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THE SUE-AND-SETTLE PHENOMENON: ITS IMPACT
ON THE LAW, AGENCY, AND
SOCIETY

by

Katie L. Colton

A thesis submitted in partial fulfillment
of the requirements for the degree

of

MASTER OF SCIENCE

in

Economics

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2018

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ABSTRACT

The Sue-and-Settle Phenomenon: It's Impact
On the Law, Agency, and Society

by

Katie L. Colton, Master of Science

Utah State University, 2018

Major Professor: Dr. Christopher Fawson
Department: Economics

Sue-and-settle is the name applied to a federal agency's use of litigation to create policy outside of the normal regulatory process. This paper discusses the impact that the sue-and-settle policy has had on Congress, the judiciary, and the Environmental Protection Agency. First, this paper examines whether a collusive relationship occurs between the litigants. A sample set of 670 suits filed against the EPA from 2000-2010 is used to establish the relationship of the litigants. This paper presents the idea that some type of collaboration occurs between the parties. A binary choice model is used to explain the statistical correlation that exists. The paper models the data using logit, probit, and linear probability models. The paper then discusses whether the relationship between the litigants in sue-and-settle cases tends to be collusive or not. The second part of the paper examines how Congress, the Environmental Protection Agency, and the judiciary are viewed because of the continued perception of collusion in the agency's settlements. Overall, this paper finds that, the impacts of the sue-and-settle policy, and the perception of collusion, has affected Congress, the Environmental Protection Agency, and the judiciary by increasing regulation, distorting the purpose of the courts, which results in a lost value for the regulatory process.

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PUBLIC ABSTRACT

Sue-and-settle: Impact on Law,
Agency, and Society.

Katie L. Colton

Sue-and-settle is the name applied to a federal agency's use of litigation to create policy outside of the normal regulatory process. This paper discusses the impact that the sue-and-settle policy has had on Congress, the judiciary, and the Environmental Protection Agency. Specifically, this paper will discuss the issues caused by the perception of collusion within the sue-and-settle policy. First, this paper examines whether a relationship occurs between the litigants. The paper then discusses whether the relationship between the litigants in sue-and-settle cases tends to be collusive or not. The second part of the paper examines how Congress, the Environmental Protection Agency, and the judiciary are viewed because of the continued perception of collusion in the agency's settlements. Overall, this paper finds that, the impacts of the sue-and-settle policy, and the perception of collusion, has affected Congress, the Environmental Protection Agency, and the judiciary by increasing regulation, distorting the purpose of the courts, and resulting in a lost value for the regulatory process.

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INTRODUCTION

On October 16, 2017 the newest Director of the Environmental Protection Agency (EPA), Scott Pruitt, ended a long-standing “sue-and-settle” practice that the agency utilized in previous administrations. In his letter to the EPA, Director Pruitt stated that the process previously used by the EPA to settle litigation through consent decrees and settlement agreements led to the appearance of collusion between the agency and outside groups. The settlement agreements relinquished “some of its discretion over Agency’s priorities and hand[ed] them over to special interests and the courts.”¹

This was not the first time that the policy of sue-and-settle came under scrutiny. During the Reagan administration (March 1986), the Department of Justice established a policy that prohibited agencies from entering into settlement agreements that “interfere with [agency] authority to revise, amend, or promulgate regulations.”² The Reagan administration claimed that past administrations had abused the ability to enter into settlements, similar to how Pruitt has viewed the previous administration.³ Critics of the policy claim that the practice of sue-and-settle limits Congressional power and removes Congressional oversight. Critics also argue that sue-and-settle excludes interested stakeholders, intervenors, and affected states from partaking in discussions that were critical to regulation and policy changes. Others, however, have argued that the sue-and-

¹ Pruitt, Scott. "Administrator Pruitt Issues Directive to End EPA "Sue & Settle"." EPA. October 16, 2017. Accessed May 06, 2018. <https://www.epa.gov/newsreleases/administrator-pruitt-issues-directive-end-epa-sue-settle>.

² “Meese” Memorandum from the Attorney General Edward Meese III, Department Policy Concerning Consent Decrees and Settlement Agreements (March 13, 1986).

³ *Ibid.*

settle policy helps move regulatory discussions that would otherwise happen behind closed-doors, out into the open.⁴

Sue-and-settle is not a new policy, nor is it a policy that only applies to environmental groups.⁵ Both industry and interest groups have lobbied and sued Congress and agencies to gain preferential regulation.⁶ The question of whether the groups participating in sue-and-settle are colluding or not is discussed within this paper. Collusion is the idea that the EPA invites certain groups to sue the agency to create regulation. Though no evidence is found to support the claim of collusion, there is evidence of a correlation between special interest groups, settlement occurrence, and the amount of attorney fees obtained. As discussed later in this paper, there are a variety of reasons why such a relationship would occur other than collusion, such as the type of suits litigated. However, despite no proof of collusion, the perception of a conspiracy between the plaintiffs and the EPA remains. It is this notion of deceit that creates societal concerns. The impacts of the sue-and-settle policy, and the perception of collusion, has affected Congress, the Environmental Protection Agency, and the judiciary by increasing regulation, distorting the purpose of the courts, which results in a lost value for the regulatory process.

⁴ Tyson, Ben. "An Empirical Analysis of Sue-and-Settle in Environmental Litigation." *Virginia Law Review*. Nov. 2014. Accessed May 02, 2018, <http://www.virginialawreview.org/volumes/content/empirical-analysis-sue-and-settle-environmental-litigation>.

⁵ Johnson, Stephen M., Sue and Settle: Demonizing the Environmental Citizen Suit (June 14, 2014). *Seattle University Law Review* 2014, vol. 37, no. 891, pg.892. <https://ssrn.com/abstract=2478866>.

⁶ Kovacs, William L., Keith W. Holman, and Jonathan A. Jackson. "Sue and Settle: Regulating Behind Closed Doors." U.S. Chamber of Commerce. May 2013, pg.14. Accessed May 06, 2018. <https://www.uschamber.com/report/sue-and-settle-regulating-behind-closed-doors>.

The first part of this paper will define sue-and-settle and its process. Then this paper will establish the relationship that occurs between the EPA and the litigation plaintiffs and debate whether the relationship is a form of collusion. The final section of this paper will discuss the various effects of the policy on the regulatory process and law.

WHAT IS SUE-AND-SETTLE?

Sue-and-settle is the process by which a federal agency agrees to a settlement agreement with an advocacy group, designed to create regulations and deadlines outside the normal rulemaking process.⁷ The settlement agreement usually results in a consent decree⁸ that binds the agency to resolve the plaintiffs' claims.⁹ Settlement agreements are often negotiated in closed meetings with no, or few, participation from other affected parties or the public at large. The results can have large regulatory and financial implications. From 2005 to 2016, the EPA implemented regulation from lawsuits costing taxpayers an estimated \$68 billion, of which \$26 billion were annual costs.¹⁰ The practice of sue-and-settle is commonly used for regulations tied to the Clean Air Act, the Clean

⁷ The two types of sue-and-settle cases are decision forcing (deadline suits) and decision making (also known as rulemaking suits).

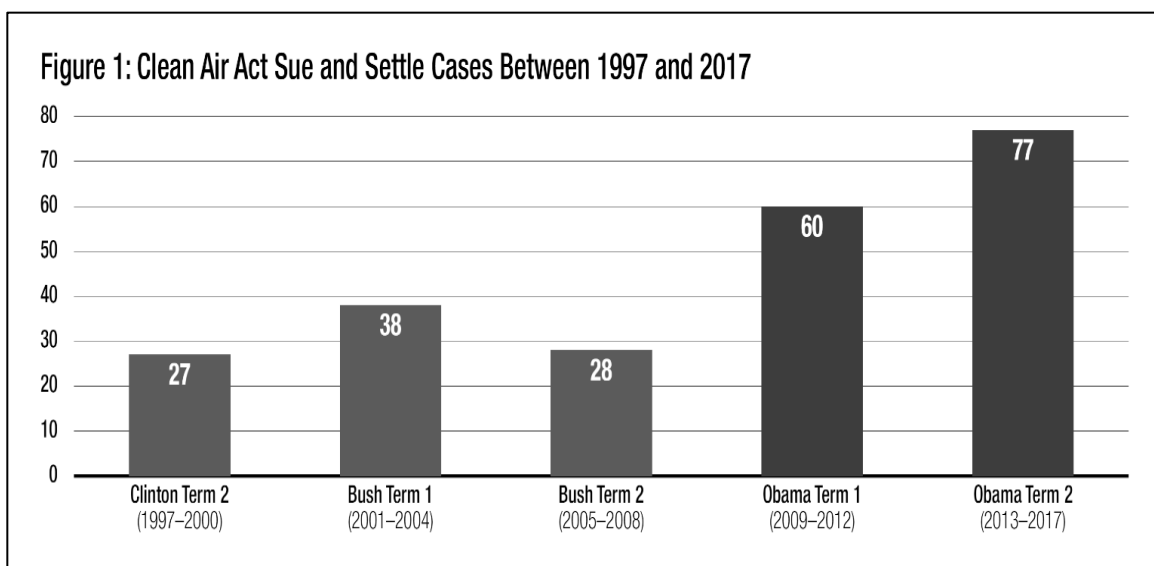
⁸ Consent decrees and settlements are functionally the same. Consent decrees are settlement agreements given the force of law by court order. Settlement agreements take their force from the law of contracts.

⁹ Voyles, Travis, "Clearing Up Perceived Problems with the Sue-and-Settle Issue in Environmental Litigation." *Journal of Land Use & Environmental Law* 2016, vol. 31, no. 2. Accessed Oct. 02, 2018, <https://ssrn.com/abstract=2927518>.

¹⁰ Bedard, Paul, and Pablo Martinez Monsivais. "Regulatory Scheme Killed by EPA's Scott Pruitt Cost Taxpayers \$68 Billion." *Washington Examiner*. October 24, 2017. Accessed May 06, 2018. <https://www.washingtonexaminer.com/regulatory-scheme-killed-by-epas-scott-pruitt-cost-taxpayers-68-billion/article/2638414>.

Water Act, and the Endangered Species Act; all of which fall under the Environmental Protection Agency's jurisdiction. As such, this paper will focus solely on the EPA.

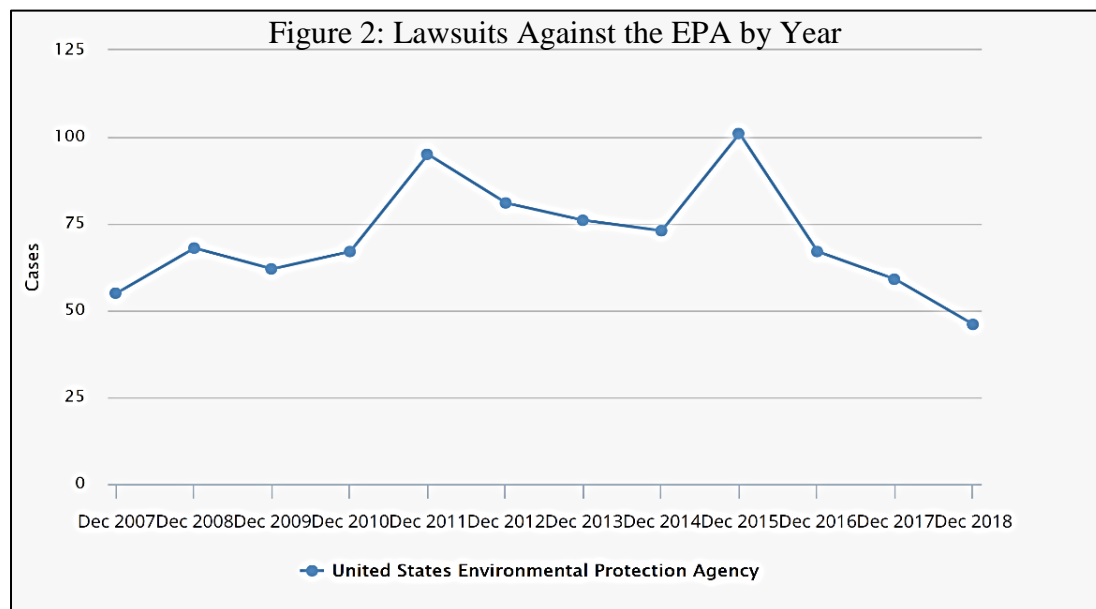
From 2008 to 2016, the number of suits filed against the EPA and subsequently, settlements, increased dramatically. The two-term Clinton administration engaged in 27 sue-and-settle cases under the Clean Air Act. During the two-term Bush administration there were 66.¹¹ A Chamber of Commerce report states that, in the Obama administration's first-term alone, 60 sue-and-settle cases were negotiated. Overall, in the two terms of the Obama presidency, (2009-2016), 137 cases were settled.¹² Figure 1 shows the amount of cases by each presidential term.¹³ Figure 2 shows how over time the



¹¹ Kovacs, William L., Keith W. Holman, and Jonathan A. Jackson. "Sue and Settle: Regulating Behind Closed Doors." U.S. Chamber of Commerce. May 2013. Accessed May 06, 2018.

¹² Kovacs, William L., Keith W. Holman, Joseph J. Johnson, and Jordan Crenshaw. "Sue and Settle Updated: Damage Done 2013-2016." U.S. Chamber of Commerce. May 2017. Accessed May 06, 2018.

¹³ Kovacs, William L., Keith W. Holman, and Jonathan A. Jackson. "Sue and Settle: Regulating Behind Closed Doors." U.S. Chamber of Commerce. May 2013. Accessed May 06, 2018.



amount of cases filed against the EPA increased up until recently.¹⁴ The downturn is most likely a result of Pruitt’s policy ending sue-and-settle, which could increase litigation costs for most plaintiffs likely causing less frequent lawsuits.

In response to the increase in cases, lawmakers proposed the Sunshine for Regulatory and Settlements Act in 2015.¹⁵ This act, if it had passed, would have required the agency to acknowledge receipt of an intent to sue by publishing the intent no later than 15 days after it was received. In addition, the proposed legislation required any consent decree or settlement to be published and open to public comments for 60 days before it could be implemented.¹⁶ Comments identified as serious concerns by the

¹⁴ The data taken for Figure 2 is from the Bloomberg Law Database analysis.

¹⁵ "Environmental Litigation: Impact of Deadline Suits on EPA's Rulemaking Is Limited." U.S. Government Accountability Office (U.S. GAO). January 14, 2015. Accessed May 06, 2018. <https://www.gao.gov/products/GAO-15-34>.

¹⁶ Sunshine for Regulatory Decrees and Settlements Act of 2015, House Report 114-184, June 25, 2015, 114-1, S. 378, 114th Cong., Senator Chuck Grassley (2015).

agency would require the agency to revisit its settlement agreement until the comment could be resolved.¹⁷ While the bill did not pass (it was tabled in the judiciary committee), it brought attention to the problems that the increase in settlement suits had caused.

One such problem is the burden that regulatory action has placed on different industries through sue-and-settle cases. The American Action Forum released a report that analyzed the White House's public database of economically significant rulings. The report shows that from 2005 to 2016, 23 sue-and-settle rules cost \$67.9 billion, with an annual cost of \$26.5 billion. Of those 23 cases, 16 imposed a paperwork burden of 8 million hours.¹⁸ Additionally, the sue-and-settle process has a large impact on how policy is implemented. Rather than going through the proper channels, sue-and-settle can result in backdoor regulations and reduced transparency. This can influence the court system and cultivate a culture of diminishing respect for the political process. The effect of sue-and-settle on law and policy implementation is further discussed later in this paper.

THE SUE-AND-SETTLE PROCESS

The process for a civil court case is mostly straightforward; yet, it can still take years for a case to reach a final outcome. The process begins when a plaintiff files a

¹⁷ Most of the comments submitted by the business community in previous settlements were overwhelmingly rejected by the EPA on the major rules that resulted from sue-and-settle agreements. Thus, the bill hoped to change the EPA's behavior regarding comments.

¹⁸ Bosch, Dan. "EPA's Sue and Settle Directive: A Step Toward Transparency." American Action Forum. October 24, 2017. Accessed May 06, 2018. <https://www.americanactionforum.org/insight/epas-sue-settle-directive-step-toward-transparency/>.

complaint and the defendant is served. The defendant then responds back to the plaintiff and sets a date for the trial. Pretrial discovery occurs before the trial date during which a trial can be settled or dismissed.¹⁹ When settlement occurs, the trial is either dismissed or judgement is entered in the court, usually through a consent decree. If settlement of the case or dismissal does not occur, the trial then proceeds, and judgement is entered into by the court. Following judgement, either the plaintiff or defendant may appeal to a higher court for judgement reversal. Figure 3 shows this process.

In the absence of misconduct or collusion,²⁰ parties involved in suits usually enter into settlements when the result allows both parties to be better off than continuing through the court process. Each party gains because the settlement removes the expense of further litigation and the costs of time. Additionally, certain settlement costs can be tax deductible, insuring that plaintiffs first look to settle before continuing litigation.²¹ Courts ensure that the settlement is a reasonable result of good faith bargaining and consistent with statutory requirements, i.e. not outside the agency's purview.²² Settlements are a

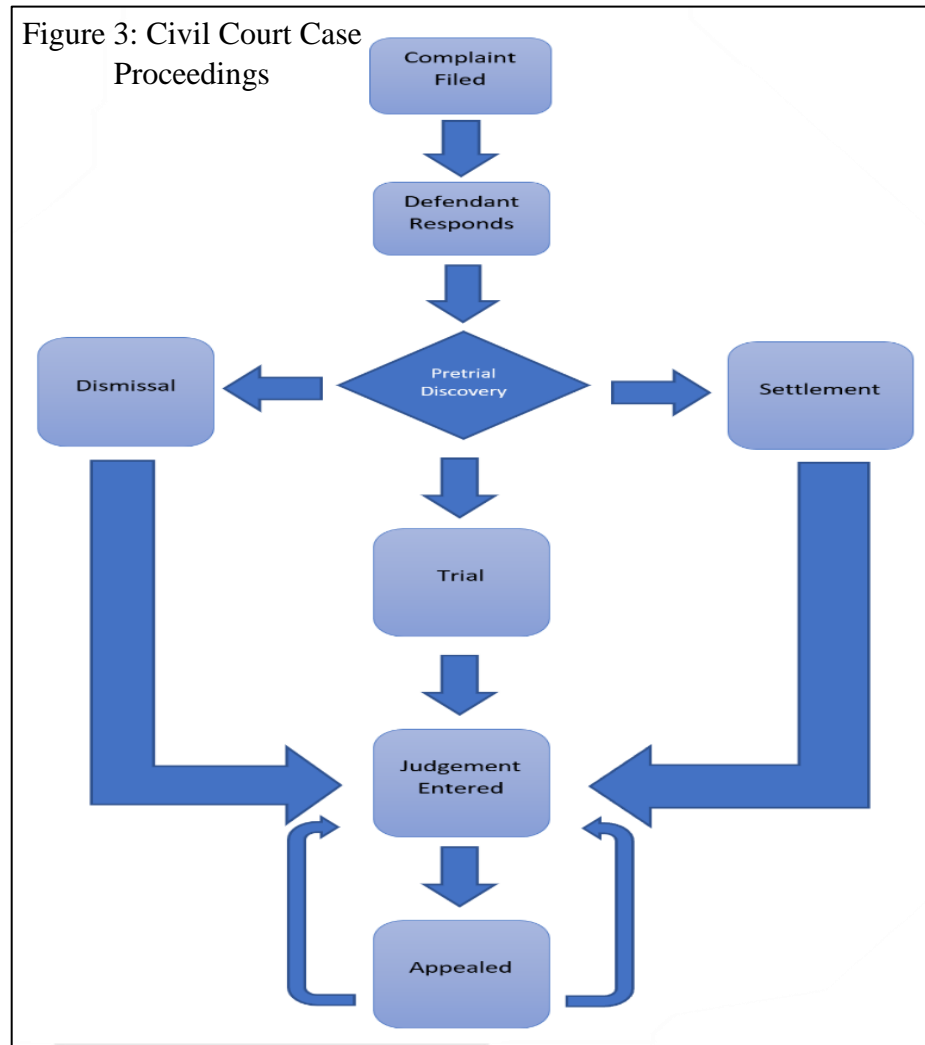
¹⁹ A case can be dismissed either voluntarily or involuntarily. Voluntary dismissal occurs if the plaintiff wishes to no longer pursue civil action or so that the case can be moved from small claims to another case. Involuntarily dismissal occurs due to a lack of evidence, jurisdictional issues, and a variety of other instances such as missed deadlines or paperwork issues. There are numerous reason why a judge will dismiss a case before trail but usually occurs after a motion to dismiss is filed by either party. A court may dismiss a case with prejudice, which means that no suit can be brought back to court on this issue by the plaintiff, or without prejudice, which allows for the case to be brought back to the court after issues with the case are fixed. See Harris, Berger, LLP, and Samuel D. Brickley, II. "Businesslawbasics.com." Ch. 19: Uniform Commercial Code. 2013. Accessed September 29, 2018. <http://www.businesslawbasics.com/chapter-9-steps-civil-case>.

²⁰ The implications of collusion is discussed in the Question of Collusion section of this paper.

²¹ Li, Yan-Xin. "Tax Consequences of Litigation Damages and Settlements." Association of Corporate Counsel. Accessed October 06, 2018. <https://www.acc.com/legalresources/quickcounsel/litigation-damages-and-settlements.cfm#hid5>.

²² Percival, Robert V. "The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making." *University of Chicago Legal Forum* 1987, no. 1, pg. 347. Accessed September 28, 2018. <http://chicagounbound.uchicago.edu/uclf/vol1987/iss1/13>.

result of private negotiation and therefore cannot be appealed, which allows for finality in the terms reached by both parties.



Additionally, parties may enter into settlements to change the behavior of the agency (usually regarding mandatory duties) or to create unique regulatory relief that

would not have been available via the courts. For example, in *Environmental Defense Fund v. EPA*, No. 86-1334 (D.C. Cir. 1986) the settlement stipulated that the EPA would gather and consider information that was beyond the minimum required by law.²³ Settlement allows for superior relief to litigants, relative to a court ruling, within the limitations of the law.

As the defendant, the EPA may settle to prevent the court from creating policy or regulation through judgement or by creating a precedent for future litigants. Additionally, a judge may place harsher sentencing on the agency than a settlement would.²⁴ By settling, the agency can create a remedial plan of their preference and prevent any decisions that place constraints on the agency's discretionary choices. In 1985, a study estimated that 80 percent of the EPA's regulations were challenged in court with 30 percent of those regulations being drastically changed.²⁵ Since then, the number of agency settlements has increased rapidly.²⁶ This leads to another reason the agency will choose to settle: resource constraints. Time spent in court proceedings could be used instead to prevent regulatory implementation delays,²⁷ and settlements conserve litigation resources.

²³ Percival, Robert V. "The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making." *University of Chicago Legal Forum* 1987, no. 1, pg. 331-332 footnote 16. Accessed September 28, 2018. <http://chicagounbound.uchicago.edu/uclf/vol1987/iss1/13>.

²⁴ *Ibid*, pg. 332.

²⁵ Lawrence Susskind & Gerard McMahon, "The Theory and Practice of Negotiated Rulemaking," *Yale J. on Reg.* 1985, vol.134.

²⁶ From 2009-2017 there were a total of 940 settlements that the EPA participated in; approximately 200 of which the EPA was a defendant. See Freedom of Information Act Request. "Settlements Between 1/20/2009 and 1/19/2017 Involving the Clean Air Act, Clean Water Act or Endangered Species Act." Department of Justice Environment and Natural Resources Division. August 08, 2017. Accessed September 29, 2018. <https://cfpub.epa.gov/compliance/cases/index.cfm?sortby=DESCRIPTION>.

²⁷ Most suits brought against the EPA are either pursuing judicial review of the agency's regulations or suits that allege the agency has failed to meet mandatory deadlines.

Enforcement of settlements is another reason to settle rather than proceed to judgement. Settlements are enforced through the fear that litigation will be revived if the contract is reneged on.²⁸ Contract law applies to settlements and courts can directly enforce settlements by labeling a party in breach of contract. Additionally, the use of consent decrees allows for easy enforcement and revision of settlements. Consent decrees are contracts that have attributes of a judicial order: consent decrees are enforceable by contempt of court.²⁹ Additionally, they can be altered over the objections of a party, through the court, if necessary.³⁰ However, consent decrees cannot dictate legal obligations on third parties who did not join the settlement.³¹

Consent decrees allow agencies to change policy in the future and are more easily modified than judgements;³² this allows future administrations to not be bound to policies enacted by past administrations. Settlements used in conjunction with consent decrees enable the plaintiff to enforce change without forcing the agency to admit to liability. Agencies also use consent decrees as “protracted informal rule-making.”³³ Thus, use of consent decrees has increased analogous to the increased use of settlements.

²⁸ Percival, Robert V. "The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making." *University of Chicago Legal Forum* 1987, no. 1, pg.336. Accessed September 28, 2018. <http://chicagounbound.uchicago.edu/uclf/vol1987/iss1/13>.

²⁹ Local Number 93 v. City of Cleveland, 106 S. Ct. 3063, 3076 (1986).

³⁰ *Ibid.*

³¹ Percival, Robert V. "The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making." *University of Chicago Legal Forum* 1987, no. 1, pg. 348. Accessed September 28, 2018. <http://chicagounbound.uchicago.edu/uclf/vol1987/iss1/13>.

³² Consent decrees allow litigants to easily resolve any interpretation and changes of circumstances issues. See Percival, Robert V. "The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making." *University of Chicago Legal Forum* 1987, no. 1, pg. 335-336. Accessed September 28, 2018. <http://chicagounbound.uchicago.edu/uclf/vol1987/iss1/13>.

³³ *Ibid*, pg.336.

However, settlements do create some loss to society. Trials are public records and thus, easily available to all interested parties whether part of negotiations or not. Settlements are private contracts and the terms of the settlements are not required to be public,³⁴ though the Freedom of Information Act allows for those records to become public through submission of an information claim. Settlements may also reflect the resources available to each party rather than the claims that each party makes.³⁵ Also, the conservation of litigation resources may cause more lawsuits as groups previously limited find they have additional resources to work with.³⁶ Settlements can also affect third parties negatively. As settlements can result in drastic regulation change, industries affected by EPA regulation are forced to redirect firm resources towards monitoring litigation that could potentially harm them.³⁷ A more detailed analysis of the full effect of settlements on society is discussed in a later section.

LITERATURE REVIEW

The debate surrounding the sue-and-settle policy is nothing new. To answer the question of whether duplicity occurs in the settlements, in 2014, the Government

³⁴ Most agency settlements that produce a change in regulation result in a press release about the regulation change.

³⁵ Owen M. Fiss, *Against Settlement*, 93 *Yale L.J.* 1073 (1984). The Equal Access to Justice Act allows the government to pay those who sue it, preventing litigation precedent based off of the wealthy. The Equal Access to Justice Act is discussed in more detail in Revolving Payment section.

³⁶ Percival, Robert V. "The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making." *University of Chicago Legal Forum* 1987, no. 1, pg. 333 footnote 26. Accessed September 28, 2018. <http://chicagounbound.uchicago.edu/uclf/vol1987/iss1/13>.

³⁷ *Ibid*, pg. 349. See also Judge Wilkey Dissenting Opinion, *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1136, D.C. Circuit (1983).

Accountability Office (GAO) released a report that deadline suits (the type of sue-and-settle cases that most recently came under review) had little policy impact on the EPA.³⁸ The report did not study other types of settlements, such as decision-forcing consent decrees since the public can comment on such decrees,³⁹ considering them negligible to the conversation of collusion. However, lawyer Ben Tyson argues that though decision-forcing suits conserve resources, they can undermine Congress and public participation in the regulatory process.⁴⁰ The Director of Environmental Law at the University of Maryland, Dr. Robert Percival, argues that settlements are a necessary part of the regulatory process and that binding consent decrees enforce those settlements. Thus, according to Percival, settlements that create decision-forcing consent decrees are healthy for both the judiciary and agency.⁴¹

A different report released by the GAO states that the policy of sue-and-settle adds a financial burden to the EPA through attorney fees forced upon the agency by the Equal Access to Justice Act (EAJA).⁴² The report showed that there was no discernible trend in the financial data, although environmental protection groups were more likely to

³⁸ This is opposite to what the US Chamber of Commerce reports decided. See footnote 41. "Environmental Litigation: Impact of Deadline Suits on EPA's Rulemaking Is Limited." U.S. Government Accountability Office (U.S. GAO). January 14, 2015. Accessed May 06, 2018. <https://www.gao.gov/products/GAO-15-34>.

³⁹ Many consider the public comment period as too short or as not received by the EPA, see footnote 17s.

⁴⁰ Tyson, Ben. "An Empirical Analysis of Sue-and-Settle in Environmental Litigation." *Virginia Law Review*, November 2014. Accessed May 06, 2018. <http://www.virginialawreview.org/volumes/content/empirical-analysis-sue-and-settle-environmental-litigation>.

⁴¹ Percival, Robert V. "The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making." *University of Chicago Legal Forum*, 1987, no. 1, pg. 347. Accessed September 28, 2018. <http://chicagounbound.uchicago.edu/uclf/vol1987/iss1/13>.

⁴² The financial burden placed on the EPA is simply a result of resources spent dealing with litigation. The impact of the financial burden placed on the EPA is discussed in later sections. "Environmental Litigation: Cases against EPA and Associated Costs over Time." U.S. Government Accountability (U.S. GAO), August 31, 2011. Accessed September 29, 2018. <https://www.gao.gov/products/GAO-11-650>.

receive funds through litigation than other litigants. In two different studies by the U.S. Chamber of Commerce, they found the regulatory burden caused by sue-and-settle cases to be significant, amounting to around \$488 billion of costs.⁴³

Alternatively, Stephen Johnson, professor of law, explains that though settlements are costly, litigation would be a far worse alternative as it would increase societal costs.⁴⁴ Another paper by Courtney McVean and Justin Pidot, professors of law, details how the citizen suit is a beneficial policy for agencies and that Congress intended citizen suits to act as a check on agency behavior by ensuring deadlines are met. They argue that the process of sue-and-settle allows bureaucracies to overcome habitual procedures and mitigate the risk of litigation.⁴⁵

However, lawyers Janette Ferguson and Laura Granier argue that there are inherent problems in the sue and settle process, or at least unintended consequences.⁴⁶ Henry Butler and Nathaniel Harris, professors of law, argue that one of the unintended consequences of using sue-and-settle for rulemaking is that the states are left with less

⁴³ Kovacs, William L., Keith W. Holman, and Jonathan A. Jackson. "Sue and Settle: Regulating Behind Closed Doors." U.S. Chamber of Commerce, May 2013. Accessed May 06, 2018. <https://www.uschamber.com/report/sue-and-settle-regulating-behind-closed-doors.>; Kovacs, William L., Keith W. Holman, Joseph J. Johnson, and Jordan Crenshaw. "Sue and Settle Updated: Damage Done 2013-2016." U.S. Chamber of Commerce, May 2017. Accessed May 06, 2018. <https://www.uschamber.com/report/sue-and-settle-updated-damage-done-2013-2016>.

⁴⁴ Johnson, Stephen M., "Sue and Settle: Demonizing the Environmental Citizen Suit." *Seattle University Law Review*, 2014, vol. 37, no. 891, 2014. Accessed October 3, 2018. <https://ssrn.com/abstract=2478866>.

⁴⁵ McVean, Courtney and Pidot, Justin R., "Environmental Settlements and Administrative Law." *Harvard Environmental Law Review* 2015; *U Denver Legal Studies Research Paper* no. 14-25. Accessed September 30, 2018. <https://ssrn.com/abstract=2425990>.

⁴⁶ Ferguson, Janette L., and Laura K. Granier. "Sue and Settle: Citizen Suit Settlements and Environmental Law." *Natural Resources and Environment*, 2015, vol.30, no. 1. https://www.americanbar.org/publications/natural_resources_environment/2015-16/summer/sue_and_settle_citizen_suit_settlements_and_environmental_law.html.

environmental enforcement and regulatory capabilities.⁴⁷ Lawyer Travis A. Voyles discusses the impacts that the sue-and-settle process has had on society and how to work within the current system for better transparency.⁴⁸

Joanna Schwartz, a professor of law, uses information collected on police brutality court cases to argue that government lawsuit settlements create a financial burden that is paid out by taxpayers without incentivizing behavioral changes from the police department; the same logic of incentives can be applied to federal agencies.⁴⁹ Two other papers discuss the effect that settlements have on the judicial system.⁵⁰ Additional papers debate the effect of settlements on the creation of common law.⁵¹

This paper will further expound upon the ideas discussed by Voyles, Butler and Harris, Ferguson and Granier, and others by considering the unintended consequences of the sue-and-settle policy, such as issues about the impact of settlements on common law and the judicial system. The impact that the sue-and-settle policy has on Congress, the

⁴⁷ Butler, Henry N., and Nathaniel J. Harris. "Sue, Settle, and Shut Out the States: Destroying the Environmental Benefits of Cooperative Federalism." *Harvard Journal Of Law and Policy*, October 21, 2013, vol. 37, no. 2. Accessed October 3, 2018. <https://ssrn.com/abstract=2343273>.

⁴⁸ Voyles, Travis A. "Clearing Up Perceived Problems with the Sue-and-Settle Issue in Environmental Litigation." *Land Use and Environmental Law Journal*, March 08, 2015. Accessed September 29, 2018. <https://heinonline.org/HOL/LandingPage?handle=hein.journals/jluenvl31&div=16&id=&page=>.

⁴⁹ Schwartz, Joanna C. "How Governments Pay: Lawsuits, Budgets, and Police Reform." *UCLA Law Review*, 2016, vol. 63. Accessed October 3, 2018. <https://www.uclalawreview.org/how-governments-pay-lawsuits-budgets-and-police-reform/>.

⁵⁰ Bundy, Stephen McG., "The Policy in Favor of Settlement in an Adversary System." *Hastings Law Journal*, 1992, vol.44, no.1. Accessed October 3, 2018. <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2000&context=facpubs;>

McMunigal, Kevin C., "The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers." *Faculty Publications*, 1990. Accessed October 3, 2018. http://scholarlycommons.law.case.edu/faculty_publications/351.

⁵¹ Mahoney, Paul G. "The Common Law and Economic Growth: Hayek Might Be Right." *The Journal of Legal Studies*, 2001, vol. 30, no. 2. Accessed October 3, 2018. <https://ssrn.com/abstract=206809>; Zywicki, Todd J. "Spontaneous Order and the Common Law: Gordon Tullock's Critique." *Public Choice* 2008, vol.135, no. 1/2. <http://www.jstor.org/stable/27698249>.

Environmental Protection Agency and its regulation, and the judiciary and the law is discussed in further detail later in this paper.

THE QUESTION OF COLLUSION

Bureaucracies receive large leeway on how to enact laws. Congress writes laws in abstract terms and then allows government agencies to enact policies that enforce the law. The only check on bureaucratic actions are Congressional oversight committees, the budget, and citizens who sue regulators. Congressional oversight committees are restricted from effective oversight because of the asymmetric information that passes from the agency to the committee. Similarly, bureaucracies enforce policies in such a way so that their budget is maximized, and their jobs are secure.⁵² One of the most effective checks on bureaucratic behavior is targeted prosecution initiated against the agencies for their regulations.

Black's Law Dictionary defines collusive action as "an action between two parties who have no actual controversy, being merely for the purpose of determining a legal question or receiving a precedent that might prove favorable in related litigation."⁵³ For the rest of this paper, collusion and collusive action will be used interchangeably.

⁵² Niskanen, William A. "The Peculiar Economics of Bureaucracy." *The American Economic Review* 1968, vol.58, no. 2. Accessed September 30, 2018, <http://www.jstor.org/stable/1831817>.

⁵³ Black, Henry Campbell, Joseph R. Nolan, and Michael J. Connolly. *Black Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern* 1979, 2nd ed, pg.12. St. Paul, MN: West Publ.

Additionally, this paper will not question whether collusive action should be illegal or if it is ethical, merely the impact that such actions can have on the outcome of cases and the overall legal system.

Collusive action is an important part of the sue-and-settle process. If the plaintiff and the defendant are not actually at odds with each other, then the court case is misleading, and litigated for the sole purpose of creating public policy without going through the proper channels. To create regulation, the EPA normally must first propose a regulation through a Notice of Proposed Rulemaking (NPRM) which is then added to the Federal Register for public comments. After a designated period of time, the EPA reviews the comments and makes necessary changes to the proposed regulation. The regulation is then codified in the Code of Federal Regulations.⁵⁴ By using the courts and skipping this process, the EPA and the plaintiffs of the cases can bypass public opinion. This often results in the enactment of regulations with large impacts where those impacted had little or no say in the matter.⁵⁵

⁵⁴ "The Basics of the Regulatory Process." EPA. September 25, 2018. Accessed September 30, 2018. <https://www.epa.gov/laws-regulations/basics-regulatory-process#regulation>.

⁵⁵ See comments in Why Sue and Settle? section above. This paper does not comment on whether public opinion is good or bad, simply that it is missing from the process. Bosch, Dan. "EPA's Sue and Settle Directive: A Step Toward Transparency." American Action Forum. October 24, 2017. Accessed May 06, 2018. <https://www.americanactionforum.org/insight/epas-sue-settle-directive-step-toward-transparency/>.

SPECIAL INTEREST GROUPS AND CRONYISM

According to the theory of public choice,⁵⁶ bureaucrats can be “captured” by special interest groups.⁵⁷ Special interest groups are a collection of people who seek advantages usually through government action. Environmental groups are classified as special interest groups who are seeking environmental policy changes through government intervention. Bureaucrats may enter government because they have some particular objective they wish to achieve. One way that special interest groups capture bureaucrats is by lobbying Congress to allocate funds for specific purposes.⁵⁸ This creates a relationship between the special interest groups and the bureaucrat which often leads to a form of cronyism.

Cronyism refers to individuals or groups who are given jobs or other types of advantages, such as regulatory advantages, regardless of the individual or group qualifications or reasoning. Cronyism is a form of collusion, where private individuals use a political process to pursue a private advantage. In the United States, both sides of the political spectrum suffer from cronyism.⁵⁹

⁵⁶ Public choice is a theory of why government can fail, similar to the economic theory of market failure. In the private market, people are rationally self-interested; in contrast, government officials are viewed as upholding the public good. The theory of public choice rejects this view of government and aims to analyze actors in the public sector as rational self-interested actors. See Buchanan, James McGill. *Politics without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*. 1984.

⁵⁷ Stigler, George J. "The Theory of Economic Regulation." *The Bell Journal of Economics and Management Science* 1979, vol.2, no. 1, pg.3-21. Accessed September 29, 2018. <https://www.jstor.org/stable/3003160>.

⁵⁸ Shaw, Jane S. "Public Choice Theory." Library of Economics and Liberty. 2002. Accessed September 30, 2018. <http://www.econlib.org/library/Enc1/PublicChoiceTheory.html>.

⁵⁹ "The Economics and History of Cronyism." Mercatus Center. July 26, 2012. pg.9-14. Accessed September 30, 2018. <https://www.mercatus.org/publication/economics-and-history-cronyism>

Not only do elected officials appoint those who have questionable qualifications for a position, but they also participate in cronyism through direct economic bailouts.⁶⁰ For example, in 2008, the Bush administration bailed out the insurance company American International Group for \$182 billion.⁶¹ This bailout was engineered principally by Henry Paulson, the Treasury Secretary, who previously had worked for Goldman Sachs. The main beneficiary from the bailout funds paid to AIG was Goldman Sachs, who received \$12.9 billion.⁶² Although Paulson did not directly gain from the bailout, his former friends and colleagues did.⁶³

Another example of American cronyism is the Solyndra subsidy awarded by the Obama administration in 2009. Steve Spinner was a senior advisor in the Energy Department and his wife was a lawyer that represented Solyndra in its bid for a subsidy. E-mails between various officials show that Spinner actively worked to get the Solyndra bid approved.⁶⁴ The end result: a \$535 million⁶⁵ investment into Solyndra lost when the

⁶⁰ "The Economics and History of Cronyism." Mercatus Center. July 26, 2012. pg.9-14. Accessed September 30, 2018. <https://www.mercatus.org/publication/economics-and-history-cronyism>.

⁶¹ Eventually the U.S. recouped some of the money lost by selling its shares of the company for \$23 billion. Amadeo, Kimberly. "This Bailout Made Bernanke Angrier than Anything Else in the Recession." The Balance Small Business. Accessed September 30, 2018. <https://www.thebalance.com/aig-bailout-cost-timeline-bonuses-causes-effects-3305693>.

⁶² Michael Mandel, "German and French Banks Got \$36 Billion from AIG Bailout," Bloomberg Businessweek "Econochat," Accessed September 15, 2018, <https://www.bloomberg.com/news/articles/2009-03-14/german-and-french-banks-got-36-billion-from-aig-bailout>.

⁶³ "The Economics and History of Cronyism." Mercatus Center. July 26, 2012. pg.9-14. Accessed September 30, 2018. <https://www.mercatus.org/publication/economics-and-history-cronyism>

⁶⁴ Joe Stephens and Carol D. Leonnig, "Solyndra Loan Deal: Warning about Legality Came from within Obama Administration," Washington Post. Accessed Oct. 7, 2018, http://www.washingtonpost.com/politics/solyndra-obama-and-rahm-emanuel-pushed-to-spotlight-energy-company/2011/10/07/gIQACDqSTL_story.html.

⁶⁵ "The Economics and History of Cronyism." Mercatus Center. July 26, 2012. pg.9-14. Accessed September 30, 2018. <https://www.mercatus.org/publication/economics-and-history-cronyism>.

company went bankrupt by 2011.⁶⁶ Bailouts and loan guarantees are one major way that the government engages in cronyism, but the government can also create preferential treatment through land seizure, regulations and laws, political appointees, government contracts, monopolies, and taxation.⁶⁷

In environmental policy, cronyism is often more indirect. Bureaucrats in charge of creating regulation become experts in that field and, upon leaving government office, will be hired by the groups who solicit or lobby for specific environmental regulation.⁶⁸ In turn, bureaucrats will often use those experts to create regulation. Thus, it is difficult to measure how much of the relationship is due to expertise and how much is due to quid-pro-quo regulation creation and job hiring. The interrelationship of the environmental advocates and the regulators is why the policy of sue-and-settle has become an issue. Thus, cronyism is a form of collusion: the regulator and environmental activist gain the ability to skip the long policy implementation process.⁶⁹

However, it is difficult to verify that collusion does occur in the court setting. If collusion is happening, it is through private individuals using the legal process to pursue

⁶⁶ Weiner, Rachel. "Solyndra, Explained." The Washington Post. June 01, 2012. Accessed September 30, 2018. https://www.washingtonpost.com/blogs/the-fix/post/solyndra--explained/2012/06/01/gJQAig2g6U_blog.html?noredirect=on&utm_term=.72fa236273a2.

⁶⁷ This is not a complete list of all ways the government can create preferential advantages to select groups. For other government created advantages see "The Economics and History of Cronyism." Mercatus Center. July 26, 2012. pg.9-14. Accessed September 30, 2018. <https://www.mercatus.org/publication/economics-and-history-cronyism>.

⁶⁸ This applies to both industry seeking an advantage by creating barriers to entry or other ways to undermine competitors; and environmental groups seeking to enact special legislation without considering third party harm. For a list of officials who have left the EPA and received a job in a complimentary industry or lobbying firm see "Revolving Door: Environmental Protection Agency." OpenSecrets.org. Accessed October 01, 2018. [https://www.opensecrets.org/revolving/search_result.php?agency=Environmental Protection Agency&id=EIEPA](https://www.opensecrets.org/revolving/search_result.php?agency=Environmental%20Protection%20Agency&id=EIEPA).

⁶⁹ In recent years the sue and settle process has been largely used by the environmental activists to create policy, but that is not to say that other types of groups use the process similarly.

a private advantage. One way to measure collusion is the time between when the suit was filed and when the settlement was agreed upon. Often consent decrees are filed at the same time as the complaint, leaving virtually no room for negotiations with interested third parties.⁷⁰ This time frame alludes to collusion, otherwise settlement would likely not occur until years later. In the following sections, a regression analysis of the time frame to settlement and the plaintiffs involved is evaluated. An arbitrary term of 6 months or less is used to consider a possible domain of collusive action, as without a direct confirmation that collusion occurred, it is impossible to declare a suitable time frame that would only include collusive court cases. Thus, the following analysis can only show if plaintiffs influence the time to settlement, whether that is because of the law firms used, the issues brought to court, or collusion between the parties it is difficult to determine.

DATA DESCRIPTION

The data used in this section comes from a Freedom of Information Act request from the EPA. The EPA provided a list of all suits filed against the agency from 2000-2010. The suits filed were then searched in a law database to establish whether the case was settled, or a verdict issued. A total of 848 separate suits were filed against the EPA during the decade (although the number could be larger as some cases were consolidated). After removing the cases held in abeyance, the sample number of

⁷⁰ Percival, Robert V. "The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making." *University of Chicago Legal Forum* 1987, no. 1, pg. 349. Accessed September 28, 2018. <http://chicagounbound.uchicago.edu/uclf/vol1987/iss1/13>.

observations used in this paper is 670. Of that 670, 480 suits reached a verdict and 190 were settled. There were 365 different plaintiffs who filed suit in 62 different courts. The maximum time it took for a case to be settled was just over 22 years and the minimum was within one month.

This section focuses on the different plaintiffs who filed at least 10 suits and the courts that adjudicated at least 50 suits. Table 1 shows the number of consent decrees, verdicts issued, and total number of cases by different plaintiffs. The courts used in

Plaintiff	Consent Decree (DCC)	Consent Decree (DDC)	Total* Consent	Verdict Issued (DCC)	Verdict Issued (DDC)	Total* Verdict	Total
Sierra Club	15	9	37	19	2	35	72
WildEarth Guardians	8	0	10	3	0	3	13
Natural Resource Defense Council	4	2	10	17	0	19	29
American Lung Association	1	0	8	6	0	6	14
American Chemistry Council	5	2	8	1	0	5	13
Environmental Defense Inc.	1	2	6	5	1	7	13

*The Total Verdict and Total Consent columns include the settlements and verdicts from other courts in addition to the DCC and DDC courts.

Table 1 and the sample data are the District of Columbia Court (DDC) and the District of Columbia Court of Appeals (DCC).⁷¹

Cases settled in under 6 months are considered as potential periods of collusive action and cases with verdicts issued in less than 6 months were often dismissed for lack of evidence or jurisdiction. A total of 119 cases were finalized in less-than six-months, 50 were dismissed and 69 were settled. In total the data set contains 190 settlements; thus, the probability that if a case was settled it was within six months is 36.3%.

ANALYSIS OF RELATIONSHIP

Do the courts used and the plaintiffs suing have a significant effect on the amount of time it takes to settle a case? If collusion occurs, that is a possibility. As discussed earlier, while this paper cannot clearly define collusion enough to show causation, a significant difference in the time spent settling a case through an adversarial channel, and the time spent settling a case with some sort of complicity between the two parties would logically be different. This paper tests the idea that some type of collusion occurs when the settlement is reached in under six months. Thus, a binary choice model was chosen to explore the question of statistical correlation between the parties or courts involved in the suits. The binary model controls for whether a settlement occurs in less-than six months rather than a settlement or judgement entered at a later date. This paper, additionally,

⁷¹ The two courts DCC and DDC had the vast majority of EPA cases litigated in them. The sample data, thus, only includes those plaintiffs who have ten or more suits filed against the EPA in either the DCC court of the DDC court.

models the data in a linear probability model (LPM), a probit model, and a logit model to further examine the empirical relationships.

The initial equation used to estimate the parameters was as follows:

$$settle(\widehat{6\ months}) = \beta_0 + \beta_1 \widehat{plaintiff} + \beta_2 \widehat{court} \quad [1]$$

The parameter *court* controls for the different courts in which the case is litigated in and the parameter *plaintiff* controls for the different plaintiffs. *Settle (6 months)* refers to the binary choice that the case is settled within six months or less or if it is not. Equation 1 estimates whether the time for a court case to reach a settlement in 6 months is statistically significant when the effects of the plaintiff and courts are controlled for.

Table 2 (pg. 24) shows the results of the different models of equation 1. The table depicts the coefficients and standard errors for the plaintiffs and courts for each different model. LPM[1] stands for the linear probability model for equation 1, with the probit and logit models similarly labeled.

The results found in table 2 from equation 1 illustrate that few plaintiffs have a statistically significant impact on the time to settlement being within 6 months. The only plaintiff with more than two cases with a statistically significant level below 1% was the Rocky Mountain Clean Air Action group, who only filed four cases against the EPA in 10 years. The Sierra Club is also statistically significant but only at the 5% level. This shows that a relationship does exist between the Sierra Club and the settlement being within 6 months. However, this only shows correlation and it cannot be stated that the relationship is a collusive one. The court used had the largest impact on whether a case was settled in less than six months. As table 2 shows, both the DCC and DDC courts

Table 2: Model Coefficients and Standard Errors of Equation 1			
	LPM[1]	Probit[1]	Logit[1]
Intercept	0.9864***	2.063	3.462
Standard Error	0.11285 ⁷²	5,780	4,1340
American Chemistry Council	-0.019714 0.063248	-0.4623 4,215	-0.2210 3,0220
American Lung Association	0.013645 0.092964	4.021 4,087	18.10 2,9230
Environmental Defense Inc.	0.18874 0.12491	4.969 4,087	19.74 2,9230
Natural Resources Defense	0.060526 0.060859	4.129 4,087	17.85 2,9230
Sierra Club	0.14053* 0.05440	4.877 4,087	19.48 2,9230
WildEarth Guardians	0.34176 0.18477	5.628 4,087	20.83 2,9230
Rocky Mountain Clean Air	0.96668*** 0.079708	12.09 4,674	42.80 3,3560
DCC	-0.98635*** 0.12091	-8.146 4,087	-25.03 2,9230
DDC	-0.88640***	-7.376	-23.64
	0.14214	4,087	2,9230
Statistical Significance codes: p-value <.001***; <.01**; <.05* LPM: Residual stand. error: 0.2924 on 309 DF ⁷³ ; Multiple R-squared: 0.5306; Adjusted R-squared: -0.01631; F-statistic: 0.9702; p-value: 0.6098 Probit: Null deviance: 413.21 on 669 DF; Residual deviance: 148.51 on 309 DF; Number of Fisher Scoring iterations: 19 Logit: Null deviance: 413.21 on 669 DF; Residual deviance: 148.37 on 309 DF; Number of Fisher Scoring iterations: 20			

⁷² Robust standard errors were used for the LPM models to reduce heteroskedasticity errors.

⁷³ DF stands for degrees of freedom.

were statistically significant below the 1% level. Eleven other courts also had a statistical significance at the 1% level; the model coefficients and standard errors of those courts can be found in table A-4 in Appendix A.

While plaintiffs did not have a statistical correlation with settlements in under six months, another analysis show that there is some relationship between a plaintiff and if a settlement occurs. This secondary equation controls for the effects of the plaintiffs and courts on settlement occurrence:

$$\widehat{consent} = \beta_0 + \beta_1 \widehat{difference} + \beta_2 \widehat{plaintiff} + \beta_3 \widehat{court} \quad [2]$$

The parameters *court* and *plaintiff* are defined as previously stated for equation 1. The parameter *difference* refers to the difference in months for a settlement to be reached from the time the suit was first filed. *Consent* is the binary choice of whether a settlement happened or not. A third equation shows the effect of time to settlement without controlling for the effects of the different plaintiffs and courts⁷⁴:

$$\widehat{consent} = \beta_0 + \beta_1 \widehat{difference} \quad [3]$$

Table 3 (pg. 27) shows the results of the modelling of equation 2 by the different models, table 4 (pg. 28) models the results for equation 3 without controls. Table 3 shows the difference each of the models and equations have on the parameter coefficients. The paper controls for all other plaintiffs, not just the ones shown, and courts but only shows the courts and plaintiffs that have more than ten cases litigated.

To understand which model is the best model to use for this data set, the Akaike Information Criterion (AIC) and Bayesian Information Criterion (BIC) scores for each

⁷⁴ Similarly, another equation modeled to control only for the courts and another equation that controlled only for the plaintiffs were analyzed but are not detailed in this paper.

model were considered. The AIC and BIC scores for the LPM models are the lowest,⁷⁵ making the LPM model the best model to use. This section focuses on the LPM model coefficients and the statistical significance of those effects.⁷⁶

In the LPM [2] model the coefficient for the difference in years is -0.00068 whereas the LPM [3]'s coefficient is 0.000699. Controlling for plaintiffs and courts, the time to settlement has a negative effect on if a case is settled but a positive when these factors are not controlled for. This suggests that the plaintiffs involved, and the courts used play a large role in whether a settlement occurs. The results of the LPM model demonstrate that the various plaintiffs – the special interest groups – have a statistically significant impact on whether a case is settled or not. Except for two plaintiffs, the table plaintiff's effect on the settlement is statistically significant at the 1% level. For example, for every suit that the WildEarth Guardians brought against the EPA, the case was 71.3 percentage points more likely to be settled as compared to other plaintiffs' briefs.

These results indicate that the court used for litigation has an equal or larger impact than plaintiffs on whether a case is settled or not. As stated previously the individual court has a large effect on the plaintiff's settlement being within 6 months. While the plaintiff and court have a statistical impact on the time of settlement, all this shows is a correlation. The next section gives a more compelling reason for considering

⁷⁵ See Appendix A for more information about the AIC and BIC scores of the individual models for each equation.

⁷⁶ A Breusch-Pagan test was run on the model and the p-value of 0.9454 suggests that there is homoskedasticity in the residuals and they are not serially correlated. A normality test shows that the data is not normally distributed. Finally, the Shapiro-Wilk normality test shows that with a p-value less than 1% the data is not a normal distribution.

Table 3: Model Coefficients and Standard Errors of Equation 2			
	LPM[2]	Probit[2]	Logit[2]
Intercept	0.872773***	1.3	2.257
Standard Error	0.112855	5,780	1.8277
Time to Settlement	-0.00068 0.0008212	-0.00139 0.004101	-0.00365 0.0974
American Chemistry Council	0.68039*** 0.063248	6.83 4,087	21.95 17,730
American Lung Association	0.12723 0.092964	4.784 4,087	18.31 17,730
Environmental Defense Inc.	0.273266* 0.124911	5.383 4,087	19.39 17,730
Natural Resources Defense	0.266326*** 0.060859	5.38 4,087	19.4 17,730
Sierra Club	0.41156*** 0.054400	5.828 4,087	20.15 17,730
Wild-Earth Guardians	0.713265*** 0.184759	6.725 4,087	21.56 17,730
DCC	-0.84212*** 0.120906	-7.321 4,087	-22.66 17,730
DDC	-0.5760*** 0.142137	-6.377 4,087	-21.14 17,730
Statistical Significance codes: p-value <.001***; <.01**; <.05* LPM: Residual standard error: 0.381 on 308 DF; Multiple R-squared: 0.6715; Adjusted R-squared: 0.2865; F-statistic: 1.744; p-value: 2.936e-07 Probit: Null deviance: 799.05 on 669 DF; Residual deviance: 240.03 on 308 DF; Number of Fisher Scoring iterations: 19 Logit: Null deviance: 799.05 on 669 DF; Residual deviance: 239.14 on 308 DF; Number of Fisher Scoring iterations: 19			

that this statistical correlation is due to possible collusion by showing the revolving payments between the EPA and the plaintiffs.

Table 4: Model Coefficients and Standard Errors of Equation 3			
	LPM[3]	Probit[3]	Logit[3]
Intercept	0.28191***	-0.57647	-0.93494
	0.11285	0.072412	0.003422
Time to Settlement	0.000699	0.001773	0.120662
	0.007253	0.083	0.035452
Statistical Significance codes: p-value <.001***; <.01**; <.05* LPM: Residual standard error: 0.4514 on 668 DF; Multiple R-squared: 1.39e-05; Adjusted R-squared: -0.001483; F-statistic: 0.009289; p-value: 0.9232 Probit: Null deviance: 799.05 on 669 DF; Residual deviance: 799.04 on 668 DF; Number of Fisher Scoring iterations: 4 Logit: Null deviance: 799.05 on 669 DF; Residual deviance: 799.04 on 668 DF; Number of Fisher Scoring iterations: 4			

REVOLVING PAYMENTS

According to public choice economics, bureaucrats are self-interested individuals acting on those interests in the public sphere.⁷⁷ Their self-interest will cause bureaucrats to seek to maximize their agency's budget and regulatory power in order to achieve a

⁷⁷ Buchanan, James McGill. *Politics without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*. 1984.

goal, increase job security, and increase the agency's political power and importance.⁷⁸

Understanding the goal that a bureaucrat pursues helps to explain why the bureaucrat seeks certain relationships while in office.

Special interest groups use lobbying firms to persuade Congress to appropriate funds toward their causes. This allows agencies, such as the EPA, to receive larger budgets and additional regulatory authority. In turn, the EPA pays the attorney fees of the special interest groups who sue the EPA. The funds spent by the special interest group in lobbying for more regulatory action is then given back to the group through litigation fees.⁷⁹ The argument of revolving payments is part of the idea that collusion occurs in sue-and-settle cases.

In 2011, the U.S. Government Accountability Office (GAO) issued a report stating that no discernible trends occur in EPA's litigation payments.⁸⁰ The Department of Justice spent about \$3.3 million to defend the EPA in court from 2003 to 2010.⁸¹

Taken from the GAO report, figure 4⁸² shows that no year appeared to result in dramatically more payments than other years, and overall costs remained about the same.

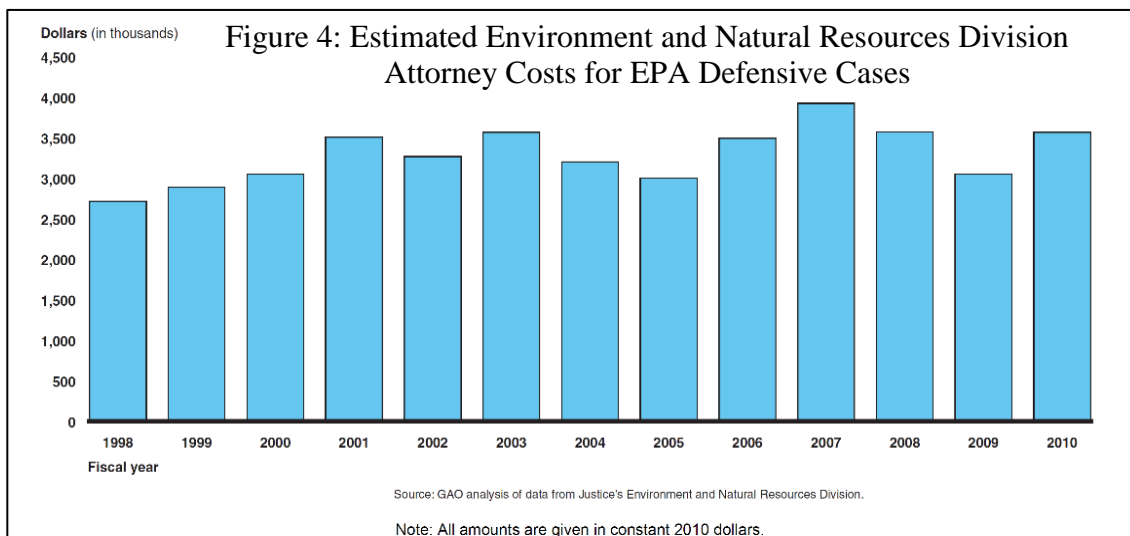
⁷⁸ Niskanen, William A. "The Peculiar Economics of Bureaucracy." *The American Economic Review* 1968, vol.58, no. 2. Accessed September 30, 2018, <http://www.jstor.org/stable/1831817>.

⁷⁹ Ben Tyson argues that the documented revolving door of personnel between agency and activist groups, "it is not beyond comprehension that a pro-green EPA" would request that their former colleagues in the environmental protection groups sue the agency "with the promise of a subsequent settlement that includes attorneys' fees. Tyson, Ben. "An Empirical Analysis of Sue-and-Settle in Environmental Litigation." *Virginia Law Review*. November 2014, pg.1574. Accessed May 06, 2018. <http://www.virginialawreview.org/volumes/content/empirical-analysis-sue-and-settle-environmental-litigation>.

⁸⁰ "Environmental Litigation: Cases against EPA and Associated Costs over Time." U.S. Government Accountability Office (U.S. GAO). August 31, 2011. Accessed October 01, 2018. <https://www.gao.gov/products/GAO-11-650>.

⁸¹ *Ibid.*

⁸² "Environmental Litigation: Cases against EPA and Associated Costs over Time." U.S. Government Accountability Office (U.S. GAO). pg.20. August 31, 2011. Accessed October 01, 2018. <https://www.gao.gov/products/GAO-11-650>.



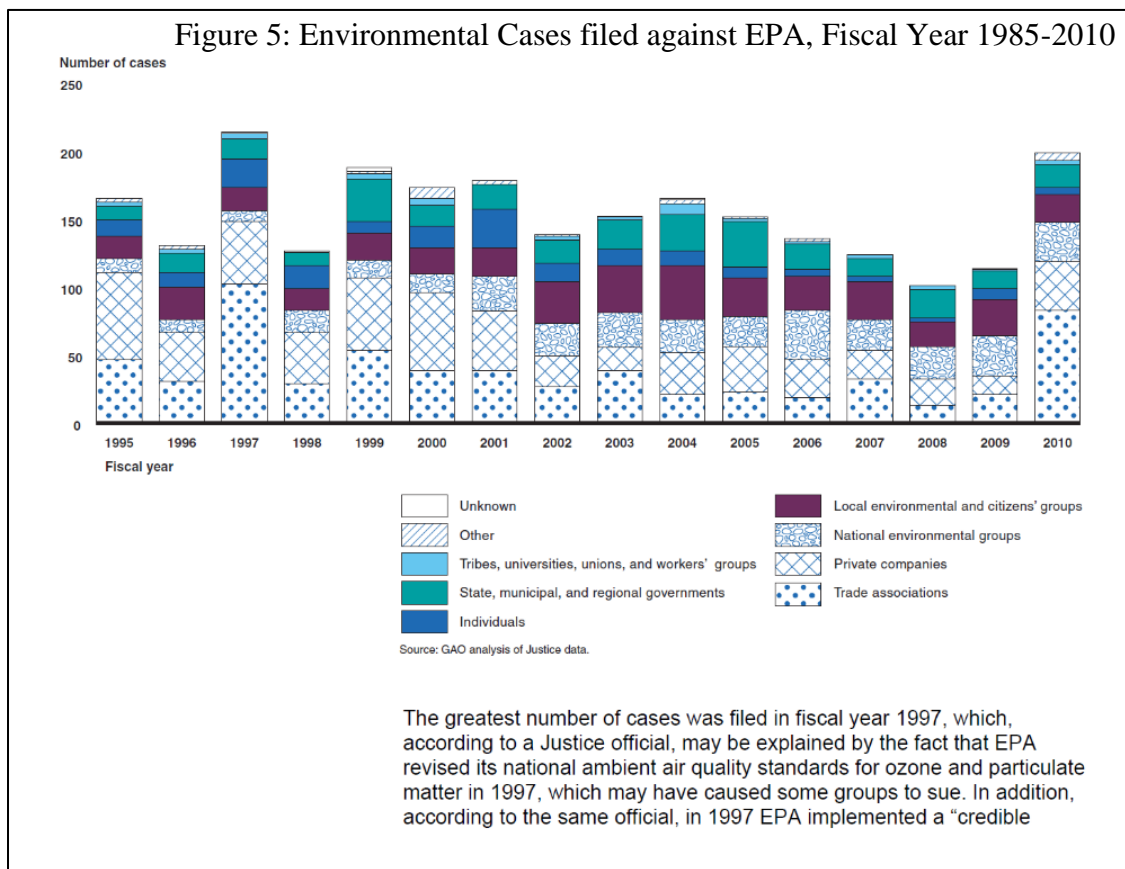
The majority of cases (approximately 59 percent of the total cases) against the EPA were brought under the Clean Air Act from 1985-2010.⁸³ Some argue that is the purpose of the citizen suit clause in the Clean Air Act or the Administrative Procedures Act (APA).⁸⁴ Citizen suits were first authorized by Congress with the passage of the Clean Air Act of 1970 and every major environmental law since then has included a citizen suit clause. Congress passed citizen suit clauses as a way of enforcing congressional will without having to expend resources monitoring agencies or industry; instead, Congress relies on interested citizens to oversee that environmental policy is enacted promptly and accurately.⁸⁵

⁸³ *Ibid.*

⁸⁴ Clean Air Act, 42 U.S.C. § 7604 (2006) (citizen suit provision); Administrative Procedures Act, 5 U.S.C. § 704 (2006) (judicial review of agency actions provision).

⁸⁵ Johnson, Stephen M., *Sue and Settle: Demoning the Environmental Citizen Suit* (June 14, 2014). *Seattle University Law Review* 2014, vol. 37, no. 891, pg.910. Accessed September 30, 2018, <https://ssrn.com/abstract=2478866>.

While the GAO report shows there is no discernible trends in the EPA litigation payments, it is interesting to note that specific groups received comparatively more payments per case. From 2003 to 2010, the Department of Treasury paid out about \$14.2 million for costs and attorney fees to the plaintiffs of litigation against the EPA. That averages to about \$1.8 million per fiscal year.⁸⁶ Figure 5⁸⁷ shows the breakdown of the various plaintiffs by year, while figure 6⁸⁸ shows the amount paid to plaintiffs each year.

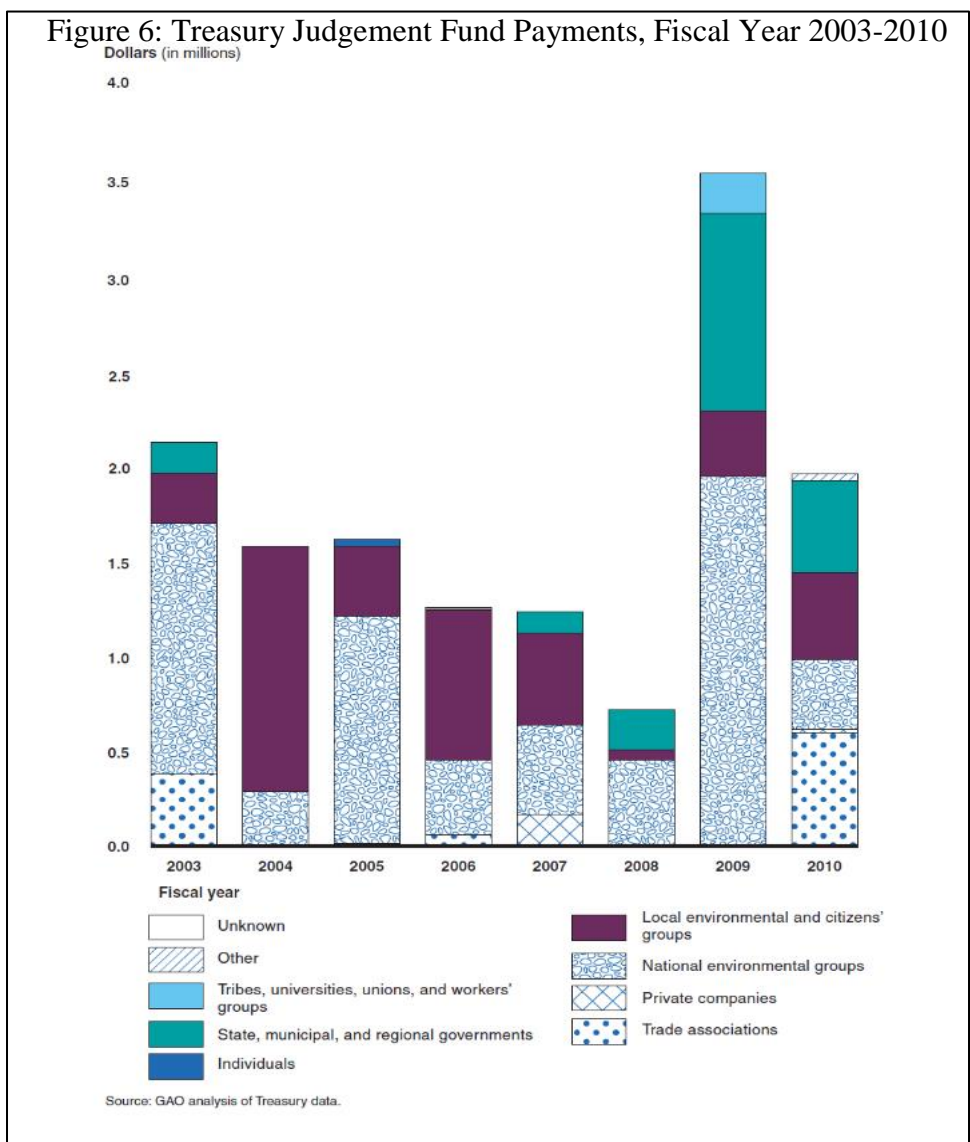


⁸⁶ "Environmental Litigation: Cases against EPA and Associated Costs over Time." U.S. Government Accountability Office (U.S. GAO). August 31, 2011. Accessed October 01, 2018. <https://www.gao.gov/products/GAO-11-650>.

⁸⁷ *Ibid.* pg.14.

⁸⁸ *Ibid.* pg.24.

The national environmental groups in figure 6 are far larger proportionately than in figure 5 by year. In comparison, trade associations, the largest group in figure 5 for year 2010, is similarly proportioned in each graph despite having the largest number of cases. There are a variety of reasons why environmental groups would receive the largest amount of



payments: the type of suits litigated or regulation indicted,⁸⁹ the Equal Access to Justice Act, or collusion.

The Equal Access to Justice Act (EAJA) authorizes the government to pay for attorney fees and costs to individuals, small businesses, and public interest groups that prevail in litigation.⁹⁰ A 1980 conference committee report demonstrated that such individuals and organizations would not contend against government action because of the costs associated and disparity in resources between them and the government.⁹¹ Overtime, the EPA began to pay attorney fees and costs in settlements as well; especially in settlements where the plaintiff would most likely prevail in litigation.⁹²

Figure 7⁹³ shows the amount paid by EPA under the Equal Access to Justice Act (EAJA) for environmental cases each year from 2006 to 2010. This data seems to support the argument that it is the EAJA causing the disproportionate payments shown in figures 5 and 6, as the vast majority of payments went to local and national environmental groups for every year except 2010. This could be a result of how environmental groups are using the advantage of the EAJA to ensure the cost of litigation against the EPA is minimized. The payments do, however, show that there is some relationship between the two groups, whether it is collusion or simply a result of citizen suits, it is difficult to determine. The

⁸⁹ For example, deadline suits are usually litigated by activists in order to galvanize agencies into action, which could always result in a favorable outcome for the plaintiffs.

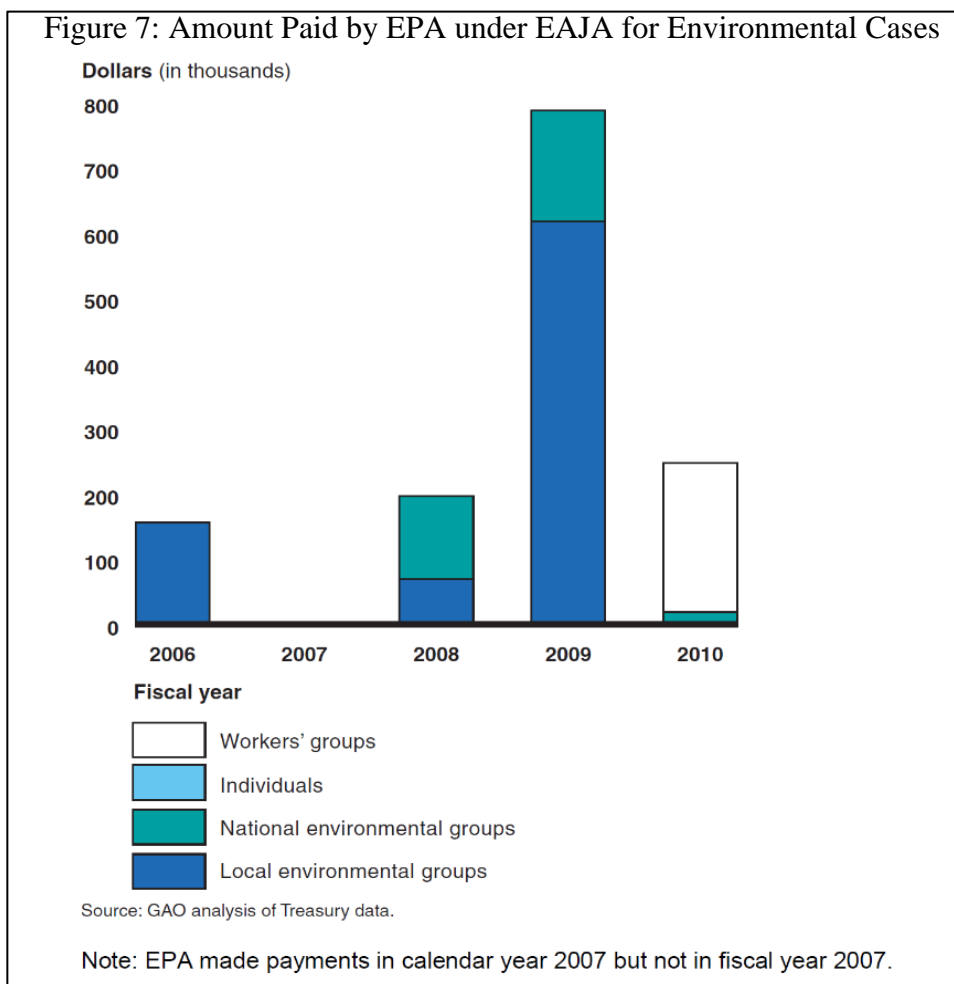
⁹⁰ Downs, Carolyn. "What Is the Equal Access to Justice Act (EAJA)?" CCK Law. April 02, 2018. Accessed October 01, 2018. <https://cck-law.com/news/equal-access-to-justice-act-eaja/>.

⁹¹ H.R. Conf. Rep. 96-1434, at 20-27 (1980) Conference committee report on Pub. L. No. 96-481, The Small Business Export Expansion Act of 1980, of which Title II is the Equal Access to Justice Act.

⁹² "Environmental Litigation: Cases against EPA and Associated Costs over Time." U.S. Government Accountability Office (U.S. GAO). pg.11. August 31, 2011. Accessed October 01, 2018. <https://www.gao.gov/products/GAO-11-650>.

⁹³ *Ibid.* pg.26.

impact of the relationship between the plaintiffs and defendants is discussed in the next section.



THE IMPACT OF SUE-AND-SETTLE ON SOCIETY

Civic participation is a substantial feature of environmental policy. As discussed in previous sections, the Clean Air Act of 1970 encourages civil litigation to help enforce

environmental policy.⁹⁴ Congress hoped that by encouraging citizen suits, the few resources allocated to environmental protection could be shifted from monitoring situations to implementing policy.⁹⁵ To help induce civilian assistance, Congress created the Equal Access to Justice Act to cover the costs of litigation.⁹⁶ Additionally, public notice and comment periods were added by the Administrative Procedures Act to encourage the public's participation in regulation creation.⁹⁷ The original purpose of the citizen suit was to encourage citizen initiative and reduce agency resources used to monitor pollution.

However, unintended consequences have occurred because of the abundant use of citizen suits. Issues have been introduced by scholars studying the impact of sue-and-settle on the states, such as "agency capture; the improper use of congressionally appropriated funds; limited participation for affected parties and the public; and avoidance of procedural requirements of the APA and other laws or executive orders regarding rulemaking."⁹⁸ Additionally, though the EAJA was meant to encourage civic litigation, the EPA has incurred extensive costs through settlement.⁹⁹ Civic action has

⁹⁴ Percival, Robert V. "The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making." *University of Chicago Legal Forum* 1987, no. 1, pg. 327. Accessed September 28, 2018. <http://chicagounbound.uchicago.edu/uclf/vol1987/iss1/13>.

⁹⁵ Voyles, Travis A. "Clearing Up Perceived Problems with the Sue-and-Settle Issue in Environmental Litigation." *Land Use and Environmental Law Journal*, March 08, 2015, pg. 299. Accessed September 29, 2018. <https://heinonline.org/HOL/LandingPage?handle=hein.journals/jluenvl31&div=16&id=&page=>.

⁹⁶ *Ibid.* pg. 298.

⁹⁷ Percival, Robert V. "The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making." *University of Chicago Legal Forum* 1987, no. 1, pg. 349. Accessed September 28, 2018. <http://chicagounbound.uchicago.edu/uclf/vol1987/iss1/13>.

⁹⁸ Johnson, Stephen M., "Sue-and-settle: Demonizing the Environmental Citizen Suit." *Seattle University Law Review*, 2014, vol. 37, no. 891, pg. 903. Accessed Sept. 30, 2018, <https://ssrn.com/abstract=2478866>.

⁹⁹ Voyles, Travis A. "Clearing Up Perceived Problems with the Sue-and-Settle Issue in Environmental Litigation." *Land Use and Environmental Law Journal*, March 08, 2015, pg. 292. Accessed September 29, 2018. <https://heinonline.org/HOL/LandingPage?handle=hein.journals/jluenvl31&div=16&id=&page=>.

prompted agencies to overcome the bureaucratic inertia and speed up legislation and executive action, which can be considered beneficial or detrimental.¹⁰⁰

Third party issues are also caused by sue-and-settle.¹⁰¹ The Federal Rules of Civil Procedure allow for interested third parties to intervene in litigation, but the burden of proof to show that their interests are not being considered in each case, rests with the third party.¹⁰² Not only is intervention difficult, but third parties must also monitor cases for possible intrusive litigation. Complaints and consent decrees are often filed at the same time, making it challenging for third parties to intervene before the decrees are approved, and even more difficult to object to the settlement once the decrees are enacted.¹⁰³ Notice and comment periods are often considered not long enough or the comments not well-received, thus making it even more problematic for affected third parties to voice their complaints.¹⁰⁴

Settlements, though, save both parties litigation costs which conserves resources for the agency and the judicial system.¹⁰⁵ Settlements have allowed agencies to authorize

¹⁰⁰ *Ibid.* pg. 329.

¹⁰¹ In this section states are considered third party intervenors. For more information regarding the impact of sue-and-settle on states see Butler, Henry N., and Nathaniel J. Harris. "Sue, Settle, and Shut Out the States: Destroying the Environmental Benefits of Cooperative Federalism." *Harvard Journal Of Law and Policy*, 2013, vol. 37, no. 2. Accessed October 3, 2018. <https://ssrn.com/abstract=2343273>.

¹⁰² Percival, Robert V. "The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making." *University of Chicago Legal Forum* 1987, no. 1, pg. 348. Accessed September 28, 2018. <http://chicagounbound.uchicago.edu/uclf/vol1987/iss1/13>.

¹⁰³ *Ibid.* pg. 349-350.

¹⁰⁴ Voyles, Travis A. "Clearing Up Perceived Problems with the Sue-and-Settle Issue in Environmental Litigation." *Land Use and Environmental Law Journal*, March 08, 2015, pg. 302. Accessed September 29, 2018. <https://heinonline.org/HOL/LandingPage?handle=hein.journals/jluenvl31&div=16&id=&page=>.

¹⁰⁵ Percival, Robert V. "The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making." *University of Chicago Legal Forum* 1987, no. 1, pg. 331-333. Accessed September 28, 2018. <http://chicagounbound.uchicago.edu/uclf/vol1987/iss1/13>.

protracted rulemaking, simplifying regulation and Congressional policies.¹⁰⁶ Protracted rulemaking is ambiguously viewed; it can be considered both a positive and negative burden on society.¹⁰⁷ Additionally, settlements must not “violate applicable laws”;¹⁰⁸ so that all agency decisions must fall within the directives from Congress. Throughout this section, these issues and others caused by sue-and-settle will be discussed, including how the actions of Congress, the EPA, and the judiciary can be considered under the belief that collusion occurs.

EFFECT ON THE REGULATORY PROCESS

Many critics blame the problems caused by sue-and-settle on Congress and its lack of legislation expressly defining the terms of citizen suits.¹⁰⁹ Congress attempted to authorize citizen suits while preserving the authority of government regulators, but the legislation failed to fill statutory gaps, allowing judges to exercise discretion in ordering judgement of suits.¹¹⁰ Decisions, such as *Hallstrom v Tillamook*, created a framework that enables defendants of civic litigation to prevent such suits.¹¹¹ Additionally, by leaving loopholes in environmental legislation, Congress has permitted the EPA to enter

¹⁰⁶ Percival, Robert V. "The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making." *University of Chicago Legal Forum* 1987, no. 1, pg. 334. Accessed September 28, 2018. <http://chicagounbound.uchicago.edu/uclf/vol1987/iss1/13>.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.* pg. 346.

¹⁰⁹ Voyles, Travis A. "Clearing Up Perceived Problems with the Sue-and-Settle Issue in Environmental Litigation." *Land Use and Environmental Law Journal*, March 08, 2015, pg. 299-301. Accessed September 29, 2018. [https://heinonline.org/HOL/LandingPage?handle=hein.journals/jluenvl31&div=16&id=&page=.](https://heinonline.org/HOL/LandingPage?handle=hein.journals/jluenvl31&div=16&id=&page=)

¹¹⁰ *Ibid.* pg. 301.

¹¹¹ *Ibid.* pg. 299.

into settlement agreements that expand the agency's regulatory authority beyond the environmental acts and use settlements as a new source of authority for further regulation.¹¹²

Others argue that Congress made “particular efforts to draft a provision that would not reduce the effectiveness of administrative enforcement” or “cause abuse of the courts.”¹¹³ The inclusion of the notice and diligent prosecution provisions within the citizen suit section of the environmental acts show that Congress did not want unconstrained citizen access to the courts.¹¹⁴

While the governance of citizen suits falls under congressional authorizing committees, and not the House and Senate Judiciary Committees, critics claim that the committees have limited expertise dealing with legal issues and cannot prevent the abuse of citizen suits.¹¹⁵ Additionally, the Office of Management and Budget, which should be involved in suits that create a regulatory impact, is rarely asked to produce impact reports for settlements.¹¹⁶ Thus, some consider Congress at fault for the problems caused by sue-and-settle by failing to create detailed legislation and meaningful oversight of citizen suits and agency actions.

¹¹² U.S. Senate Committee on Environment and Public Works, Minority Office: House, Senate Lawmakers Highlight Concerns with EPA Sue and Settle Tactic for Backdoor Regulation (2012).

¹¹³ Voyles 16 cited other work A Legislative History of the Clean Air Act Amendments of 1970, vol. 1 at 387 (1974), remarks of Senator Cooper.

¹¹⁴ Voyles, Travis A. "Clearing Up Perceived Problems with the Sue-and-Settle Issue in Environmental Litigation." *Land Use and Environmental Law Journal*, March 08, 2015, pg. 295-298. Accessed September 29, 2018. [https://heinonline.org/HOL/LandingPage?handle=hein.journals/jluenv131&div=16&id=&page=.](https://heinonline.org/HOL/LandingPage?handle=hein.journals/jluenv131&div=16&id=&page=)

¹¹⁵ *Ibid.*

¹¹⁶ McVean, Courtney and Pidot, Justin R., “Environmental Settlements and Administrative Law.” *Harvard Environmental Law Review* 2015; *U Denver Legal Studies Research Paper* no. 14-25, pg. 211. Accessed September 30, 2018. <https://ssrn.com/abstract=2425990>.

ENVIRONMENTAL PROTECTION AGENCY

The EPA similarly receives an unflattering reputation regarding sue-and-settle suits. Unreasonable deadlines set in settlements often lead to “rushed [and] sloppy rulemaking.”¹¹⁷ The ineffective regulation and quick deadlines then prevent the agency from complying with Congressional requirements for a thorough review of regulation.¹¹⁸ Before regulation is created, a dialogue is typically sought with the affected industry. When settlements do not have representation for the regulated community privy to the negotiations, the agency ends up creating regulation that is ill-advised and difficult for target industries to comply with.¹¹⁹ Though the agency is not legally obligated to enact certain types of regulations, settlement agreements predispose the agency to do so to avoid litigation.¹²⁰ Additionally, extremely detailed settlements impose increasingly exact obligations on the agency,¹²¹ forcing the agency to divert resources and prioritize

¹¹⁷ Voyles, Travis A. "Clearing Up Perceived Problems with the Sue-and-Settle Issue in Environmental Litigation." *Land Use and Environmental Law Journal*, March 08, 2015, pg. 294. Accessed September 29, 2018. <https://heinonline.org/HOL/LandingPage?handle=hein.journals/jluenvl31&div=16&id=&page=>. Though some consider it Congress' fault as the deadlines set in litigation are unreasonable and citizen suits are simply taking advantage of those deadlines. McVean, Courtney and Pidot, Justin R., "Environmental Settlements and Administrative Law." *Harvard Environmental Law Review* 2015; *U Denver Legal Studies Research Paper* no. 14-25, pg. 235. Accessed September 30, 2018. <https://ssrn.com/abstract=2425990>.

¹¹⁸ Voyles, Travis A. "Clearing Up Perceived Problems with the Sue-and-Settle Issue in Environmental Litigation." *Land Use and Environmental Law Journal*, March 08, 2015, pg. 294. Accessed September 29, 2018. <https://heinonline.org/HOL/LandingPage?handle=hein.journals/jluenvl31&div=16&id=&page=>.

¹¹⁹ Voyles, Travis A. "Clearing Up Perceived Problems with the Sue-and-Settle Issue in Environmental Litigation." *Land Use and Environmental Law Journal*, March 08, 2015, pg. 295. Accessed September 29, 2018. <https://heinonline.org/HOL/LandingPage?handle=hein.journals/jluenvl31&div=16&id=&page=>.

¹²⁰ Tyson, Ben. "An Empirical Analysis of Sue-and-Settle in Environmental Litigation." *Virginia Law Review*. November 2014, pg.1567. Accessed May 06, 2018. <http://www.virginialawreview.org/volumes/content/empirical-analysis-sue-and-settle-environmental-litigation>.

¹²¹ Percival, Robert V. "The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making." *University of Chicago Legal Forum* 1987, no. 1, pg. 327. Accessed September 28, 2018. <http://chicagounbound.uchicago.edu/uclf/vol1987/iss1/13>.

different programs.¹²² This backdoor rulemaking is, arguably, the point of citizen suits: to streamline future regulations by demonstrating a process of rule-making that society finds more desirable.

Despite the numerous issues settlements can cause, they do allow the agency to seek solutions that would not otherwise be considered as it would not be within the court's jurisdiction to offer such solutions.¹²³ As stated previously, settlements reduce the agency's litigation cost which can open up resources for other programs. Some argue that settlements prevent judgements that could affect an agency's, and thus the executive's, discretionary power.¹²⁴ Additionally, most settlements are outside of the Administrative Procedures Act meaning that no public notice and comment period is required by law.¹²⁵

However, against the backdrop of collusion occurring in the settlement process, the EPA's actions are perceived as deliberately infringing on executive discretion.¹²⁶ By ignoring rules such as review by the public, the regulated community, and the executive branch; the EPA fails to represent the executive branch.¹²⁷ Instead, the EPA is seen as

¹²² Voyles, Travis A. "Clearing Up Perceived Problems with the Sue-and-Settle Issue in Environmental Litigation." *Land Use and Environmental Law Journal*, March 08, 2015, pg. 304. Accessed September 29, 2018. <https://heinonline.org/HOL/LandingPage?handle=hein.journals/jluenvl31&div=16&id=&page=>

¹²³ Percival, Robert V. "The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making." *University of Chicago Legal Forum* 1987, no. 1, pg. 331. Accessed September 28, 2018. <http://chicagounbound.uchicago.edu/uclf/vol1987/iss1/13>.

¹²⁴ *Ibid.* pg. 331

¹²⁵ The APA defines how a federal regulation is created. The APA is detailed more in a later section of this paper. McVean, Courtney and Pidot, Justin R., "Environmental Settlements and Administrative Law." *Harvard Environmental Law Review* 2015; *U Denver Legal Studies Research Paper* no. 14-25, pg. 211. Accessed September 30, 2018. <https://ssrn.com/abstract=2425990>.

¹²⁶ Percival, Robert V. "The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making." *University of Chicago Legal Forum* 1987, no. 1, pg. 350. Accessed September 28, 2018. <http://chicagounbound.uchicago.edu/uclf/vol1987/iss1/13>.

¹²⁷ Voyles, Travis A. "Clearing Up Perceived Problems with the Sue-and-Settle Issue in Environmental Litigation." *Land Use and Environmental Law Journal*, March 08, 2015, pg. 294. Accessed September 29, 2018. <https://heinonline.org/HOL/LandingPage?handle=hein.journals/jluenvl31&div=16&id=&page=>

pursuing its own agenda without regard to federal procedures.¹²⁸ Without the framework of collusion, the agency's actions take on a less negative connotation. Instead, the EPA is seen as strategically pursuing its own agenda.¹²⁹ As previously stated, public choice economics depicts bureaucrats as individuals, working in the public sphere, who seek to maximize their own self-interest. Thus, an agency will attempt to increase both its influence and budget.¹³⁰

The EPA pursues settlements that help expand its political power; enabling the agency to lobby for a larger budget to encompass its additional jurisdiction. Some critics of sue-and-settle worry that settlements could be used to bind a future administration's policy initiatives.¹³¹ Under the scope of collusion, when an agency does try to create a binding regulation for a future administration, the agency's actions are subversive to the regulatory process. When the agency's actions are instead viewed under the lens of public choice economics, the EPA is not undermining the government but is instead acting rationally. Regulations can easily be repealed, so those currently in power will want to entrench their preferred policies as strongly as possible.¹³² Additionally, some argue that

¹²⁸ Percival, Robert V. "The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making." *University of Chicago Legal Forum* 1987, no. 1, pg. 350. Accessed September 28, 2018. <http://chicagounbound.uchicago.edu/uclf/vol1987/iss1/13>.

¹²⁹ Niskanen, William A. "The Peculiar Economics of Bureaucracy." *The American Economic Review* 1968, vol.58, no. 2. Accessed September 30, 2018, <http://www.jstor.org/stable/1831817>.

¹³⁰ *Ibid.*

¹³¹ Percival, Robert V. "The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making." *University of Chicago Legal Forum* 1987, no. 1, pg. 343-344. Accessed September 28, 2018. <http://chicagounbound.uchicago.edu/uclf/vol1987/iss1/13>.

¹³² Niskanen, William A. "The Peculiar Economics of Bureaucracy." *The American Economic Review* 1968, vol.58, no. 2. Accessed September 30, 2018, <http://www.jstor.org/stable/1831817>.

the courts do not allow such substantive settlements.¹³³ The next section describes in more detail how the courts limit or enable citizen settlements by analyzing a case study.

Case Study: *Fowler, et. al vs EPA*, No.09-cv-00005,

On January 5, 2009, environmental protection groups sued the EPA for its failure to protect the Chesapeake Bay from pollution.¹³⁴ By May 10, 2010, the EPA reached a settlement establishing total maximum daily load (TMDL) standards for nitrogen, phosphorous, and sediment.¹³⁵ The settlement also instructed the EPA to set new stormwater regulations by 2012.¹³⁶

In *American Farm Bureau Federation vs EPA*, plaintiffs claimed that the settlement agreement circumvented procedures set in the Clean Water Act (CWA) for state regulated water control and failed to provide scientific evidence that TMDL standards were correctly specified.¹³⁷ The plaintiffs also felt that a timeline of seven months was too short for the public notice and comment period.¹³⁸ The Middle District Court of Pennsylvania and the Third Circuit, the original court and the appellant court, both ruled in favor of the EPA and affirmed the settlement.¹³⁹ On February 3, 2016, the Supreme Court denied the plaintiffs appeal.¹⁴⁰

¹³³ McVean, Courtney and Pidot, Justin R., “Environmental Settlements and Administrative Law.” *Harvard Environmental Law Review* 2015; *U Denver Legal Studies Research Paper* no. 14-25, pg. 232-235. Accessed September 30, 2018. <https://ssrn.com/abstract=2425990>.

¹³⁴ *Fowler v. EPA*, No. 1:09-00005, DDC, Complaint (Jan. 5, 2009).

¹³⁵ Settlement Agreement, *Fowler v. EPA*, No. 09-00005, DDC, (May 19, 2010) (CWA – EPA agrees to establish Chesapeake Bay TMDL).

¹³⁶ *Ibid.*

¹³⁷ *American Farm Bureau Federation v. EPA*, No.11-cv-0067, MD Penn., Complaint (January 2011).

¹³⁸ *Ibid.*

¹³⁹ *American Farm Bureau Federation v. EPA*, No. 13-4079, 3d Cir, Opinion (July 6, 2015).

¹⁴⁰ *American Farm Bureau Federation v. EPA*. SCOTUSblog. October 09, 2018. Accessed October 09, 2018. <http://www.scotusblog.com/case-files/cases/american-farm-bureau-federation-v-epa/>.

Though the Third Circuit court ruled that the EPA's final action was not outside of the scope of the CWA, issues remain from this sue-and-settle case. Specifically, critics claim that the EPA has used the settlement as its source of regulatory authority rather than the CWA to create and implement new stormwater programs.¹⁴¹ While the agency might have the regulatory authority under the CWA, the EPA is instead using a settlement agreement to enlarge its jurisdiction.¹⁴² Thus, within the context of potential collusion, the EPA is perceived as expanding its own authority at the expense of the executive by hastily creating ineffective regulation.

EFFECT ON THE JUDICIARY

The American court system is based on an adversarial system.¹⁴³ This means, that, for the truth to be established there must be some form of controversy between the two parties in litigation. In an adversarial system, the two parties bring their potentially biased versions of the truth into the court where they are compared. The suit is litigated by each party working to promote its version of the claim.¹⁴⁴ A court then judges which of the versions is the most compelling. In an inquisitorial system, the judge, or usually a board

¹⁴¹ Kovacs, William L., Keith W. Holman, and Jonathan A. Jackson. "Sue-and-settle: Regulating Behind Closed Doors." U.S. Chamber of Commerce. May 2013, pg.18. Accessed May 06, 2018. <https://www.uschamber.com/report/sue-and-settle-regulating-behind-closed-doors>.

¹⁴² U.S. Senate Committee on Environment and Public Works, Minority Office: House, Senate Lawmakers Highlight Concerns with EPA Sue & Settle Tactic for Backdoor Regulation (2012).

¹⁴³ Mahoney, Paul G. "The Common Law and Economic Growth: Hayek Might Be Right." *The Journal of Legal Studies*, 2001, vol. 30, no. 2, pg.506. Accessed October 3, 2018. <https://ssrn.com/abstract=206809>.

¹⁴⁴ Zywicki, Todd J. "Spontaneous Order and the Common Law: Gordon Tullock's Critique." *Public Choice* 2008, vol.135, no. ½, pg. 38. <http://www.jstor.org/stable/27698249>.

of judges, carry out an independent investigation into the matter. The evidence is then collected and judged by the judges.¹⁴⁵

The United States uses an adversarial system because it is believed to prevent inherent judicial bias.¹⁴⁶ Additionally, adversarial systems are shown to unveil further details in a court case than in an inquisitorial system.¹⁴⁷ However, when like-minded people sue each other, the adversarial system does not work as it should. The like-minded individuals can establish the veracity of their claims without opposition.¹⁴⁸ Often, the cases of these individuals are settled before a judgement can be entered on the truth of the claims.¹⁴⁹ Under traditional common law jurisprudence, a judge does not create law but defends it and establishes the boundaries of the law.¹⁵⁰ Settlements remove the role of the judiciary by preventing judges from carrying out their prescribed role.¹⁵¹ Thus, settlements weaken the ability of judges to enforce or establish the law.

Settlement also prevents the development of the common law. By not allowing for judgement, settlements do not create precedent.¹⁵² This permits greater leeway in judicial opinions within cases that resort to litigation. Common law acts as a check on the

¹⁴⁵ *Ibid.*

¹⁴⁶ Zywicki, Todd J. "Spontaneous Order and the Common Law: Gordon Tullock's Critique." *Public Choice* 2008, vol.135, no. ½, pg. 45. <http://www.jstor.org/stable/27698249>.

¹⁴⁷ *Ibid.*

¹⁴⁸ Ferguson, Janette L., and Laura K. Granier. "Sue and Settle: Citizen Suit Settlements and Environmental Law." *Natural Resources and Environment*, 2015, vol.30, no. 1, pg. 2. https://www.americanbar.org/publications/natural_resources_environment/2015-16/summer/sue_and_settle_citizen_suit_settlements_and_environmental_law.html.

¹⁴⁹ *Ibid.*

¹⁵⁰ Owen M. Fiss, *Against Settlement*, 93 *Yale L.J.* 1073 (1984).

¹⁵¹ McVean, Courtney and Pidot, Justin R., "Environmental Settlements and Administrative Law." *Harvard Environmental Law Review* 2015; *U Denver Legal Studies Research Paper* no. 14-25, pg. 214. Accessed September 30, 2018. <https://ssrn.com/abstract=2425990>.

¹⁵² Common law is created by custom and precedent. Mahoney, Paul G. "The Common Law and Economic Growth: Hayek Might Be Right." *The Journal of Legal Studies*, 2001, vol. 30, no. 2, pg. 506-507. Accessed October 3, 2018. <https://ssrn.com/abstract=206809>.

executive authority; with less precedent to check an agency's discretion, courts will refrain from judgement to prevent the transfer of rulemaking to the judiciary.¹⁵³

Additionally, settlements create a loss of skilled adjudicators. Lawyers have become moderators in a process of settlement rather than skilled adversarial counselors.¹⁵⁴ As the United States court system is based on adversary proceedings this can limit the creation of future common law.

Settlements can also cause issues with public disclosure laws. Under the Freedom of Information Act, information exchanged during settlements are subject to all FOIA requests.¹⁵⁵ However, a settlement agreement can include a court order preventing disclosure of such documents.¹⁵⁶ The incentives of the EPA and the special interest groups converge on this matter: both groups want as much secrecy as possible to limit criticism of new regulations that result from a settlement. Additionally, settlement agreements do not have to be published, although they are still subject to all information requests.¹⁵⁷

¹⁵³ Voyles, Travis A. "Clearing Up Perceived Problems with the Sue-and-Settle Issue in Environmental Litigation." *Land Use and Environmental Law Journal*. March 08, 2015, pg. 304. Accessed September 29, 2018. <https://heinonline.org/HOL/LandingPage?handle=hein.journals/jluenvl31&div=16&id=&page=>

¹⁵⁴ McMunigal, Kevin C., "The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers." *Faculty Publications*, 1990, pg. 881. Accessed October 3, 2018. http://scholarlycommons.law.case.edu/faculty_publications/351.

¹⁵⁵ Silva, Diana A. "Settlement Negotiations and Public Disclosure Laws." *The Legal Intelligencer*. July 25, 2016. Accessed October 06, 2018. <https://www.law.com/thelegalintelligencer/almID/1202763357348/settlement-negotiations-and-public-disclosure-laws/>.

¹⁵⁶ Silva, Diana A. "Settlement Negotiations and Public Disclosure Laws." *The Legal Intelligencer*. July 25, 2016. Accessed October 06, 2018. <https://www.law.com/thelegalintelligencer/almID/1202763357348/settlement-negotiations-and-public-disclosure-laws/>.

¹⁵⁷ McVean, Courtney and Pidot, Justin R., "Environmental Settlements and Administrative Law." *Harvard Environmental Law Review* 2015; *U Denver Legal Studies Research Paper* no. 14-25, pg. 207. Accessed September 30, 2018. <https://ssrn.com/abstract=2425990>.

Intervention into settlements is also an issue for courts. There are three ways of interceding into a settlement: intervention during the settlement; a lawsuit disputing the legitimacy of the settlement; and asking for judicial review of the agency's final action.¹⁵⁸ The difficulty of preventing settlement agreements or even interceding during negotiations is a concern for both industry and activist groups.¹⁵⁹ Courts, as stated earlier, are likely to prevent interested third parties unless they can prove substantial future consequences due to the settlement decrees.¹⁶⁰ It is difficult to prevent consent decrees and costly to oppose them once they are implemented. In a study of the consent decrees imposed by sue-and-settle suits, not one of the 88 cases identified as sue-and-settle were prevented from introducing a consent decree by judicial review.¹⁶¹ Thus, some critics of the sue-and-settle policy blame the judiciary for not acting as a better check.

Despite the numerous problems caused by settlements, they are still considered beneficial to the court system.¹⁶² Settlements free up resources to allow for more pressing cases to proceed through litigation. They remove frivolous cases from burdening society

¹⁵⁸ Ferguson, Janette L., and Laura K. Granier. "Sue and Settle: Citizen Suit Settlements and Environmental Law." *Natural Resources and Environment*, 2015, vol.30, no. 1, pg. 5.

https://www.americanbar.org/publications/natural_resources_environment/2015-16/summer/sue_and_settle_citizen_suit_settlements_and_environmental_law.html.

¹⁵⁹ McVean, Courtney and Pidot, Justin R., "Environmental Settlements and Administrative Law." *Harvard Environmental Law Review* 2015; *U Denver Legal Studies Research Paper* no. 14-25, pg. 212. Accessed September 30, 2018. <https://ssrn.com/abstract=2425990>.

¹⁶⁰ Percival, Robert V. "The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making." *University of Chicago Legal Forum* 1987, no. 1, pg. 348. Accessed September 28, 2018. <http://chicagounbound.uchicago.edu/uclf/vol1987/iss1/13>.

¹⁶¹ Tyson, Ben. "An Empirical Analysis of Sue-and-Settle in Environmental Litigation." *Virginia Law Review*. November 2014, pg.1567. Accessed May 06, 2018. <http://www.virginialawreview.org/volumes/content/empirical-analysis-sue-and-settle-environmental-litigation>.

¹⁶² Bundy, Stephen McG., "The Policy in Favor of Settlement in an Adversary System." *Hastings Law Journal*, 1992, vol.44, no.1, pg.78. Accessed October 3, 2018. <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2000&context=facpubs>.

and allow class action suits to be settled in bulk.¹⁶³ They allow for unique solutions that otherwise would not occur in the system and speed up executive decisions. Interestingly, activist groups who use sue-and-settle are more likely to incorporate a public notice and comment period in the settlements than industry plaintiffs (at least during the Obama administration).¹⁶⁴ Settlements are also less costly than litigation, both personally and for the state.¹⁶⁵ Settlements would not occur within society if there were not benefits to both parties that outweigh the costs.

Case Study: *In Re ESA Section 4 Deadline Litigation*, No.10-00377, DDC

The Endangered Species Act (ESA) requires the agency to issue an initial finding on a species protection petition within 90 days of receiving the petition.¹⁶⁶ Additionally, the agency has one year to find whether the petition for species protection is “warranted, not warranted, or warranted but precluded by higher-priority actions.”¹⁶⁷ As a result of the large amount of petitions filed, the agency often fails to review the petition within the required timeframe; by 2010, there were more than 250 species protection petitions that had been filed but not answered. This resulted in twelve lawsuits from the WildEarth

¹⁶³ *Ibid.* pg. 34.

¹⁶⁴ Tyson, Ben. "An Empirical Analysis of Sue-and-Settle in Environmental Litigation." *Virginia Law Review*, November 2014, pg.1564. Accessed May 06, 2018. <http://www.virginialawreview.org/volumes/content/empirical-analysis-sue-and-settle-environmental-litigation>.

¹⁶⁵ Bundy, Stephen McG., “The Policy in Favor of Settlement in an Adversary System.” *Hastings Law Journal*, 1992, vol.44, no.1. Accessed October 3, 2018. <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2000&context=facpubs>.

¹⁶⁶ Endangered Species Act, 16 U.S.C. § 1533.

¹⁶⁷ *Ibid.*

Guardians and one from the Center for Biological Diversity which were then consolidated into one litigation suit.¹⁶⁸

The agency settled with the plaintiffs and agreed to a series of deadlines forcing the agency to render a decision on all petitions, currently not resolved, by September of 2016.¹⁶⁹ The agency also agreed to not use the warranted but precluded by higher priorities for any of the petitions filed.¹⁷⁰ In return, the environmental groups offered to limit the number of petitions they filed and cease deadline litigation against the agency for a time.¹⁷¹ The Safari Club International tried to intervene in the settlement but was denied by the district court. On September 9, 2011, the ruling was then affirmed by the D.C. Circuit and the settlement approved by the district court.¹⁷²

There are a few problems with this settlement. First, agency inaction caused this suit. Without the agency failing to respond, or without the unrealistic deadlines set in the legislation, the suit would not have happened. Therefore, the question is whether the agency or Congress was at fault for the regulatory failure. Second, the agency enacted a substantive decision in removing the power to assign a species to the warranted but precluded by higher actions status.¹⁷³ The settlement agreement, thus, takes power that

¹⁶⁸ Kovacs, William L., Keith W. Holman, and Jonathan A. Jackson. "Sue-and-settle: Regulating Behind Closed Doors." U.S. Chamber of Commerce. May 2013, pg.33. Accessed May 06, 2018. <https://www.uschamber.com/report/sue-and-settle-regulating-behind-closed-doors>.

¹⁶⁹ *In re Endangered Species Act Section 4 Deadline Litig.-MDL*, No. 10-00377, DCC, Complaint (May 5, 2011).

¹⁷⁰ Settlement Agreement, *In re Endangered Species Act Section 4 Deadline Litig.-MDL*, No. 10-00377, DCC, (May 5, 2011).

¹⁷¹ *Ibid.*

¹⁷² *In re Endangered Species Act Section 4 Deadline Litig.-MDL*, No. 2165, 704 F.3d., Opinion (DC Cir., 2013).

¹⁷³ McVean, Courtney and Pidot, Justin R., "Environmental Settlements and Administrative Law." *Harvard Environmental Law Review* 2015; *U Denver Legal Studies Research Paper* no. 14-25, pg. 225. Accessed September 30, 2018. <https://ssrn.com/abstract=2425990>.

Congress gave to the agency and removes it. The agency limited future administrations from exercising certain executive authority that Congress had granted.¹⁷⁴ Interestingly, supporters of sue-and-settle argue that courts would not allow for substantive decisions to stand,¹⁷⁵ yet, in the case of the ESA deadline litigation, a substantive agreement was affirmed by two courts.

This introduces the final issue with sue-and-settle as shown by the ESA deadline litigation case. Courts are likely to refrain from judgement for fear of transferring rulemaking to the courts.¹⁷⁶ Likewise, courts will hold intervenors to higher standards of proof, lest the courts remove agency discretion.¹⁷⁷ When viewed under the guise that collusion transpires in these settlements, the lack of a check makes the courts appear incompetent at enforcement.

THE LAW

The murky legislation surrounding the citizen suit provisions have left judges to attempt to define statutes through opinions; a common occurrence in common law. The opinions have created a variety of contradictory judgements that allow a judge to access

¹⁷⁴ The concern of limiting agency discretion for future administrations is a large part of why sue-and-settle is criticized. See Percival, Robert V. "The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making." *University of Chicago Legal Forum* 1987, no. 1, pg. 350. Accessed September 28, 2018. <http://chicagounbound.uchicago.edu/uclf/vol1987/iss1/13>.

¹⁷⁵ McVean, Courtney and Pidot, Justin R., "Environmental Settlements and Administrative Law." *Harvard Environmental Law Review* 2015; *U Denver Legal Studies Research Paper* no. 14-25, pg. 232-235. Accessed September 30, 2018. <https://ssrn.com/abstract=2425990>.

¹⁷⁶ Voyles, Travis A. "Clearing Up Perceived Problems with the Sue-and-Settle Issue in Environmental Litigation." *Land Use and Environmental Law Journal*. March 08, 2015, pg. 304. Accessed September 29, 2018. <https://heinonline.org/HOL/LandingPage?handle=hein.journals/jluenvl31&div=16&id=&page=>.

¹⁷⁷ McVean, Courtney and Pidot, Justin R., "Environmental Settlements and Administrative Law." *Harvard Environmental Law Review* 2015; *U Denver Legal Studies Research Paper* no. 14-25, pg. 231. Accessed September 30, 2018. <https://ssrn.com/abstract=2425990>.

an array of precedents to use to support their opinion.¹⁷⁸ The court makes a calculated decision to either refrain from ruling, and compel parties to settle, or to award relief to one of the parties.¹⁷⁹ Courts generally abstain from making judgements on regulatory procedures and agency resources.¹⁸⁰ Most courts enter judgement only when the agency makes a substantive decision,¹⁸¹ although not always. The rest of this section will discuss the effects two specific laws have had on the sue-and-settle policy: the Administrative Procedures Act and the Equal Access to Justice Act.

The Administrative Procedures Act

The APA establishes how federal agencies create and authorize regulation. Settlements can create regulation that are a surprise to the regulated community and the public. The APA requires a notice and comment period as well as a regulation impact statement and other analytical reports.¹⁸² Sue-and-settle often cuts out public participation and is viewed, by some, as a violation of the APA.¹⁸³ As stated previously, activist

¹⁷⁸ Voyles, Travis A. "Clearing Up Perceived Problems with the Sue-and-Settle Issue in Environmental Litigation." *Land Use and Environmental Law Journal*. March 08, 2015, pg. 301. Accessed September 29, 2018. <https://heinonline.org/HOL/LandingPage?handle=hein.journals/jluenvl31&div=16&id=&page=>

¹⁷⁹ *Ibid.* pg. 304.

¹⁸⁰ McVean, Courtney and Pidot, Justin R., "Environmental Settlements and Administrative Law." *Harvard Environmental Law Review* 2015; *U Denver Legal Studies Research Paper* no. 14-25, pg. 231. Accessed September 30, 2018. <https://ssrn.com/abstract=2425990>.

¹⁸¹ Substantive law is defined as "the part of the law that creates, defines, and regulates the rights, duties, and powers of parties" from Black, Henry Campbell, Joseph R. Nolan, and Michael J. Connolly. *Black Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern* 1979, 2nd ed, pg.12. St. Paul, MN: West Publ.

¹⁸² "Environmental Litigation: Cases against EPA and Associated Costs over Time." U.S. Government Accountability Office (U.S. GAO). August 31, 2011. Accessed October 01, 2018. <https://www.gao.gov/products/GAO-11-650>.

¹⁸³ Not just activist groups are considered as having used settlements to exploit the regulatory process. See information about "sweetheart deals" in McVean, Courtney and Pidot, Justin R., "Environmental Settlements and Administrative Law." *Harvard Environmental Law Review* 2015; *U Denver Legal Studies Research Paper* no. 14-25, pg. 210. Accessed September 30, 2018. <https://ssrn.com/abstract=2425990>.

groups who adopt a sue-and-settle policy were more likely to incorporate a public notice and comment period in settlements; especially during the Obama administration.¹⁸⁴ The Supreme Court has ruled that resource and some procedural cases are beyond the purview of the APA and therefore, are not in the courts' jurisdiction to review.¹⁸⁵ The courts will only review the agency's final actions, and so only review settlements once regulation is finalized. Thus, the APA is either an ineffective way to regulate sue-and-settle or the sue-and-settle cases appear to circumvent the point of the law.¹⁸⁶

The Equal Access to Justice Act

The EAJA applies to businesses, individuals and nonprofit organizations that prevail in litigation against the federal government.¹⁸⁷ The act forces the government to pay for people to sue them. The EAJA reduces the cost of suing; when the cost of an action is reduced, the most likely outcome is that the demand for the good is increased. Thus, with the EAJA reducing the cost of suing the EPA, there has been a dramatic increase in the number of lawsuits instigated against the agency.

As shown in the Revolving Payments section of this paper, the EAJA creates a relationship between the agency and the activist groups. The EAJA attempts to solve the

¹⁸⁴ Tyson, Ben. "An Empirical Analysis of Sue-and-Settle in Environmental Litigation." *Virginia Law Review*. November 2014, pg.1564. Accessed May 06, 2018. <http://www.virginialawreview.org/volumes/content/empirical-analysis-sue-and-settle-environmental-litigation>.

¹⁸⁵ McVean, Courtney and Pidot, Justin R., "Environmental Settlements and Administrative Law." *Harvard Environmental Law Review* 2015; *U Denver Legal Studies Research Paper* no. 14-25, pg. 230-233. Accessed September 30, 2018. <https://ssrn.com/abstract=2425990>.

¹⁸⁶ Butler, Henry N., and Nathaniel J. Harris. "Sue, Settle, and Shut Out the States: Destroying the Environmental Benefits of Cooperative Federalism." *Harvard Journal Of Law and Policy* 37, no. 2 (October 21, 2013). Accessed October 3, 2018. <https://ssrn.com/abstract=2343273>.

¹⁸⁷ Downs, Carolyn. "What Is the Equal Access to Justice Act (EAJA)?" *CCK Law*. April 02, 2018. Accessed October 01, 2018. <https://cck-law.com/news/equal-access-to-justice-act-eaja/>.

problem of only the rich seeking justice through litigation and to allow for more balanced outcomes in settlements.¹⁸⁸ The EAJA, though, can simply act as a transfer of wealth from the government to special interest groups.¹⁸⁹ Special interest groups seeking private advantage, use the EAJA to support their case for wealth transfer under the guise of enforcing legislation.¹⁹⁰ Under the Bush Administration, “sweetheart deals” were made with industry groups where former colleagues of the agency would be invited to sue the agency with the purpose of creating policy.¹⁹¹ The Obama administration has similarly been accused of creating “green sweetheart” deals through the sue-and-settle policy and then sweetening the deal by awarding attorney fees.¹⁹² Additionally, by allowing the cost of litigation to be covered by the government, Congress may have incentivized citizen suits beyond the ideal threshold for litigation.¹⁹³

The payments made due to litigation, do not come directly from the agency’s budget. Rather, the fees are paid from the Department of the Treasury’s Judgement Fund,

¹⁸⁸ Percival, Robert V. "The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making." *University of Chicago Legal Forum* 1987, no. 1, pg. 333. Accessed September 28, 2018. <http://chicagounbound.uchicago.edu/uclf/vol1987/iss1/13>.

¹⁸⁹ Bhagat, Sanjai, John Bizjak, and Jeffrey L. Coles. "The Shareholder Wealth Implications of Corporate Lawsuits." *Financial Management* 1998, vol. 27, no. 4, pg.5-27. Accessed October 3, 2018. <http://www.jstor.org/stable/3666410>.; See also information regarding tax write-offs: "Government Agencies Allow Corporations To Write off Billions In Federal Settlement Payments." United States Public Interest Research Group Education Fund. December 03, 2015. Accessed October 06, 2018. <https://uspirg.org/news/usf/government-agencies-allow-corporations-write-billions-federal-settlement-payments>.

¹⁹⁰ "Environmental Litigation: Cases against EPA and Associated Costs over Time." U.S. Government Accountability Office (U.S. GAO). August 31, 2011. Accessed October 01, 2018. <https://www.gao.gov/products/GAO-11-650>.

¹⁹¹ McVean, Courtney and Pidot, Justin R., “Environmental Settlements and Administrative Law.” *Harvard Environmental Law Review* 2015; *U Denver Legal Studies Research Paper* no. 14-25, pg. 210. Accessed September 30, 2018. <https://ssrn.com/abstract=2425990>.

¹⁹² Tyson, Ben. "An Empirical Analysis of Sue-and-Settle in Environmental Litigation." *Virginia Law Review*. November 2014, pg.1574. Accessed May 06, 2018. <http://www.virginialawreview.org/volumes/content/empirical-analysis-sue-and-settle-environmental-litigation>.

¹⁹³ *Ibid.*

and the Department of Justice defends the EPA in all lawsuits.¹⁹⁴ In litigation, fees are applied to curb certain behavior by the defendant. If the EPA is not paying the litigation fees, whether in time spent at court or in payments, then the agency does not have any reason to prevent its bad behavior.¹⁹⁵

The increase in sue-and-settle lawsuits caused by the EAJA then may not be doing what Congress intended: monitoring agency behavior, ensuring deadlines, and improving the quality of regulations. If the agency does not have to pay for misconduct, then sue-and-settle will continue to act only as enforcement on the agency after litigation; the agency will not fulfill its duties without constant supervision. Thus, the law, rather than acting as a constraint on the agency by increasing costs for not completing its responsibility in a timely manner, only adds to society's perception of ineffective legislation and a disorderly agency; especially if their behavior is viewed with the idea that collusion is occurring. As the courts are either unwilling, or unable, to authorize a definitive answer to use of citizen suits and the EAJA, these problems will continue.

The sue-and-settle policy will have a lasting effect on the law; whether it is by the regulatory overreach, the distortion of the purpose of the courts, or a loss of respect for the regulatory process. In a letter to Scott Pruitt, former EPA officials pointed out the debate on the sue-and-settle policy is skewed; whether collusion occurs or not, there will

¹⁹⁴ McVean, Courtney and Pidot, Justin R., "Environmental Settlements and Administrative Law." *Harvard Environmental Law Review* 2015; *U Denver Legal Studies Research Paper* no. 14-25, pg. 210. Accessed September 30, 2018. <https://ssrn.com/abstract=2425990>.

¹⁹⁵ Schwartz, Joanna C. "How Governments Pay: Lawsuits, Budgets, and Police Reform." *UCLA Law Review*, 2016, vol. 63. Accessed October 3, 2018. <https://www.uclalawreview.org/how-governments-pay-lawsuits-budgets-and-police-reform/>.

always be litigation and settlements that result in regulation.¹⁹⁶ Settlements have both positive and negative effects on the court system and the law. However, it is the perception that collusion exists, distorting the actions of the legislature, judiciary, and EPA, that may cause more critical issues with society.

CONCLUSION

Approximately a year ago, Scott Pruitt, EPA director, announced an end to the use of sue-and-settle. Though some are skeptical that ending the practice will result in reform and not harm of the regulatory process,¹⁹⁷ others laud Pruitt for taking a step toward transparency.¹⁹⁸ To change the agency's behavior, lessen the load of sue-and-settle cases, and prevent litigation for deadline suits, Congress would need to incentivize the agency to effectively perform its duties in a timely fashion. Only when the policy of sue-and-settle is no longer beneficial to both parties will the practice end.

This paper found a variety of alternative theories for the close relationship established between the parties in sue-and-settle cases. Further research is needed to establish whether the relationship is collusive or not. This paper focused on those plaintiffs that filed a large number of suits between 2000-2010. Evidence of collusion

¹⁹⁶ "Response to Directive on Consent Decrees and Settlements." Letter to Scott Pruitt. November 13, 2017. Accessed October 6, 2018. <http://environment.law.harvard.edu/wp-content/uploads/2018/03/Response-to-Directive-re-Consent-Decrees-and-Settlements.pdf>.

¹⁹⁷ *Ibid.*

¹⁹⁸ Bosch, Dan. "EPA's Sue-and-settle Directive: A Step Toward Transparency." American Action Forum. October 24, 2017. Accessed May 06, 2018. <https://www.americanactionforum.org/insight/epas-sue-settle-directive-step-toward-transparency/>.

may be more effectively explored by extending the dataset to include settlements through 2018. An interesting idea for further research is to compare the Obama and Trump administrations and identify what effects loss of the sue-and-settle policy has had on the courts, Congress, and the EPA. Additionally, research could be done on why certain laws remain encouraging sue-and-settle. Understanding the different incentives behind the laws could help answer the question of why sue-and-settle exists.

The recent increase in sue-and-settle suits over the past years, may be what is raising the profile of issues with the policy. Low numbers of sue-and-settle cases could help maintain a balance of power by enforcing deadline suits and encouraging agency duties. However, current institutions have created incentives for special interest groups to inundate the agency with a plethora of suits in recent years. This has caused numerous issues as discussed for both the agency and the court system. Most of their actions are distorted from the perception that collusion occurs between the parties in litigation and, despite numerous studies showing no collusion exists, this perception persists.

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APPENDICES

APPENDIX A: MODEL INFORMATION

Table 3 shows a summary of each model's statistics. As shown, the models vary widely across all statistics suggesting the relationships are largely affected by the type of model used.

	Min	1st Qu	Median	Mean	3rd Qu	Max
LPM[1]	-1.95304	-0.09817	0.00000	-0.13445	0.00000	1.03692
LPM [2]	-1.2816	-0.07106	-0.01158	0.02307	0.14979	1.13066
LPM [3]	0.000699	0.071003	0.141306	0.141306	0.211610	0.281914
Probit [1]	-20.2315	-0.6778	0.0000	-0.8962	0.0000	16.4752
Probit [2]	-18.90108	-0.15579	-0.02366	1.16982	4.79583	17.68627
Probit [3]	-0.576468	-0.431907	-0.287347	-0.287347	-0.142787	0.001773
Logit [1]	-67.82693	-1.26856	0.00001	-2.20805	0.00001	59.53752
Logit [2]	-60.56700	-0.31527	-0.05846	4.50460	18.29193	59.51504
Logit [3]	-0.934944	-0.700353	-0.465761	-0.465761	-0.23117	0.003422

To understand which model is the best fit, the AIC and BIC scores for each model is shown in table A-2 for equation 1 and table A-3 for equation 2. The AIC scores for the LPM models are the lowest. Thus, the LPM coefficients will be used in analysis of the relationships between settlement, time, plaintiffs, and court.

Table A-2: Comparison of Model AIC/BIC Scores Eq. 1				
	AIC	BIC	Sample Size	DF
lpm1	296.3186	1936.968	670	309
probit1	870.51	2497.642	670	309
logit1	870.3709	2497.498	670	309

Table A-3: Comparison of Model AIC/BIC Scores Eq. 2				
	AIC	BIC	Sample Size	DF
lpm1	813.7245	2449.866	670	308
probit1	964.0295	2595.664	670	308
logit1	963.1442	2594.779	670	308

Table A-4 shows the model coefficients and standard errors for the courts that had a statistically significant impact on a settlement occurring within 6 months. Refer to table 2 for other results.

Table A-4: Model Coefficients and Standard Errors for Equation 1 (Courts)				
	LPM	Probit	Logit	Total Cases
Circuit 5	-0.9017 0.21595	-7.48 4087.00	-23.76 29230.00	12
Circuit 7	-1.0512 0.1038`	-12.78 4549.00	-43.16 32790.00	4
Circuit 9	-1.0233 0.12143	-8.20 4087.00	-25.10 29230.00	36
Circuit 10	-0.9876 0.09009	-12.54 4216.00	-41.91 30290.00	18
Circuit 11	-1.0167 0.97413	-12.67 4348.00	-42.58 31290.00	8
D. Montana	-1.0314 0.13307	-7.75 5027.00	-25.25 36110.00	3
D. New Mexico	-1.1062 0.10342	-12.93 4634.00	-43.98 33270.00	3
D. Oregon	-1.0181 0.10088	-12.74 4340.00	-42.71 31240.00	6
D. S. Carolina	-1.0490 0..09410	-12.77 4543.00	-43.14 2750.00	3
S.D. New York	-1.0307 0.11075	-12.71 4410.00	-42.81 31780.00	5
W.D. Wisconsin	-0.88933 0.22875	-7.49 4087.00	-23.87 29230.00	6
All courts in this table were statistically significant at the 1% level on the LPM model.				

APPENDIX B: LETTERS OF PERMISSION

Chamber of Commerce of the
United States of America
1615 H Street, NW
Washington, DC 20062-2000

To Whom it May Concern:

I am in the process of preparing my thesis in the Economics department at Utah State University. I hope to complete my degree program in December 2018.

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Kovacs, William L., Keith W. Holman, and Jonathan A. Jackson. "Sue and Settle: Regulating Behind Closed Doors." U.S. Chamber of Commerce. May 2013. Figure on page 12. Accessed May 06, 2018. <https://www.uschamber.com/report/sue-and-settle-regulating-behind-closed-doors>.

Fee: _____

Signed: _____