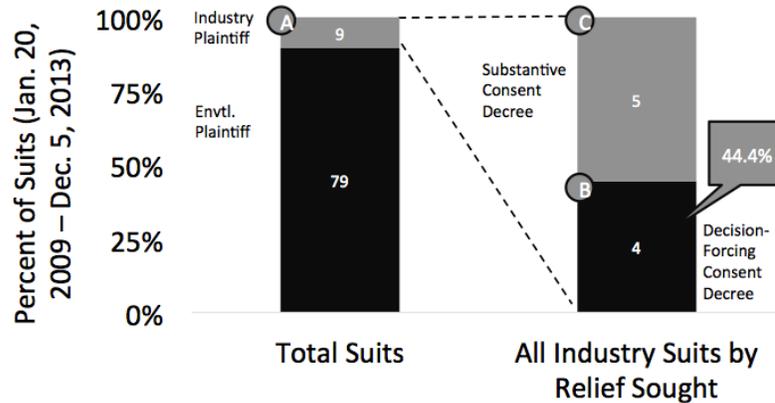
ly takes place in private, outside of the public eye. An agency may show different behavior in acceding to the demands of a regulated party in private interventions than in the case of public rulemaking (for example, EPA, when negotiating a consent decree, declines to follow the views of the American Automobile Association, thinking that those views lack popular backing; public notice-and-comment would have triggered hundreds of thousands of pro-American Automobile Association comments from motorists). Intervention is an imperfect substitute.

4. Industry Plaintiffs' Use of Sue-and-Settle

Figure 5 repeats the above analysis, but this time examines suits brought by industry groups. Industry brought nine suits resulting in consent decrees (Area A in Figure 5). Of these nine consent decrees, only four are properly classified as decision-forcing consent decrees where environmental groups would have the opportunity to be heard according to normal notice-and-comment procedures after the case (Area B in Figure 5)—the remaining five are substantive consent decrees, where environmental groups would lack an effective opportunity to be heard before the substance of the rules quickened (Area C in Figure 5).⁶⁴ Of those five substantive consent decrees, in no case did an environmental group intervene. Thus, Area C in Figure 5 contains five cases (or 55.6% of cases brought by industry plaintiffs), and represents all instances where environmental groups lacked an opportunity to be heard as a percentage of sue-and-settle suits brought by industry groups.

⁶⁴ See *infra* Appendix C for a list of substantive consent decrees.

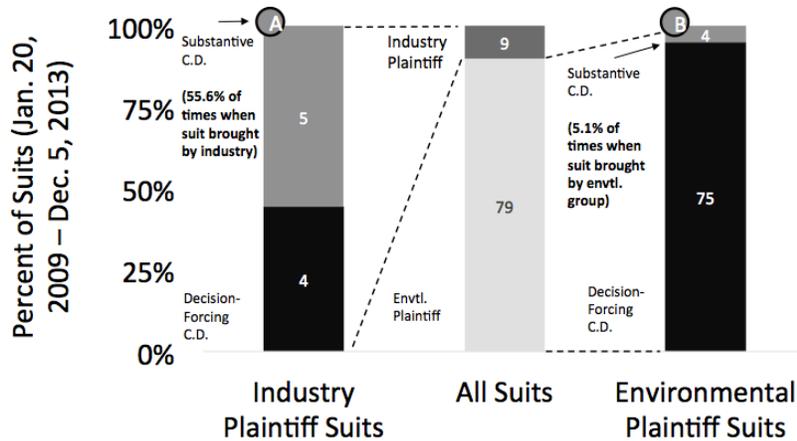
Figure 5: Detailed Breakdown of Suits Brought by Industry Plaintiffs



Here we find an interesting pattern: While environmental groups use sue-and-settle far more often than industry groups, industry groups are more likely to use the tactic in ways that seek to create substantive obligations for an agency, rather than simply seek decision-forcing consent decrees that are neutral as to substantive regulatory outcomes. The discrepancy is striking—especially when understood as conditional probabilities, displayed visually in Figure 6. The center bar represents all suits analyzed, broken down by plaintiff identification. The left bar breaks out in detail the sue-and-settle suits brought by industry groups, and the right bar breaks out the suits brought by environmental groups. Sue-and-settle suits brought by industry groups have a 55.6% frequency of seeking substantive consent decrees (Area A in Figure 6), while sue-and-settle suits brought by environmental groups have only a 5.1% frequency of seeking such relief (Area B in Figure 6). This is a statistically significant difference.⁶⁵

⁶⁵ This sample, with n=79 for environmental suits and n=9 for industry suits, is statistically significant for both populations. A chi-squared contingency table analysis reveals a chi-squared test statistic of 22.4, meaning that there is a 0.000217% chance that, given the data presented, industry and environmental groups seek decision-forcing and substantive relief at the same rates. See E-mail from Casey Lichtendahl, Assoc. Professor of Bus. Admin., Darden Graduate Sch. of Bus., to author (Dec. 31, 2013, 11:25 CST) (on file with author). This analysis is reproduced in Appendix D.

Figure 6: Conditional Probabilities of Relief Sought by Plaintiff Type



5. Conclusions from and Limitations of This Analysis

Sue-and-settle, when used by environmental group plaintiffs, is not principally about secret, backdoor rulemaking. When the proper accounting is made of the crucial differences between decision-forcing and substantive consent decrees, sue-and-settle is overwhelmingly a decision-forcing process. From the analysis above, we find that in all but nine cases groups engaged in these tactics predominantly to force EPA to perform some sort of non-discretionary duty without specifying what particular actions EPA should take.⁶⁶ Only in those nine cases (or 10.2%) of all of the sue-and-settle cases identified under the CAA, the CWA, and the ESA during the Obama administration can allegations of such secret rulemaking be sustained. If one includes intervention as at least a partial bulwark against secret rulemaking, the number drops to only five cases. When one considers only suits brought by environmental plaintiffs, the number of suits that implicate such secret rulemaking drops to four (or to only one if intervention is counted as a substitute). This makes it difficult to sustain the Chamber’s charge that industry is greatly harmed by secret rulemaking from sue-and-settle.

⁶⁶ This analysis does not discount any unstated but preferred result, however, so is not conclusory in ruling out collusion with decision-forcing consent decrees.

Despite the fact that decision-forcing consent decrees make up the overwhelming majority of relief sought by environmental groups, the small number of suits resulting in substantive consent decrees still presents a real cause for concern (even if not the calamity originally advertised). With compliance costs for some major rules estimated at billions of dollars annually,⁶⁷ the ability to impose *any* such burdens (either now or in the future) in a secret rulemaking process is wrong. Fairness considerations aside, this process denies the regulated party the opportunity to provide the regulatory agency with valuable information and views in the notice-and-comment period that might generate more efficient, narrowly drawn, and effective regulations.

The analysis reveals a particularly interesting quirk: When environmental groups use sue-and-settle, the process is more amenable to public notice-and-comment participation than when used by industry group plaintiffs. Environmental groups are significantly more likely to seek decision-forcing relief (94.9% of relief sought) than are industry groups (44.5% of relief sought). One should be careful about drawing too many conclusions from this analysis, however. For example, it is possible that environmental groups do not seek substantive relief because they feel that the pro-environmental Obama EPA will reach the same substantive relief that the environmental plaintiffs desire simply by being forced to make a decision (that is, through the use of a decision-forcing consent decree). In that case, environmental groups would feel no need to seek substantive consent decrees as such decrees would not be incrementally valuable to their goals. While this analysis provides a helpful platform from which to continue the discussion, it is of paramount importance to be cognizant of its limitations.

It is also important to recognize the limits of the above statistical analysis. The analysis is sufficient to cast doubt on the Chamber's main allegation that the principal threat from sue-and-settle is the danger of an end-run around public participation in the rulemaking process. Nevertheless, the analysis only inquires into the *effects* of sue-and-settle and not into the causes of any behavior. The effects are clear: Sue-and-settle—when taken as a whole—does not chiefly work to undermine notice-and-comment rulemaking. The causes of those effects are not as evident: Why, for example, are industry groups more likely to seek substantive relief than are environmental groups? Why is substantive relief

⁶⁷ Chamber Report, *supra* note 3, at 14.

2014]

Empirical Analysis of Sue-and-Settle

1565

sought in certain areas but not others? Such questions are beyond the scope of this Note and ripe for future analysis.

While sue-and-settle does not appear to threaten wide public participation in notice-and-comment rulemaking, the Chamber nevertheless has rightly identified that certain types of consent decrees do pose a problem to the public participation goals of the environmental statutes. One type of consent decree needs to be reformed: substantive consent decrees. To protect public participation in environmental rulemaking, the use of substantive consent decrees should be eliminated or curtailed. Accordingly, Part III discusses certain targeted options for reform.

III. TARGETED PROPOSALS FOR REFORM

The above analysis demonstrates that, despite the lack of widespread calamity, there are legitimate concerns with sue-and-settle litigation's impact on public participation in notice-and-comment that call for targeted reform. In the small (but undoubtedly meaningful to those involved) number of sue-and-settle suits involving substantive consent decrees, there is weight to the Chamber's charge that the process has the potential to become "rulemaking in secret."⁶⁸ Any reforms must be narrowly drawn to retain the good while excising the bad.

A. Any Reforms to Sue-and-Settle Must Be Narrowly Drawn

Given the identified problems with sue-and-settle, one must grapple with a threshold question: Why not legislate to eliminate sue-and-settle as a whole (or at least drastically curtail its use), as the Chamber would prefer?⁶⁹ The identified issues notwithstanding, consent decrees have certain clear benefits. They are an invaluable tool in conserving scarce resources. The U.S. Supreme Court finds that the will of Congress "expresses a clear policy of favoring settlement of all lawsuits," rather than prolonged litigation.⁷⁰ "[E]ven for those who would prevail at trial, settlement will provide . . . [a remedy] at an earlier date without the burdens, stress, and time of litigation."⁷¹ Environmental litigation magnifies those benefits of settlement by consent decree: "Society benefits from settlement of environmental litigation because it reduces the demands

⁶⁸ Id. at 7.

⁶⁹ Id. at 28–29.

⁷⁰ *Marek v. Chesny*, 473 U.S. 1, 10 (1985).

⁷¹ Id.

placed on the judicial system and frees environmental agencies to concentrate on the performance of their statutory duties,” Professor Robert Percival reasons.⁷² That is exceptionally important given the vast range of complex rulemaking and enforcement obligations imposed on the federal environmental agencies,⁷³ even more so in an era when budget constraints limit agency deployment of resources.⁷⁴ Accordingly, any efforts to reform sue-and-settle should be narrowly drawn to preserve those benefits while stripping away deleterious aspects of the process.

B. Ending Substantive Sue-and-Settle to Mitigate Threats to Public Notice-and-Comment Rulemaking

Both decision-forcing and substantive consent decrees share the above-discussed beneficial features—both are adept at efficient deployment of scarce executive and judicial resources. Yet while decision-forcing consent decrees appear to pose no deleterious effects to notice-and-comment rulemaking, substantive sue-and-settle is more invidious. The tendency of substantive sue-and-settle to prejudice the regulatory process by predisposing regulatory agencies to adopt certain regulations⁷⁵ creates a third-party problem.⁷⁶ While settlement agreements and consent decrees, as used in sue-and-settle, do not (and indeed typically cannot) bind third parties otherwise not party to the litigation, they nevertheless have a “substantial impact on the interests of persons affected by [any subsequently proposed] regulations.”⁷⁷ While decision-forcing sue-and-settle should be encouraged, substantive sue-and-settle must be minimized.

The path to ending substantive sue-and-settle is not through judicial review. Judicial review of substantive consent decrees—as used in sue-and-settle—is an empty threat. Although a thorough analysis of the jurisprudence governing review of consent decrees is beyond the scope of this Note, empirical evidence from the sue-and-settle dataset indicates

⁷² Percival, *supra* note 53, at 333.

⁷³ *Id.* at 328.

⁷⁴ See, e.g., Jim Efstathiou Jr., EPA Budget Cut Will Restrict Enforcement of Clean-Air Rules, Activists Say, Bloomberg (Apr. 12, 2011, 4:35 PM), <http://www.bloomberg.com/news/2011-04-12/epa-budget-cut-will-restrict-enforcement-of-clean-air-rules-activists-say.html>.

⁷⁵ See *supra* Sections II.B–C.

⁷⁶ Percival, *supra* note 53, at 348.

⁷⁷ *Id.*

the toothlessness of judicial review in that context: In *none* of the eighty-eight sue-and-settle cases identified for this Note did judicial review refuse the entry of a consent decree, whether substantive or decision forcing.

Given that consent decrees typically represent “an amalgam of delicate balancing, gross approximations, and rough justice, and need not impose all the obligations authorized by law,”⁷⁸ both courts and administrative agencies have a wide degree of discretion in agreeing to their terms. While courts are willing to refuse or overturn entry of consent decrees when the decrees actually impose substantive rules outside of the statutorily mandated procedures (for example, notice-and-comment requirements),⁷⁹ the consent decrees used in sue-and-settle are carefully crafted to avoid these pitfalls. The typical substantive consent decree in the sue-and-settle dataset contains provisions along the lines of those found in the substantive consent decree entered in *American Forest & Paper Ass’n v. EPA*:

The Parties acknowledge that . . . during the notice-and-comment rulemaking proceedings EPA will consider the proposal, and that EPA’s final action . . . will be based upon its consideration of the administrative record before the Agency, including public comments. Nothing in the terms of this Agreement shall be construed to limit or modify the discretion accorded EPA by the Clean Air Act or by general principles of administrative law. Nothing in the terms of this Agreement shall be construed to limit EPA’s authority to alter, amend, or revise any final rule, interpretation or guidance EPA issues . . .⁸⁰

Such terms effectively immunize that consent decree from judicial interference on the grounds that it limits EPA’s discretion or ignores notice-and-comment requirements. Yet as discussed in Part II, even though EPA is not legally bound to propose or adopt any certain rule, the settlement agreement nevertheless has the effect of predisposing it to do so—de facto backdoor rulemaking. And because no substantive outcome

⁷⁸ *Conservation Nw. v. Sherman*, 715 F.3d 1181, 1185 (9th Cir. 2013) (quoting *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990)) (internal quotation marks omitted).

⁷⁹ See *id.* at 1188; see also *Citizens for a Better Env’t v. Gorsuch*, 718 F.2d 1117, 1127–30 (D.C. Cir. 1983) (noting that consent decrees must be consistent with agency statutory obligations, and “not a negotiation of them”).

⁸⁰ Settlement Agreement ¶ 5, *Am. Forest & Paper Ass’n v. EPA*, No. 12-1452 (D.C. Cir. 2013).

is dictated by the settlement agreement, courts' hands are tied to refuse entry of those consent decrees.⁸¹ So what solutions are to be had?

The path forward lies not with the judicial branch but with the executive branch.⁸² The best policy would be to bar administrative agencies from using substantive sue-and-settle decrees entirely. A bar can be adopted by the executive branch at the agency level (for example, at EPA),⁸³ the Department of Justice level (which often litigates and settles cases on behalf of EPA),⁸⁴ or across the entire executive branch. Failing that, safeguards should be incorporated into the process to ensure that sue-and-settle does not lead to de facto rulemaking without public participation.

If, by use of substantive consent decrees, the substance of rules is effectively determined before the rulemaking process's notice-and-comment provisions take effect, the impact of those provisions should be moved earlier in the process. This could happen with two changes to the sue-and-settle process when a party seeks a substantive consent decree: First, require the agency to give advanced public notice seeking comments for any proposed consent decree or settlement agreement (as already required by the Clean Air Act⁸⁵) before execution.⁸⁶ Second, require the agency to actually respond to any significant issues raised in public comments before executing or seeking entry of a settlement or consent decree (as is required in the rulemaking process).⁸⁷ The first provision would ensure that the public has notice of any settlement agreement; the second provision would allow the public input into any settlement agreement before it is ratified and force the agency to consider all interested perspectives before making a rational choice on the record before it. The agency's decision to enter into the consent decree

⁸¹ *Citizens for a Better Env't*, 718 F.2d at 1127–30.

⁸² Of course, congressional action would also be an option.

⁸³ See *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 524 (1978) (“Agencies are free to grant additional procedural rights in the exercise of their discretion.”).

⁸⁴ Indeed, Edwin Meese, President Reagan's attorney general, imposed guidelines on all Department of Justice attorneys in the use of consent decrees. See Memorandum from Edwin Meese III, Attorney Gen., to All Assistant Attorneys Gen. & All U.S. Attorneys, Department Policy Regarding Consent Decrees and Settlement Agreements (Mar. 13, 1986), available at <http://www.archives.gov/news/samuel-alito/accession-060-89-1/Acc060-89-1-box9-memoAyer-LSWG-1986.pdf>.

⁸⁵ See Clean Air Act § 113, 42 U.S.C. § 7413(g) (2012).

⁸⁶ See Rulemaking Testimony, *supra* note 27.

⁸⁷ *Id.*

2014]

Empirical Analysis of Sue-and-Settle

1569

would still be reviewed by the “arbitrary and capricious” standard,⁸⁸ but these safeguards would ensure public participation in the sue-and-settle process and provide ample record for judicial review.⁸⁹

IV. IN SEARCH OF OTHER EXPLANATIONS

The foregoing analysis contained in Part II confirms that sue-and-settle as a whole is not principally used by environmental groups to collude with EPA in secret, backdoor rulemaking, as is often charged. Yet while the analysis works to dismiss a principal charge against the process, it raises an even larger question: If not driven by collusion to engage in rulemaking outside of the public eye,⁹⁰ what is behind the explosive growth in sue-and-settle under the Obama administration? While empirical analysis to generate a definitive answer to this question is outside the scope of this Note, this Part identifies two hypotheses—one benign and one more worrisome—and proposes further analysis.

A. Hypothesis A—Benign Explanation: More Environmental Groups, Better Targets

1. Overview of the Hypothesis

One possibility is that the increase observed over time in sue-and-settle settlements is not caused by any special pro-environmental disposition of the incumbent administration, but rather by an increase in total suits in the first place. More suits equals more settlements, all things being equal. That is, regardless of the pro-green disposition of the incumbent administration, sue-and-settle settlements are increasing over time simply because of the proliferation of zealous environmental advocates filing more suits each year.

Each year, environmental advocacy litigation groups proliferate, growing more numerous and better-funded.⁹¹ Such ubiquitous groups

⁸⁸ See, e.g., *Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 79 (D.C. Cir. 2000).

⁸⁹ See Rulemaking Testimony, *supra* note 27.

⁹⁰ Implicit in this conclusion that environmental sue-and-settle is not *caused* by the desire for secret rulemaking is that the plaintiffs could achieve secret rulemaking if collusion to this end existed. That is, because environmental groups *can* get substantive consent decrees via sue-and-settle (as evidenced in the four cases discussed in Part II), but in the vast majority of cases they *do not* get such decrees, they are therefore not colluding with EPA to seek such decrees on a large scale.

⁹¹ Amy Blackwood, Katie Roeger & Sarah Pettijohn, *Urban Inst.*, *The Nonprofit Sector in Brief: Public Charities, Giving, and Volunteering* 4 (2012).

provide for increasingly vigilant private attorneys general,⁹² zealously enforcing the main environmental statutes via their citizen suit provisions. The result could be more suits overall, regardless of the pro- or anti-environmental proclivities of the incumbent administration. According to this hypothesis, as the list of potential plaintiffs in possible citizen suits grows, so grows the overall number of suits. Such growth would occur even with an environmentally friendly administration: After all, even the pro-green Obama EPA crosses swords with green organizations over policies and priorities, generating myriad citizen suits. Accordingly, the increase in environmental sue-and-settle lawsuits may be a function of an increase in environmental litigation overall, and not due to collusion.

Furthermore, this phenomenon would be reinforced by the fact that environmental litigation groups find an ever-more attractive environment for potential lawsuits. The CAA, for example, is a broad statute imposing countless deadlines and non-discretionary actions on EPA and other federal agencies.⁹³ While the Obama EPA seems intuitively more likely than the Bush EPA to be responsive to environmental activism, it, like all federal agencies, is nevertheless constrained by limited resources. Lack of manpower and competing priorities will cause any administration to miss non-discretionary deadlines. EPA's failure to meet deadlines is not reset with each administration; rather, the agency is open to suits dating back to previous administrations. For example, the Obama administration found itself settling a suit regarding 1994 NAAQS attainment⁹⁴—an issue dating from when the President was still a constitutional law professor.

Any time that a deadline for a non-discretionary action is missed, the agency is open to a lawsuit. Just because an administration is broadly considered to be pro-environment will not stay a lawsuit—after all, most of the issues addressed by sue-and-settle suits are inherently local. A finding on NAAQS attainment for Eagle River, Alaska on a type of particulate matter pollution (PM₁₀) will not assuage residents in Imperial

⁹² For an in-depth discussion of the role of citizen suits in environmental law and a discussion of the concept of private attorneys general, see generally Jeannette Austin, *The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General*, 81 *Nw. U. L. Rev.* 220 (1987) (offering an in-depth discussion of the role citizen suits play in environmental law and a discussion of the concept of private attorneys general).

⁹³ See, e.g., 42 U.S.C. § 7409(d)(2)(B) (2012).

⁹⁴ Consent Decree at 3, *Ctr. for Biological Diversity v. Jackson*, No. cv-10-1846-MMC (N.D. Cal. 2010).

Valley, California worried about missed deadlines for ozone level determinations on the South Coast. It is difficult to imagine a South Coast resident thinking, “[I]t’s fine that EPA is not doing anything for us in California; the agency is trying its best up in Alaska with its limited resources.” Instead, a lawsuit from an environmental group results.⁹⁵ EPA, in many cases, has clearly missed statutory deadlines. Rather than squander resources fighting a clearly losing battle, EPA wisely settles. The case is classified as sue-and-settle. This scenario is far from collusion. Given the continued growth in environmental nonprofits, both in number and in resources, it would not be at all surprising if the growth in sue-and-settle could be widely explained simply by the resource-conserving settlement of an ever-increasing number of lawsuits brought by environmental plaintiffs. Historical data correlates with this logic. Though the Bush administration is thought to be less pro-environment than the Clinton administration, the Bush administration nevertheless saw an increase in sue-and-settle cases in a term-over-term comparison.⁹⁶

2. Overview of Possible Empirical Analysis

Though outside the scope of this Note, empirical analysis could do much to test this hypothesis. A useful test would look for statistically significant differences between the Bush and Obama EPAs in their settlement behavior relative to the number of suits filed against them under environmental statutes to see whether the observed increase in settlement behavior under the Obama EPA could be described as the result of an increase in the number of suits filed, or whether further exploration is needed. The analysis would test two populations: sue-and-settle settlements as a function of the number of sue-and-settle-type suits filed in the Bush administration, and sue-and-settle settlements as a function of the number of sue-and-settle-type suits filed in the Obama administration.

If the numbers are not statistically significantly different, one could conclude that given the change in the number of sue-and-settle-type suits filed against it, the Obama administration does not display different settlement behavior than the Bush administration. If one sees similar set-

⁹⁵ Even though many environmental organizations are national, many also have local chapters with local concerns. See, e.g., Sierra Club Chapters, Sierra Club, <http://www.sierraclub.org/chapters> (last visited Aug. 14, 2014).

⁹⁶ Chamber Report, *supra* note 3, at 14.

tlement behavior between the pro-green Obama EPA and the less-green Bush EPA, there is evidence that the headline increase in overall settlements is not due to any easy-settlement policies resulting from the pro-green leanings of the incumbent EPA, but rather is a function of the number of suits filed. The implicit assumption is, of course, that the Bush administration's ideology would mean that that administration's EPA did not engage in questionable sue-and-settle practices.⁹⁷

3. Limitations of the Potential Analysis

A crucial limitation of that analysis is that while it provides evidence, it cannot provide definitive conclusions as to causation. Lack of a statistically significant difference between the two sampled populations will demonstrate that the Obama administration is no more disposed to participate in sue-and-settle than the Bush administration, when controlling for an increasing number of suits filed each year—but it cannot show why this is. That evidence would certainly be probative of a finding of no sue-and-settle collusion between the Obama EPA and environmental groups, but may be confounded by uncontrolled factors. Accordingly, while the evidence from this analysis may point in that particular direction if the two administrations settle at the same rates when controlling for the number of suits filed, this cannot definitively rule out collusion due to the presence of other, uncontrolled factors. For example, what about the underlying merits of the cases? If the cases between the two administrations are significantly different (that is, the Obama administration has more sure “winners” than the Bush administration), then a zero percent increase in settlements relative to suits filed under the Obama administration might still be indicative of possible collusion and warrant further examination. Nevertheless, the foregoing analysis would usefully further the discussion of sue-and-settle behavior by providing more refined analysis than the simple headline number of suits. Future analyses should examine more confounding variables for further refinement.

⁹⁷ Given that many EPA staff are career civil servants, rather than political appointees, this assumption could be called into question. Nevertheless, because the controversy surrounding sue-and-settle typically focuses on the growth from the Bush administration to the Obama administration, the Bush administration provides a useful baseline. See *infra* Appendix E, Equation 1, and accompanying commentary for a further detailed explication of the potential analysis.

*B. Hypothesis B—Invidious Explanation: Green Sweetheart Fees**1. Overview of the Hypothesis*

Another more invidious potential cause of the explosion of sue-and-settle under the environmentally friendly Obama administration relates to the role played by attorneys' fees. In derogation of the typical "American rule," where each party pays its own costs of litigation regardless of the disposition of the case,⁹⁸ many of the federal environmental statutes now provide for fee-shifting to plaintiffs' attorneys—provisions designed to encourage citizens suits. For example, attorneys' fees provisions are included in the CAA,⁹⁹ the CWA,¹⁰⁰ and the ESA.¹⁰¹ Attorneys' fees are normally justified in the citizen suit provisions of the main environmental statutes by the claim that they encourage citizen suits, because "without attorneys' fees provisions, citizens are often unable to enforce environmental litigation because the costs of enforcement are too high."¹⁰² Yet there is growing concern that these provisions are abused.¹⁰³ Awards of attorneys' fees may create the risk that these advocacy groups are more motivated to sue the federal government by profit than for vindication of any particular environmental end. Given the well-documented revolving door between EPA and green organizations,¹⁰⁴ it is certainly not beyond comprehension that a pro-green EPA could "invite old friends in Big Green Groups to sue"¹⁰⁵ with the promise of a subsequent settlement that includes attorneys' fees. This practice would amount to green sweetheart fees.

The prevalence of attorneys' fees in environmental statutes and their subsequent payment in sue-and-settle practice begs for future analysis.

⁹⁸ See *Jung v. Jung*, 844 A.2d 1099, 1107 (D.C. 2004).

⁹⁹ See, e.g., 42 U.S.C. § 7604(d) (2012).

¹⁰⁰ See, e.g., 33 U.S.C. § 1365(d) (2012).

¹⁰¹ See, e.g., 16 U.S.C. § 1540(g)(4) (2012).

¹⁰² Kerry Florio, Comment, Attorneys' Fees in Environmental Citizen Suits: Should Prevailing Defendants Recover?, 27 B.C. Envtl. Aff. L. Rev. 707, 707–08 (2000).

¹⁰³ See, e.g., Josiah Neeley, How the EPA Helps Environmental Groups Sue the EPA, *Federalist* (Feb. 6, 2014), <http://thefederalist.com/2014/02/06/how-the-epa-helps-environmental-groups-sue-the-epa/>.

¹⁰⁴ See Jeffrey Joseph, Too Close for Comfort, *Balt. Sun* (Mar. 3, 2014), http://articles.baltimoresun.com/2014-03-03/news/bs-ed-revolving-door-20140302_1_epa-officials-al-armendariz-natural-resources-defense-council.

¹⁰⁵ Ron Arnold, Big Green's 'Sue-and-Settle' Strategy Draws Pushback from States, Congress, *Wash. Examiner* (Apr. 1, 2014, 12:00 AM), <http://washingtonexaminer.com/big-greens-sue-and-settle-strategy-draws-pushback-from-states-congress/article/2546654>.

In an incomplete analysis, the Chamber Report identifies at least forty-nine cases that it classifies as sue-and-settle where attorneys' fees were paid in settlement agreements. Are such cases the result of collusion between EPA and environmental groups? Or just routine examples of fee-shifting pursuant to environmental statutes that are no more or less invidious under sue-and-settle?

2. Overview of Possible Empirical Analysis

Empirical analysis could contribute to this discussion as well. A useful first pass would examine whether the Obama administration demonstrated statistically significant different fee-paying behavior than the Bush administration in conceding attorneys' fees in settling sue-and-settle suits under the main environmental statutes. The analysis would again test two populations: sue-and-settle settlements conceding attorneys' fees as a function of the total number of sue-and-settle-type suits (that is, those suits arising under the main environmental statutes and seeking rules of general applicability; see *supra* Section I.A for this Note's definition) during the Bush administration, and sue-and-settle settlements conceding attorneys' fees as a function of the total number of sue-and-settle-type suits during the Obama administration. It is important that the foregoing analysis consider the fee-paying settlements as a function of total suits *filed* and not just total *settlements*. If one is trying to test for collusion between the Obama EPA and environmental groups, the relevant claim to collusion is that the Obama administration encourages environmental groups to *file* suit with the promise of a fee-paying settlement—not simply to terminate existing suits in exchange for fees.

If the differences found are statistically significant, one can conclude that, given the number of total suits filed against it, the Obama administration displays different settlement behavior than the Bush administration. If one finds settlement behavior that is more likely to award attorneys' fees in settlements (as a function of total sue-and-settle-type suits) under the pro-green Obama EPA than under the less-green Bush EPA, this is evidence that would warrant further exploration into allegations of green sweetheart fees.

While the foregoing analysis may provide good initial evidence, it nevertheless could provide a misleading view due to confounding factors. A more robust empirical analysis would control for differences in *overall* sovereign litigation attorneys' fees settlement practices across all

fee-shifting statutes between the administrations. It is possible, for example, that the Obama or Bush administration simply has a preference to conserve resources by settling all types of litigation in a way that does not specially favor or disfavor green groups, and that fees are often a necessary component to achieve such settlements. The above analysis would find it significant if the Bush administration settled with fees in twenty percent of sue-and-settle-type suits, while the Obama administration settled with fees in fifty percent of sue-and-settle-type suits. Consider, however, if the Obama administration settles with fees in eighty percent of all suits against it under all fee-shifting statutes (environmental or not), and the Bush administration settles with fees in ten percent of all suits against it under all fee-shifting statutes. In that case, the Bush administration would actually be *more* likely to settle with environmental groups than average plaintiffs under fee-shifting statutes, while the Obama administration would be less likely to settle with environmental groups than average plaintiffs under fee-shifting statutes.

In such a case, the analysis showing the Obama administration is more likely than the Bush administration to settle sue-and-settle-type suits with fees would no longer provide powerful evidence of collusion—rather, any difference would be more a function of overall differences in sovereign litigation settlement policy across all fee-shifting statutes between the Bush and Obama administrations, rather than any environmental-litigation-specific policy. To control for overall sovereign litigation policies and isolate the specific environmental sue-and-settle policies of each administration, one should adjust the Obama administration's count of sue-and-settle fee-paying settlements by a factor to reflect the administration's overall fee-settlement behavior relative to the Bush administration.¹⁰⁶ For example, if the Obama administration is twice as likely to settle suits with fees under any fee-paying statute, the number of sue-and-settle fee-paying settlements should be divided by two when compared to the Bush administration's sue-and-settle fee-paying settlements. This will allow for a like-to-like comparison of environmental sue-and-settle fee-paying behavior between the two administrations.

¹⁰⁶ As this would require significant amounts of research, statistical sampling would be a useful tool. For example, it is possible that the analysis could be limited to a single, representative judicial district.

If the Bush administration's use of attorneys' fees in settlements in environmental litigation, after controlling for confounding factors such as administration settlement policies across all statutes,¹⁰⁷ is statistically significantly less than that of the Obama administration, the pattern becomes even more implicit of some sort of collusion in the field of environmental sue-and-settle.¹⁰⁸ If the two administrations display no statistically significant difference in their propensities to use attorneys' fees in environmental sue-and-settle suits, this would be evidence that, when controlling for overall (that is, not limited to environmental statutes) administration behavior in fee-settlement cases, the administrations settle with attorneys' fees at similar rates in environmental litigation. As the Bush administration is widely considered to have a different environmental disposition than the pro-environment Obama administration, this would be evidence that the Obama administration is not engaging in any sort of differentiated environmental litigation sweetheart payment of attorneys' fees to environmental groups. As with the other analyses, there is the implicit assumption that the Bush EPA was not party to any sort of invidious sue-and-settle practices.¹⁰⁹

3. Limitations of the Potential Analysis

Like all other statistical analyses, this one shares the same shortcomings: It can provide evidence but it cannot provide definitive conclusions about causation. On one hand, a statistically significant difference would provide evidence tending to support the green sweetheart fees hypothesis—but it cannot definitively prove the causal factors behind the payment of fees. For example, it is possible that intervening court decisions made the award of attorneys' fees in environmental litigation more likely, and, therefore, a rational (not invidious) settlement policy has changed accordingly. On the other hand, lack of any statistically significant difference could not rule out collusion. Imagine, for example, an intervening court decision going the other way (that is, it is now harder for plaintiffs' groups to recover attorneys' fees in environmental litigation). In such a case, even a zero percent increase in attorneys' fees paid in environmental sue-and-settle under the Obama administration might never-

¹⁰⁷ See, e.g., *infra* Appendix F, $O_{\text{Bush-adjusted}}$ in Equation 5.

¹⁰⁸ Due to the limits of the statistical analysis, it can only be considered implicit evidence and cannot give rise to a definitive conclusion as to causation.

¹⁰⁹ See *infra* Appendix F, Equations 2–5, and accompanying commentary for a further detailed explication of the potential analysis.

theless hide green sweetheart fees. Similarly, the analysis adjusting the number of sue-and-settle fee settlements under the Obama administration to control for overall sovereign fee settlement litigation behavior between the two administrations will not be definitive: It can only show that the Obama administration does (or does not) discriminate in favor of fee settlements for environmental plaintiffs relative to all other sorts of plaintiffs seeking relief under any sort of fee-shifting statute. While this may be probative of a lack of collusion, it still leaves open the possibility that the Obama administration colludes with many different types of plaintiffs under all fee-shifting statutes—not just under environmental statutes. In that case, a charge of green sweetheart fees should stand, even though the foregoing analysis would tend to reject it. Nevertheless, such analysis would usefully further the discussion of sue-and-settle behavior by taking the initial steps necessary to evaluate the green sweetheart fees hypothesis. Future analyses should continue to explore the presence of other confounding variables.

CONCLUSION

At the heart of many attacks on the proliferation of sue-and-settle suits is the process's alleged derogation of effective public participation in notice-and-comment rulemaking. Closer examination of sue-and-settle reveals that not all sue-and-settle cases are the same: Some seek settlements that are only decision forcing, while others seek substantive settlements. Only in the latter case is sue-and-settle actually subversive to public notice-and-comment in the rulemaking process. Indeed, decision-forcing sue-and-settle furthers the will of Congress by holding agencies to statutory deadlines and non-discretionary actions. While substantive sue-and-settle still requires notice-and-comment rulemaking, structural factors work to predispose the agency to adopt the already-negotiated substance of the consent decree. In short, while decision-forcing sue-and-settle provides a public benefit by conserving scarce administrative and judicial resources, substantive sue-and-settle is deleterious to the public interest by undermining the public participation in rulemaking contemplated by Congress.

Empirical analysis of environmental sue-and-settle under the Obama administration reveals that sue-and-settle is not the enormous cause for alarm that it is thought to be when used by green groups. When used by environmental plaintiffs, industry groups had an effective opportunity to be heard (either through intervention or public notice-and-comment) a

striking 98.8% of the time. Indeed, as one commentator has put it, proposed sue-and-settle legislation is closer to a “cure [without] a disease.”¹¹⁰ Nevertheless, in a few cases, sue-and-settle does provide an end-run around public notice-and-comment. While these deleterious sue-and-settle cases are but a small part of the overall use of the tactic, attempts should nevertheless be made to reform the less admirable uses of the process that infringe on public participation in the rulemaking process.

Judicial options for reforming sue-and-settle are limited, as the settlements and consent decrees are carefully crafted to avoid judicial intervention. The best recourse lies with the executive branch and Congress. Any reform should be careful to keep in place valuable decision-forcing sue-and-settle, while excising substantive sue-and-settle. Substantive sue-and-settle should be banned outright, or, failing that, notice-and-comment safeguards should be required so as to treat substantive sue-and-settle like the de facto rulemaking it is.

This Note does not completely illuminate the causes of sue-and-settle. The most effective contribution its empirical analysis can make is to undermine the claim that sue-and-settle works broadly to strip away effective public participation in notice-and-comment rulemaking. It leaves open further analysis of the practice for future study. The proliferation of sue-and-settle could be explained by benign causes, or it could be more suspect: Hypotheses attributing the proliferation of the practice to more aggressive environmental groups in an era of constrained agency resources or to collusion over attorneys’ fees seem particularly ripe for analysis.

¹¹⁰ Ann Alexander, *Sue-and-Settle Legislation: A Cure in Search of a Disease*, Nat. Resources Def. Council Switchboard (July 16, 2012), http://switchboard.nrdc.org/blogs/aalexander/sue_and_settle_legislation_a_c.html.

APPENDIX A: SUMMARY OF ANALYSIS USED TO COMPILE SUE-AND-SETTLE CASES

Note that the citations in these appendices do not include reporter information for the sake of consistency, as most are unpublished and potentially still pending resolution. Instead, parenthetical information on the presiding court, year, and the substance of the settlement agreement or consent decree is provided in order to identify the proceeding.

The dataset: The dataset was designed to capture all closed sue-and-settle cases resulting in consent decrees or settlement agreements of general applicability arising under the Clean Air Act, Clean Water Act, or Endangered Species Act. The dataset was created to capture only those rules of broad and general applicability, and therefore excludes consent decrees and settlement agreements involving enforcement actions or CAA Title V permits.¹¹¹ The identified cases include only causes of action deemed arising under one of those three statutes; for example, cases where the cause of action turns on a substantive or procedural duty under one of those acts. Cases where the cause of action arose under another statute such as the National Environmental Policy Act (“NEPA”),¹¹² but still implicate a responsibility under the CAA, CWA, or ESA (for example, a responsibility to determine the impact on endangered species in an environmental impact statement required under NEPA) are excluded (for in that example, the cause of action would be deemed to arise under NEPA, not the ESA).¹¹³

The dataset was compiled as follows:

1. The U.S. Chamber of Commerce Report, “Sue-and-Settle: Regulating Behind Closed Doors,”¹¹⁴ identifies sixty-eight cases qualifying as sue-and-settle for this analysis:¹¹⁵ Settlement Agreement, American Petroleum Institute v. EPA, No. 08-1277 (D.C. Cir. 2010)

¹¹¹ The Chamber Report uses similar methodology to ensure that the Chamber’s dataset contains only sue-and-settle cases that have potential to bind a regulated entity not otherwise party to the case. Chamber Report, *supra* note 3, at 13, 49.

¹¹² 42 U.S.C. §§ 4321–4370 (2012).

¹¹³ See, e.g., Settlement Agreement, *Coal River Mountain Watch v. Salazar*, No. 08-02212 (D.D.C. 2010).

¹¹⁴ Chamber Report, *supra* note 3.

¹¹⁵ *Id.* at 30–42. Some of the parenthetical descriptions very closely or exactly match the wording of information provided by the Chamber Report, for when the Chamber Report was accurate and sufficient there was no need to change its description. Quotation marks are omitted.

(CAA – EPA to propose GHG NSPS rules for power plants and refineries) (consolidated with *New York v. EPA* (D.C. Cir. 2010)).

2. Consent Decree, *American Lung Association v. EPA*, No. 12-00243 (D.D.C. 2012) (CAA – EPA to review NAAQS for particulate matter).
3. Consent Decree, *American Nurses Association v. Jackson*, No. 08-02198 (D.D.C. 2010) (CAA – EPA to propose rule on emissions standards for coal- and oil-fired electrical generating utilities).
4. Consent Decree, *Association of Irrigated Residents v. EPA*, No. 10-03051 (N.D. Cal. 2010) (CAA – EPA to take final action on California SIP for PM_{2.5} NAAQS).
5. Consent Decree, *Association of Irrigated Residents v. EPA*, No. 09-1890 (N.D. Cal. 2009) (CAA – EPA to take final action on California SIP for San Joaquin Valley Unified Air Pollution Control District).
6. Consent Decree, *Center for Biological Diversity v. EPA*, (No. 11-06059) (N.D. Cal. 2012) (CAA – EPA to propose rule or publish notice that no rule is required for kraft pulp NSPS).
7. Notice of Voluntary Dismissal, *Center for Biological Diversity v. EPA*, No. 09-00670 (W.D. Wash. 2010) (CWA – EPA agrees to take comments on whether and how to address ocean acidification under the CWA and, if choosing to address it, issue guidance to states).
8. Settlement Agreement, *Center for Biological Diversity v. Department of Agriculture*, No. 08-03884 (N.D. Cal. 2010) (Department of Agriculture and Forest Service agree to withhold certain areas from development and create collaborative process to identify priority roads).
9. Settlement Agreement, *Center for Biological Diversity v. Department of the Interior*, No. 10-00952 (D.D.C. 2011) (NEPA – Department of Agriculture, Bureau of Land Management, and Forest Service agree to evaluate whether an environmental impact statement is required by NEPA to promulgate new regulations in fee grazing program).

2014] *Empirical Analysis of Sue-and-Settle* 1581

10. Agreement to Settle Cases Seeking Judicial Review of the 2008 Stream Buffer Zone Rule, *Coal River Mountain Watch v. Kempthorne*, No. 08-02212 (D.D.C. 2010) (EPA and Department of the Interior agree to amend or replace stream buffer rule under the Surface Mining Control and Reclamation Act).
11. Settlement Agreement, *Colorado Citizens Against Toxic Waste v. Jackson*, No. 08-1787 (D. Colo. 2009) (CAA – EPA agrees to take final action on radon emissions standards).
12. Settlement Agreement, *Colorado Environmental Coalition v. Salazar*, No. 09-00085 (D. Colo. 2011) (ESA – Bureau of Land Management agrees to analyze, at a minimum, certain alternative shale oil resource management plans for impacts on endangered species).
13. Consent Decree, *Comite Civico del Valle, Inc. v. Jackson*, No. 10-00946 (N.D. Cal. 2010) (CAA – EPA to take final action on California SIP for feedlot emissions).
14. Consent Decree, *Comite Civico del Valle, Inc. v. Jackson*, No. 09-04095 (N.D. Cal. 2010) (CAA – EPA agrees to take final action on California SIP for PM₁₀ in Imperial County).
15. Consent Decree, *Comite Civico del Valle, Inc. v. Jackson*, No. 10-02859 (N.D. Cal. 2010) (CAA – EPA agrees to take final action on California SIP for PM_{2.5} in Imperial County).
16. Consent Decree, *Defenders of Wildlife v. Jackson*, No. 10-1915 (D.D.C. 2012) (CWA – EPA agrees to commence rulemaking for steam electric power plant point source effluent limitations).
17. Consent Decree, *El Comite Para El Bienestar De Earlimart v. EPA*, No. 11-3779 (N.D. Cal. 2012) (CAA – EPA agrees to propose actions on revised pesticide and fumigant rules in California SIPs).
18. Consent Decree, *Environmental Defense Fund v. Jackson*, No. 11-04492 (S.D.N.Y. 2012) (CAA – EPA agrees to review whether new NSPS are required for municipal solid waste landfills).
19. Consent Decree, *Florida Wildlife Federation v. Jackson*, No. 08-00324 (N.D. Fla. 2009) (CWA – EPA agrees to issue numeric Florida water quality standards in phases).
20. Settlement Agreement, *Fowler v. EPA*, No. 09-00005 (D.D.C. 2010) (CWA – EPA agrees to establish Chesapeake Bay TMDL).

21. Stipulated Settlement Agreement and Proposed Order, *Friends of Animals v. Salazar*, No. 10-357 (D.D.C. 2010) (ESA – Department of the Interior agrees to issue twelve-month findings on petition to list certain parrots, cockatoos, and macaws as endangered or threatened).
22. Stipulated Settlement Agreements, *In re Endangered Species Act Section 4 Deadline Litigation*, No. 10-377 (D.D.C. 2011) (ESA – Forest Service and Fish and Wildlife Service agree to make final determinations and findings on petitions for listing of hundreds of endangered species, resolving suits by the Center for Biological Diversity, WildEarth Guardians, and other plaintiffs).
23. Consent Decree at 1–2, *Kentucky Environmental Foundation v. Jackson*, No. 10-1814 (D.D.C. 2011) (CAA – EPA agrees to take final action on Kentucky SIP for PM_{2.5} NAAQS).
24. Settlement Agreement, *Louisiana Environmental Action Network v. Jackson*, No. 09-01333 (D.D.C. 2010) (CAA – EPA agrees to take final action on Louisiana SIP for ozone NAAQS).
25. Settlement Agreement, *Mossville Environmental Action NOW v. Jackson*, No. 08-1803 (D.D.C. 2009) (CAA – EPA agrees to take final action on control technology standards for PVC manufacturing).
26. Partial Consent Decree at 1, 4–5, *National Parks Conservation Association v. Jackson*, No. 11-01548 (D.D.C. 2012) (CAA – EPA agrees to take final action on FIPs and SIPs for regional haze rules).
27. Settlement Agreement at 1–4, *Natural Resources Defense Council v. EPA*, No. 09-60510 (5th Cir. 2010) (CWA – EPA agrees to publish guidance on concentrated animal feedlot effluent limitation applicability and to require submission of certain information to EPA).
28. Settlement Agreement at 1, Exhibit A, *Natural Resources Defense Council v. EPA*, No. 06-0820 (2d Cir. 2010) (EPA agrees to incorporate specific language into consent rules for human pesticide evaluations).
29. Consent Decree at 1–2, 4, *Natural Resources Defense Council v. EPA*, No. 10-6029 (C.D. Cal. 2011) (CAA – EPA agrees to take final action on California SIP for PM_{2.5} in South Coast).

2014] *Empirical Analysis of Sue-and-Settle* 1583

30. Stipulated Settlement Agreement and Order at 1–2, *Natural Resources Defense Council v. Salazar*, No. 10-00299 (D.D.C. 2010) (ESA – Department of the Interior agrees to consider petition for listing whitebark pine as threatened due to climate change).
31. Settlement Agreement, *New York v. EPA*, No. 06-1322 (D.C. Cir. 2010) (CAA – EPA to propose GHG NSPS rules for power plants and refineries) (consolidated with *American Petroleum Institute v. EPA* (D.C. Cir. 2010)).
32. Stipulated Settlement Agreement and Order of Dismissal, *Northwoods Wilderness Recovery v. Kempthorne*, No. 08-1407 (N.D. Ill. 2009) (ESA – Fish and Wildlife Service agrees to reconsider critical habitat listing for Hine’s emerald dragonfly).
33. Settlement Agreement at 1–2, *Portland Cement Association v. EPA*, No. 07-1046 (D.C. Cir. 2009) (CAA – EPA agrees to reconsider MACT standards for cement firing).
34. Settlement Agreement at 1, 8, *Riverkeeper v. EPA*, No. 06-12987 (S.D.N.Y. 2010) (CWA – EPA agrees to propose and finalize cooling water intake rules).
35. Notice of Proposed Settlement and Joint Motion to Stay All Deadlines for 90 Days at 1, 4–10, *Sierra Club v. Jackson*, No. 10-04060 (N.D. Cal. 2011) (CAA – EPA agrees to take final action on ozone NAAQS revisions for sixteen states).
36. Consent Decree at 1–4, *Sierra Club v. Jackson*, No. 11-03106 (N.D. Cal. 2012) (CAA – EPA agrees to take final action on reasonable available control technology finding as implemented in California SIP).
37. Consent Decree at 1–2, *Sierra Club v. Jackson*, No. 10-01954 (N.D. Cal. 2011) (CAA – EPA agrees to take final action on eight-hour ozone SIP for San Joaquin Valley Air Pollution Control District).
38. Settlement Agreement, *Sierra Club v. EPA*, No. 08-1258 (D.C. Cir. 2009) (EPA agrees to propose specific changes in Lead Renovation, Repair, and Painting Program).
39. Settlement Agreement at 1–2, *Sierra Club Notice of Intent* (CAA – EPA agrees to take final action on 1997 ozone NAAQS attainment determinations for New York, New Jersey, Connecticut, Massachu-

setts, Illinois, and Missouri; the EPA agreed to take this action without an actual court order) (settled Dec. 19, 2011).

40. Consent Decree at 1–2, *Sierra Club v. EPA*, No. 08-00424 (D.D.C. 2013) (CAA – EPA agrees to propose final rule on MACT for brick and clay manufacturing facilities).
41. Partial Consent Decree at 1–4, *Sierra Club v. EPA*, No. 10-1541 (D.D.C. 2011) (CAA – EPA agrees to take final action on Texas SIP for ozone and PM_{2.5}).
42. Consent Decree at 1–2, *Sierra Club v. Jackson*, No. 10-00133 (D.D.C. 2010) (CAA – EPA agrees to take final action on eight-hour ozone NAAQS in twenty-one state SIPs to approve or otherwise promulgate FIPs).
43. Consent Decree at 1–2, *Sierra Club v. Jackson*, No. 09-00152 (N.D. Cal. 2011) (CAA – EPA agrees to consider, and if necessary, propose MACT revisions impacting twenty-eight industry source categories).
44. Consent Decree at 1–2, 4, *Sierra Club v. Jackson*, No. 11-2000 (D.D.C. 2012) (CAA – EPA agrees to take final action on Alabama SIP for PM_{2.5} and Georgia SIP for ozone).
45. Consent Decree at 1–2, *Sierra Club v. Jackson*, No. 10-02112 (D.D.C. 2011) (CAA – EPA agrees to take final action on Arkansas SIP for regional haze).
46. Stipulation of Modification to Deadline in Partial Consent Decree at 1, *Sierra Club v. Jackson*, No. 01-01537 (D.D.C. 2010) (CAA – EPA agrees to consider and, if necessary, propose revisions to MACT boiler and internal combustion standards).
47. Settlement and Motion to Sever and Hold Case in Abeyance at 1, 4, *Sierra Club v. EPA*, No. 09-1041 (D.C. Cir. 2010) (EPA agrees to reconsider rule defining definition of solid waste).
48. Consent Decree at 1–2, *Sierra Club v. Jackson*, No. 12-00012 (D.D.C. 2012) (CAA – EPA agrees to take final action on Texas submission for Houston eight-hour ozone SIP).
49. Consent Decree at 1–3, *Sierra Club v. Jackson*, No. 10-00889 (D.D.C. 2011) (CAA – EPA agrees to take final action on Kentucky

2014] *Empirical Analysis of Sue-and-Settle* 1585

submission for Kentucky ozone maintenance SIPs and regional haze program).

50. Consent Decree at 2, Attachment A, *Sierra Club v. Jackson*, No. 11-2180 (D.D.C. 2012) (CAA – EPA agrees to take final action on SIP submissions for Massachusetts, Connecticut, New Jersey, New York, Pennsylvania, Maryland, and Delaware).
51. Consent Decree at 1–2, 4–5, *Sierra Club v. Jackson*, No. 11-00035 (D.D.C. 2012) (CAA – EPA agrees to take final action on ozone SIPs for Illinois, Maine, and Missouri).
52. Consent Decree at 1, 4, *Sierra Club v. Jackson*, No. 12-00013 (D.D.C. 2012) (CAA – EPA agrees to take final action on ozone SIPs for North Carolina and South Carolina).
53. Consent Decree at 1–2, *Sierra Club v. Jackson*, No. 12-00705 (D.D.C. 2012) (CAA – EPA agrees to take final action on Oklahoma SIP for excess emissions).
54. Settlement Agreement at 1–3, *Sierra Club v. Jackson*, No. 11-00100 (D.D.C. 2011) (CAA – EPA agrees to take final action on attainment determinations for one-hour ozone attainment for Texas, Connecticut, Maryland, New York, New Jersey, Massachusetts, and New Hampshire).
55. Settlement Agreement at 1–3, *WildEarth Guardians v. Jackson*, No. 10-04603 (N.D. Cal. 2011) (CAA – EPA agrees to set deadlines for issuing findings of failure to submit ozone SIPs for Nevada and Pennsylvania; EPA agrees to take final actions on SIPs for Pennsylvania and Tennessee).
56. Consent Decree at 1, 3, *WildEarth Guardians v. Jackson*, No. 11-1661 (D. Ariz. 2012) (CAA – EPA agrees to make determinations on area designations for ground level ozone NAAQS).
57. Consent Decree, *WildEarth Guardians v. Jackson*, No. 11-02205 (N.D. Cal. 2011) (CAA – EPA agrees to take final action on Arizona ozone SIP for Phoenix area).
58. Consent Decree, *WildEarth Guardians v. Jackson*, No. 09-02148 (D. Colo. 2010) (CAA – EPA agrees to take final action on SIP submissions for Colorado, Utah, and Montana).

59. Consent Decree, *WildEarth Guardians v. Jackson*, No. 09-00089 (D.D.C. 2009) (CAA – EPA agrees to review and update oil and gas drilling rules on NSPS, MACT, and residual risk standards).
60. Consent Decree, *WildEarth Guardians v. Jackson*, No. 11-00190 (N.D. Cal. 2010) (CAA – EPA agrees to take final action on PM_{2.5} SIP submissions by Alabama, Connecticut, Florida, Mississippi, North Carolina, Tennessee, Indiana, Maine, Ohio, New Mexico, Delaware, Kentucky, Nevada, Arkansas, New Hampshire, South Carolina, Massachusetts, Arizona, Georgia, and West Virginia).
61. Consent Decree, *WildEarth Guardians v. Jackson*, No. 11-0001 (D. Colo. 2011) (CAA – EPA agrees to take final action on regional haze and excess emissions SIP submissions by Colorado, Wyoming, Montana, and North Dakota).
62. Consent Decree, *WildEarth Guardians v. Jackson*, No. 09-02109 (D. Colo. 2009) (CAA – EPA agrees to take final action on “unavoidable breakdown” period SIP submission by Utah).
63. Consent Decree, *WildEarth Guardians v. Jackson*, No. 10-01218 (D. Colo. 2010) (CAA – EPA agrees to take final action on regional haze and PM₁₀ SIP submission by Utah).
64. Consent Decree, *WildEarth Guardians v. Jackson*, No. 12-00754 (D. Colo. 2012) (CAA – EPA agrees to take final action on ozone SIP submission by Utah for Salt Lake and Davis counties).
65. Consent Decree, *WildEarth Guardians v. Salazar*, No. 08-00689 (D. Ariz. 2009) (ESA – Department of the Interior agrees to reconsider “prudence” decision not to designate Chiricahua leopard frog critical habitat).
66. Stipulated Settlement Agreement, *WildEarth Guardians v. Locke*, No. 10-00283 (D.D.C. 2010) (ESA – National Marine Fisheries Service agrees to issue recovery plans for sperm, sei, and fin whales).
67. Stipulated Settlement, *WildEarth Guardians v. Salazar*, No. 08-00472 (D.D.C. 2009) (ESA – Department of the Interior agrees to issue decisions where none have been made on a petition for listing 674 species).

2014] *Empirical Analysis of Sue-and-Settle* 1587

68. Stipulated Settlement, *WildEarth Guardians v. Salazar*, No. 10-00122 (D.N.M. 2010) (ESA – Department of the Interior agrees to issue a decision on listing of Wright’s marsh thistle).

2. Of the sixty-eight cases identified by the Chamber Report, eight were removed because they were either (a) initially settled outside the applicable date range (the Obama administration, January 20, 2009, to December 5, 2013) or (b) not involving cases filed under the CAA, CWA, or ESA. After this removal, the dataset consisted of sixty cases.

(a) Cases removed for not settling during the Obama administration:

1. Settlement Agreement, *Portland Cement Association v. EPA*, No. 07-1046 (D.C. Cir. 2009) (CAA - EPA agrees to reconsider MACT standards for cement firing) (settled Jan. 6, 2009).
2. Stipulation of Modification to Deadline in Partial Consent Decree, *Sierra Club v. Jackson*, No. 01-01537 (D.D.C. 2010) (CAA – EPA agrees to consider and, if necessary, propose revisions to MACT boiler and internal combustion standards) (originally settled May 22, 2003).

(b) Cases removed for not arising under CAA, CWA, or ESA:

1. Settlement Agreement, *Coal River Mountain Watch v. Salazar*, No. 08-2212 (D.D.C. 2010) (EPA and Department of the Interior agree to amend or replace stream buffer rule under the Surface Mining Control and Reclamation Act).
2. Settlement Agreement, *Center for Biological Diversity v. Department of Agriculture*, Nos. 08-01185 and 08-03884 (N.D. Cal. 2010) (Department of Agriculture and Forest Service agree to withhold certain areas from development and create collaborative process to identify priority roads).
3. Settlement Agreement, *Center for Biological Diversity v. Department of the Interior*, No. 10-00952 (D.D.C. 2011) (Department of Agriculture, Bureau of Land Management, and Forest Service agree to evaluate whether an environmental impact statement is required by NEPA to promulgate new regulations in fee grazing program).
4. Settlement Agreement, *Natural Resources Defense Council v. EPA*, No. 06-0820 (2d Cir. 2010) (EPA agrees to incorporate specific language into consent rules for human pesticide evaluations).

5. Settlement Agreement, *Sierra Club v. EPA*, No. 09-00218 (D.C. Cir. 2009) (EPA agrees to specific change in Lead Renovation, Repair, and Painting Program).
 6. Settlement Agreement, *Sierra Club v. EPA*, No. 09-1041 (D.C. Cir. 2010) (EPA agrees to reconsider rule defining solid waste).
3. Cases were then added to the dataset using an independent search. The search criteria used were as indicated in Appendix B.¹¹⁶ This search added twenty-eight additional cases to the dataset:
1. Settlement Agreement, *Natural Resources Defense Council v. EPA*, No. 09-1089 (D.C. Cir. filed Mar. 9, 2009) (CWA – EPA agrees to set specific standards on ballast water discharge from large commercial vessels).
 2. Settlement Agreement, *Wisconsin Builders Association v. EPA*, No. 09-4113 (7th Cir. 2012) (CWA – EPA agrees to withdraw certain effluent limitations guidelines, including numeric turbidity limitations, for the construction sector).
 3. Settlement Agreement, *City of Columbia v. EPA*, No. 11-04155 (W.D. Mo. 2012) (CWA – EPA agrees to modify Columbia’s TMDL to drop the use of storm water flow as a surrogate pollutant).
 4. Settlement Agreement, *Center for Biological Diversity v. Jackson*, No. 12-01920 (N.D. Cal. 2013) (CWA – EPA agrees to pursue informal consultations with the National Marine Fisheries Service before approving certain oil dispersants for use in the event of an oil spill).
 5. Settlement Agreement, *Communities for a Better Environment v. EPA*, No. 12-71340 (9th Cir. 2013) (CAA – EPA agrees to take final action on California SIP for eight-hour ozone rule for California South Coast).
 6. Modification of Settlement Agreement, *Sierra Club v. Jackson*, No. 10-04060 (N.D. Cal. 2012) (CAA – EPA agrees to take final action on California SIP for excess emissions during startup, shutdown, or malfunction).

¹¹⁶ Search criteria were largely chosen to replicate the criteria used in the Chamber Report, *supra* note 3, app. at 46–49. See *infra* Appendix B for more detail.

2014] *Empirical Analysis of Sue-and-Settle* 1589

7. Settlement Agreement, Public Service Company of Oklahoma v. EPA, No. 12-9542 (10th Cir. 2012) (CAA – EPA agrees to take final action on Oklahoma SIP provisions on visibility and interstate transport).
8. Settlement Agreement, Imperial County Air Pollution Control District v. EPA, No. 10-72709 (9th Cir. 2012) (CAA – EPA agrees to approve California SIP for PM₁₀ in Imperial Valley if revised according to certain agreed substantive parameters).
9. Settlement Agreement, American Forest & Paper Association v. EPA, No. 12-1452 (D.C. Cir. 2013) (CAA – EPA agrees to propose certain substantive rules on mandatory greenhouse gas reporting).
10. Settlement Agreement, Sierra Club v. Jackson, No. 10-04060 (N.D. Cal. 2011) (CAA – EPA agrees to take final action on eight-hour ozone SIPs for twelve states).
11. Settlement Agreement, EnerNOC v. EPA, No. 10-1090 (D.C. Cir. 2011) (CAA – EPA agrees to propose specified revisions to RICE NESHAPS rules; also addresses issues from *Engine Manufacturing Association v. EPA*, Nos. 01-1129 and 02-1080 (D.C. Cir. 2011)).
12. Consent Decree, BCCA Appeal Group v. EPA, No. 08-1491 (N.D. Tex. 2009) (CAA – EPA agrees to take final action on Texas SIP rules for NSR permitting process banking and trading).
13. Settlement Agreement, Center for Biological Diversity v. Jackson, No. 10-1846 (N.D. Cal. 2010) (CAA – EPA agrees to take final action on Alaska, Arizona, Montana, and Nevada PM₁₀).
14. Settlement Agreement, Navistar v. EPA, No. 09-1113 (D.C. Cir. 2010) (CAA – EPA agrees to engage in public process to review policies for heavy-duty diesel engines).
15. Settlement Agreement, Alliance of Automobile Manufacturers v. EPA, No. 08-1109 (D.C. Cir. 2009) (CAA – EPA agrees to propose specific substantive revisions to gasoline distribution NESHAP).
16. Consent Decree, WildEarth Guardians v. McCarthy, No. 12-03307 (D. Colo. 2013) (CAA – EPA agrees to take final action on Colorado, North Dakota, South Dakota, and Utah SIPs).

17. Consent Decree, *Bahr v. McCarthy*, No. 13-00872 (D. Ariz. 2013) (CAA – EPA agrees to take final action to promulgate Arizona FIP for PM₁₀).
18. Consent Decree, *Air Alliance Houston v. McCarthy*, No. 12-1607 (D.D.C. 2013) (CAA – EPA agrees to evaluate revisions for petroleum refineries MACT).
19. Consent Decree, *Sierra Club v. Perciasepe*, No. 12-01237 (D.D.C. 2013) (CAA – EPA agrees to take final action on New Jersey and Michigan SIPs).
20. Consent Decree, *Sierra Club v. Perciasepe*, No. 12-01917 (D.D.C. 2013) (CAA – EPA agrees to take final action on Wyoming and Connecticut SIPs).
21. Proposed Consent Decree, *Sierra Club v. Perciasepe*, No. 12-cv-4078 (N.D. Cal. 2013) (CAA – EPA agrees to take final action on Nevada SIP).
22. Consent Decree, *Sierra Club v. Jackson*, No. 12-00347 (D.D.C. 2013) (CAA – EPA agrees to take final action on Colorado, Kansas, Missouri, New Jersey, New York, North Dakota, and Utah PM_{2.5} SIPs).
23. Proposed Consent Decree, *Clean Air Council [sic] v. Jackson*, No. 12-00707 (D.D.C. 2013) (CAA – EPA agrees to take final action on Pennsylvania PM_{2.5} FIP implementation).
24. Consent Decree, *Center for Biological Diversity v. Jackson*, No. 12-04968 (N.D. Cal. 2013) (CAA – EPA agrees to take final action on Colorado, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, Oklahoma, Oregon, Pennsylvania, South Dakota, Virginia, and Washington 2008 lead NAAQS SIPs).
25. Consent Decree, *Natural Resources Defense Council v. Jackson*, No. 10-6029 (C.D. Cal. 2011) (CAA – EPA agrees to take final action on California SIP for South Coast Air Quality Management District).
26. Consent Decree, *Bahr v. Jackson*, No. 09-2511 (D. Ariz. 2010) (CAA – EPA agrees to take final action on PM₁₀ SIP for Maricopa County).

2014] *Empirical Analysis of Sue-and-Settle* 1591

27. Consent Decree, *WildEarth Guardians v. Jackson*, No. 09-02453 (N.D. Cal. 2010) (CAA – EPA agrees to take final action on California, Colorado, Idaho, New Mexico, North Dakota, Oklahoma, and Oregon SIPs for eight-hour ozone and PM_{2.5}).
28. Consent Decree, *Environmental Integrity Project v. EPA*, No. 09-00218 (D.D.C. 2009) (CAA – EPA agrees to review if new NSPS are needed for nitric acid plants).

The sue-and-settle dataset used for this Note thus consisted of eighty-eight cases: the sixty-eight cases identified in Step One, less the eight cases removed in Step Two, plus the twenty-eight cases added in Step Three.

APPENDIX B: SEARCH QUERIES

Searches under Clean Air Act:

1. Federal Register search #1¹¹⁷:
Agency: “Environmental Protection Agency”
Search Query: “Clean Air Act” AND “Settlement Agreement”
Dates: “1/20/2009” to “12/5/2013”
Only regulations deemed significant
2. Federal Register search #2:
Agency: “Environmental Protection Agency”
Search Query: “Clean Air Act” AND “Consent Decree”
Dates: “1/20/2009” to “12/5/2013”
Only regulations deemed significant

Searches under Clean Water Act:

1. InsideEPA.com search #1¹¹⁸:
Search Query: “Clean Water Act” AND “Settlement Agreement”
Dates: “1/20/2009” to “12/5/2013”
2. InsideEPA.com search #2:
Search Query: “Clean Water Act” AND “Consent Decree”
Dates: “1/20/2009” to “12/5/2013”
3. Federal Register search #1:
Agency: “Environmental Protection Agency”
Search Query: “Clean Water Act” AND “Settlement Agreement”
Dates: “1/20/2009” to “12/5/2013”
Only regulations deemed significant
4. Federal Register search #2:
Agency: “Environmental Protection Agency”
Search Query: “Clean Water Act” AND “Consent Decree”
Dates: “1/20/2009” to “12/5/2013”
Only regulations deemed significant

¹¹⁷ Because EPA is required to publish notice of CAA consent decrees and settlement agreements in the Federal Register, a Federal Register search alone is sufficiently comprehensive to reveal all applicable CAA cases. See Clean Air Act, 42 U.S.C. § 7413(g) (2012); Chamber Report, *supra* note 3, app. at 48.

¹¹⁸ InsideEPA.com is a subscribers-only dataset that posts daily articles on EPA news, including settlement agreements and consent decrees. It can be accessed at www.InsideEPA.com.

2014] *Empirical Analysis of Sue-and-Settle* 1593

5. WestlawNext dataset search #1:
Search Query: "Clean Water Act" AND "Settlement Agreement"
Jurisdiction: "All Federal"
Dates: "1/20/2009" to "12/5/2013"
6. WestlawNext dataset search #2:
Search Query: "Clean Water Act" AND "Consent Decree"
Jurisdiction: "All Federal"
Dates: "1/20/2009" to "12/5/2013"

Searches under Endangered Species Act:

1. InsideEPA.com search #1:
Search Query: "Endangered Species Act" AND "Settlement Agreement"
Dates: "1/20/2009" to "12/5/2013"
2. InsideEPA.com search #2:
Search Query: "Endangered Species Act" AND "Consent Decree"
Dates: "1/20/2009" to "12/5/2013"
3. Federal Register search #1:
Agency: "Environmental Protection Agency"
Title: "Endangered Species Act" AND "Settlement Agreement"
Dates: "1/20/2009" to "12/5/2013"
Only regulations deemed significant
4. Federal Register search #2:
Agency: "Environmental Protection Agency"
Title: "Endangered Species Act" AND "Consent Decree"
Dates: "1/20/2009" to "12/5/2013"
Only regulations deemed significant
5. WestlawNext dataset search #1:
Search Query: "Endangered Species Act" AND "Settlement Agreement"
Jurisdiction: "All Federal"
Dates: "1/20/2009" to "12/5/2013"
6. WestlawNext dataset search #2:
Search Query: "Endangered Species Act" AND "Consent Decree"
Jurisdiction: "All Federal"
Dates: "1/20/2009" to "12/5/2013"

APPENDIX C: LIST OF SUBSTANTIVE CONSENT DECREES

Sought by Industry:

1. Settlement Agreement, Alliance of Automobile Manufacturers v. EPA, No. 08-1109 (D.C. Cir. 2009) (CAA – EPA agrees to propose specific substantive revisions to gasoline distribution NESHAP).
2. Settlement Agreement, American Forest & Paper Association v. EPA, No. 12-1452 (D.C. Cir. 2013) (CAA – EPA agrees to propose certain substantive rules on mandatory greenhouse gas reporting).
3. Settlement Agreement, City of Columbia v. EPA, No. 11-04155 (W.D. Mo. 2012) (CWA – EPA agrees to modify Columbia’s TMDL to drop the use of storm water flow as a surrogate pollutant).
4. Settlement Agreement, Imperial County Air Pollution Control District v. EPA, Nos. 10-72709 and 10-72729 (9th Cir. 2012) (CAA – EPA agrees to approve California SIP for PM₁₀ in Imperial Valley if revised according to certain agreed substantive parameters).
5. Settlement Agreement, Wisconsin Builders Association v. EPA, Nos. 09-4113, 10-1247, and 10-1876 (7th Cir. 2012) (CWA – EPA agrees to withdraw certain effluent limitations guidelines, including numeric turbidity limitations, for the construction sector).

Sought by Environmental Groups:

1. Settlement Agreement, Fowler v. EPA, No. 09-00005 (D.D.C. 2010) (CWA – EPA agrees to establish Chesapeake Bay TMDL).
2. Settlement Agreement, Natural Resources Defense Council v. EPA, No. 13-00617 (D.C. Cir. filed March 9, 2009) (CWA – EPA agrees to set specific standards on ballast water discharge from large commercial vessels).
3. Settlement Agreement, Natural Resources Defense Council v. EPA, No. 08-61093 (5th Cir. 2010) (CWA – EPA agrees to publish guidance on concentrated animal feedlot effluent limitation applicability and to require submission of certain information to EPA).
4. Settlement Agreement, WildEarth Guardians v. Locke, No. 10-00283 (D.D.C. 2010) (ESA – National Marine Fisheries Service agrees to issue recovery plans for sperm, sei, and fin whales).

2014]

Empirical Analysis of Sue-and-Settle

1595

APPENDIX D: CHI-SQUARED CONTINGENCY TABLE ANALYSIS FOR STATISTICAL SIGNIFICANCE¹¹⁹

Observed Frequency

Plaintiff Type	Decision-Forcing Relief	Substantive Relief	Total	Percentage of Total
Environmental	75	4	79	89.8%
Industry	4	5	9	10.2%
Total	79	9	88	-
Percentage of Total	89.8%	10.2%	-	-

Expected Frequency: (Null Hypothesis: No Connection Between Relief Sought and Plaintiff Type)

Plaintiff Type	Decision-Forcing Relief	Substantive Relief	Total	Percentage of Total
Environmental	71	8	79	89.8%
Industry	8	1	9	10.2%
Total	79	9	88	-
Percentage of Total	89.8%	10.2%	-	-

Chi-Squared Analysis I: (Expected – Observed)² / Expected

Plaintiff Type	Decision-Forcing Relief	Substantive Relief
Environmental	0.234	2.059
Industry	2.059	18.080

¹¹⁹ E-mail from Casey Lichtendahl, supra note 65.

1596

Virginia Law Review

[Vol. 100:1545]

Chi-Squared Analysis II

Chi-Squared Test Statistic	22.435
P-value of Chi-Squared Test Statistic	.000217%

Any p-value of less than 5% is considered statistically significant. We “can safely reject the null hypothesis [that industry and environmental groups seek the two types of relief at the same rates]. These groups seek these types of relief at statistically significantly different rates.”¹²⁰

¹²⁰ Id.

APPENDIX E: EQUATION 1

Equation 1: Relative Frequency of Environmental Sue-and-Settle Settlements by Administration

$T_{se-env-Bush}$ = Total Environmental Sue-and-Settle Settlements Under Bush Administration

$T_{su-env-Bush}$ = Total Environmental Sue-and-Settle-Type Suits Brought Under Bush Administration

$T_{se-env-Obama}$ = Total Environmental Sue-and-Settle Settlements Under Obama Administration

$T_{su-env-Obama}$ = Total Environmental Sue-and-Settle-Type Suits Brought Under Obama Administration

Compare with Chi-Squared Analysis	
$F_{se-env-Bush} = \frac{T_{se-env-Bush}}{T_{su-env-Bush}}$	$F_{se-env-Obama} = \frac{T_{se-env-Obama}}{T_{su-env-Obama}}$

Commentary to Empirical Analysis

The recommended analysis could be conducted according to Equation 1. First, one would find the total number of suits filed against the administration under the relevant environmental statutes that could potentially result in a sue-and-settle settlement (that is, a suit that could result in a rule of general applicability¹²¹) during the Bush and Obama administrations ($T_{su-env-Bush}$ and $T_{su-env-Obama}$ in Equation 1, respectively). One would then count the number of these suits settled via sue-and-settle settlements ($T_{se-env-Bush}$ and $T_{se-env-Obama}$ in Equation 1, respectively) and divide this by the number of suits counted (for example, $T_{se-env-Bush} / T_{su-env-Obama}$ in Equation 1). This results in a statistic which represents the frequency of settlement of each administration relative to the number of suits filed ($F_{se-env-Bush}$ and $F_{se-env-Obama}$ in Equation 1, respectively). One would then run a chi-squared test to determine if there is a statistically significant difference between the two populations (that is, between $F_{se-env-Bush}$ and $F_{se-env-Obama}$ in Equation 1).

¹²¹ See supra Part I (defining sue-and-settle).

APPENDIX F: EQUATIONS 2–5

Equation 2: Relative Frequency of Fee Awards in Environmental Sue-and-Settle by Administration

$T_{se-env-fees-Bush}$ = Total Environmental Sue-and-Settle Fee-Awarding Settlements Under Bush Administration

$T_{su-env-Bush}$ = Total Environmental Sue-and-Settle-Type Suits Brought Under Bush Administration

$T_{se-env-fees-Obama}$ = Total Environmental Sue-and-Settle Fee-Awarding Settlements Under Obama Administration

$T_{su-env-Obama}$ = Total Environmental Sue-and-Settle-Type Suits Brought Under Obama Administration

Compare with Chi-Squared Analysis

$$F_{fees-env-Bush} = \frac{T_{se-env-fees-Bush}}{T_{su-env-Bush}}$$

$$F_{se-env-fees-Obama} = \frac{T_{se-env-fees-Obama}}{T_{su-env-Obama}}$$

Equation 3: Baseline Frequency of Payment of Fees in Settlement Across All Fee-Shifting Statutes

$T_{se-fee-eligible-Bush}$ = Total Fee-Awarding Settlements Under Bush Administration

$T_{su-fee-eligible-Bush}$ = Total Suits Brought Under Statutes with Fee-Shifting Provisions Under Bush Administration

$T_{se-fee-eligible-Obama}$ = Total Fee-Awarding Settlements Under Obama Administration

$T_{su-fee-eligible-Obama}$ = Total Suits Brought Under Statutes with Fee-Shifting Provisions Under Obama Administration

$$F_{fee-all-Bush} = \frac{T_{se-fee-eligible-Bush}}{T_{su-fee-eligible-Bush}}$$

$$F_{fee-all-Obama} = \frac{T_{se-fee-eligible-Obama}}{T_{su-fee-eligible-Obama}}$$

Equation 4: Relative Frequency of Obama Settlement with Fees v. Bush Across All Eligible Litigation

$F_{\text{fee-all-Bush}}$ = calculated from Equation 3

$F_{\text{fee-all-Obama}}$ = calculated from Equation 3

$$R_{\text{fee-all-Obama\&Bush}} = \frac{F_{\text{fee-all-Obama}}}{F_{\text{fee-all-Bush}}}$$

Equation 5: Bush v. Obama Environmental Fee Settlement Policy Adjusted by Overall Fee-Settlement Policy

$F_{\text{fees-env-Bush}}$ = calculated from Equation 2

$R_{\text{fee-all-Obama\&Bush}}$ = calculated from Equation 4

Compare with Chi-Squared Analysis	
$O_{\text{Bush-adjusted}} = \frac{F_{\text{fees-env-Bush}}}{R_{\text{fee-all-Obama\&Bush}}}$	$F_{\text{fees-env-Obama}}$ <small>(from Equation 2)</small>

Commentary to Empirical Analysis

The analysis could be conducted according to Equation 2. First, one would find the total number of suits filed against the administration under the relevant environmental statutes that could potentially result in a sue-and-settle settlement (that is, a suit that could result in a rule of general applicability, see definition of sue-and-settle in Part I) during the Bush and Obama administrations ($T_{\text{su-env-Bush}}$ and $T_{\text{su-env-Obama}}$ in Equation 2, respectively). One would then count the number of those suits settled via sue-and-settle settlements that awarded attorneys' fees ($T_{\text{se-env-fees-Bush}}$

and $T_{\text{se-env-fees-Obama}}$ in Equation 2, respectively), and divide this by the number of suits counted (for example, $T_{\text{se-env-fees-Bush}} / T_{\text{su-env-Bush}}$ in Equation 2). This results in a statistic that represents the relative frequency of environmental settlements with fees to environmental suits of each administration ($F_{\text{fees-env-Bush}}$ and $F_{\text{fees-env-Obama}}$ in Equation 2, respectively). One could then run a chi-squared test to determine if there is a statistically significant difference between the two populations (that is, between $F_{\text{fees-env-Bush}}$ and $F_{\text{fees-env-Obama}}$ in Equation 2).

As the foregoing analysis could provide a misleading view due to confounding factors, a more robust empirical analysis would control for differences in *overall* sovereign litigation attorneys' fees settlement policy across all fee-shifting statutes between the administrations. It is possible, for example, that the Obama or Bush administration simply has a preference to conserve resources by settling all types of litigation in a way that does not specially favor or disfavor green groups, and that fees are often a necessary component to achieve such settlements. One could control for this according to Equations 3 and 4.

To control for this possible confounding variable, one can calculate a baseline frequency of settlements with fees relative to the total number of eligible suits across *all* fee-shifting statutes under both administrations. First, one would find the total number of suits filed against the administration under all statutes that provide for fee-shifting during the Bush and Obama administrations ($T_{\text{su-fee-eligible-Bush}}$ and $T_{\text{su-fee-eligible-Obama}}$ in Equation 3, respectively). One would then count the number of those suits settled across *all* fee-shifting statutes that awarded attorneys' fees ($T_{\text{se-fee-eligible-Bush}}$ and $T_{\text{se-fee-eligible-Obama}}$ in Equation 3, respectively), and divide this by the number of suits counted (for example, $T_{\text{se-fee-eligible-Bush}} / T_{\text{su-fee-eligible-Bush}}$ in Equation 3). This results in a statistic that represents the relative frequency of attorneys' fees settlements across all types of fee-eligible suits during each administration ($F_{\text{fee-all-Bush}}$ and $F_{\text{fee-all-Obama}}$ in Equation 3, respectively). One would then use this statistic to determine the Obama administration's overarching settlement policy on attorneys' fees for suits under all fee-shifting statutes, as compared to the Bush administration's policy, by using Equation 4. Dividing the Obama statistic ($F_{\text{fee-all-Obama}}$ from Equation 3 is placed in Equation 4) by the Bush statistic ($F_{\text{fee-all-Bush}}$ from Equation 3 is placed in Equation 4) yields a statistic ($R_{\text{fee-all-Obama\&Bush}}$ in Equation 4) that demonstrates how likely the Obama administration is to settle all types of litigation arising

under fee-shifting statutes by including attorneys' fees in the settlement as compared to the Bush administration.

This relative-frequency statistic ($R_{\text{fee-all-Obama\&Bush}}$ in Equation 4) would then control the analysis of environmental fee-shifting for overall fee settlement policy across all statutes. For example, if the Bush administration appeared to have an anti-fee settlement policy across all statutes that made the administration half as likely as the Obama administration to settle with fees across all statutes (that is, $R_{\text{fee-all-Obama\&Bush}} = 2$ from Equation 4), one would expect the Obama administration to have twice as many fee-inclusive settlements in environmental litigation as did the Bush administration (that is, $F_{\text{fees-env-Obama}} = 2 \times F_{\text{fees-env-Bush}}$) without supporting any allegation of uneven favoritism toward environmental groups. One would thus adjust the statistical analysis of each administration's use of environmental fee-shifting settlements from Equation 2 to control for overall fee-shifting policy using Equation 5. We multiply the relative frequency of the Bush administration's use of attorneys' fees in environmental settlements ($F_{\text{fees-env-Bush}}$ from Equation 2 is placed in Equation 5) by the Bush administration's overall tendency to use attorneys' fees in all types of settlements as compared to the Obama administration ($R_{\text{fee-all-Obama\&Bush}}$ from Equation 4 is placed in Equation 5) to yield an adjusted statistic ($O_{\text{Bush-adjusted}}$ in Equation 5). This statistic would represent the Bush administration's fee-shifting sue-and-settle behavior in environmental suits controlled as if the Bush administration had the same broad settlement policy on fee-shifting settlements across all types of suits (not just environmental litigation) as did the Obama administration. One could then run a chi-squared test to determine if there is a statistically significant difference between the Bush administration's adjusted (that is, controlled for overall settlement policy across all types of fee-shifting litigation) use of attorneys' fees in settlements of environmental litigation and the Obama administration's use of attorneys' fees in settlements of environmental litigation (that is, between $O_{\text{Bush-adjusted}}$ in Equation 5 and $F_{\text{fees-env-Obama}}$ in Equation 2).

