2023 SENATE AGRICULTURE AND VETERANS AFFAIRS

SCR 4017

2023 SENATE STANDING COMMITTEE MINUTES

Agriculture and Veterans Affairs Committee
Fort Union Room, State Capitol

SCR 4017
3/2/2023

A concurrent resolution urging the Administrator of the United States Environmental Protection Agency to fully reinstate, and strictly abide by the October 17, 2017, memorandum titled Adhering to the Fundamental Principles of Due Process, Rule of Law, and Cooperative Federalism in Consent Degrees and Settlement Agreements; to promulgate and enforce only environmental regulations that appropriately take into account public and private fiscal impacts as well as the nation's continuing food security and energy security; and to defer to and work together in good faith with all sovereign states in the spirit of cooperative federalism.

10:57 AM Chairman Luick opened the meeting. Senators Hogan, Weston, Weber, Luick, Myrdal, and Lemm were present.

Discussion Topics:

- Crop Spraying
- Environmental Protection Agency
- October 17th memorandum
- Impact on farmers

10:58 AM Senator Kessel, District 39 Senator, introduced SCR 4017 and verbally testified in favor.

11:12 AM Julie Ellingson, North Dakota Stockman's Association, verbally testified in favor.

11:14 AM Senator Myrdal moved DO PASS SCR 4017.
11:14 AM Senator Lemm seconded.

Roll call vote.

Senators	Vote
Senator Larry Luick	Y
Senator Janne Myrdal	Y
Senator Kathy Hogan	N
Senator Randy D. Lemm	Y
Senator Mark F. Weber	Y
Senator Kent Weston	Y

Motion Passed 5-1-0. DO PASS SCR 4017.

11:18 AM Senator Luick will carry the bill.

11:18 AM Chairman Luick closed the meeting.

Dave Owen, Committee Clerk

REPORT OF STANDING COMMITTEE

SCR 4017: Agriculture and Veterans Affairs Committee (Sen. Luick, Chairman) recommends **DO PASS** (5 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). SCR 4017 was placed on the Eleventh order on the calendar. This resolution does not affect workforce development.

2023 HOUSE ENERGY AND NATURAL RESOURCES

SCR 4017

2023 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Coteau AB Room, State Capitol

SCR 4017
3/16/2023

A concurrent resolution urging the Administrator of the United States Environmental Protection Agency to fully reinstate, and strictly abide by the October 17, 2017, memorandum titled adhering to the Fundamental Principles of Due Process, Rule of Law, and Cooperative Federalism in Consent Decrees and Settlement Agreements; to promulgate and enforce only environmental regulations that appropriately take into account public and private fiscal impacts as well as the nation's continuing food security and energy security; and to defer to and work together in good faith with all sovereign states in the spirit of cooperative federalism.

10:53 AM Vice Chairman Anderson opened the hearing.

Members present: Chairman Porter, Vice Chairman D. Anderson, Representatives Bosch, Conmy, Dockter, Hagert, Heinert, Ista, Kasper, Marschall, Novak, Olson, Roers Jones, and Ruby.

Discussion Topics:

- EPA
- Rule making
- Lawsuits
- Use restrictions.
- Cancellations
- Endangered Species
- Environmentalists

Sen. Greg Kessel, District 39, introduced SCR 4017, oral testimony
Eric Delzer, Pesticide and Fertilizer Division Director, ND Dept of Ag, Testimony #25375, #25376, #25377, #25385, #25386
Ed Kessel, President, ND Grain Growers Association, Testimony #25427, #25428, #25429

11:09 AM Vice Chairman Anderson closed the hearing.

Rep Ruby moved an amendment to include certified mail return receipt requested, seconded by Rep Heinert. Voice vote. Motion carried.

Rep Ruby moved a Do Pass as Amended and Place on the Consent Calendar, seconded by Rep Olson.

Representatives	Vote
Representative Todd Porter	Y
Representative Dick Anderson	Y
Representative Glenn Bosch	Y
Representative Liz Conmy	N

Representative Jason Dockter	Y
Representative Jared Hagert	Y
Representative Pat D. Heinert	Y
Representative Zachary Ista	N
Representative Jim Kasper	AB
Representative Andrew Marschall	Y
Representative Anna S. Novak	Y
Representative Jeremy Olson	Y
Representative Shannon Roers Jones	Y
Representative Matthew Ruby	Y

11-2-1 Motion carried. Rep D Anderson is carrier.

11:14 AM Meeting adjourned.

Kathleen Davis, Committee Clerk

Adopted by the House Energy and Natural Resources Committee
March 16, 2023

dlf 3-16-23

PROPOSED AMENDMENTS TO SENATE CONCURRENT RESOLUTION NO. 4017

Page 3, line 1, after "resolution" insert "via certified mail with return receipt requested"

Renumber accordingly

REPORT OF STANDING COMMITTEE

SCR 4017: Energy and Natural Resources Committee (Rep. Porter, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** and **BE PLACED ON THE CONSENT CALENDAR** (11 YEAS, 2 NAYS, 1 ABSENT AND NOT VOTING). SCR 4017 was placed on the Sixth order on the calendar.

Page 3, line 1, after "resolution" insert "via certified mail with return receipt requested"

Renumber accordingly

2023 SENATE AGRICULTURE AND VETERANS AFFAIRS

SCR 4017

2023 SENATE STANDING COMMITTEE MINUTES

Agriculture and Veterans Affairs Committee
Fort Union Room, State Capitol

SCR 4017
3/24/2023

A concurrent resolution urging the Administrator of the United States Environmental Protection Agency to fully reinstate, and strictly abide by the October 17, 2017, memorandum titled Adhering to the Fundamental Principles of Due Process, Rule of Law, and Cooperative Federalism in Consent Decrees and Settlement Agreements; to promulgate and enforce only environmental regulations that appropriately take into account public and private fiscal impacts as well as the nation's continuing food security and energy security; and to defer to and work together in good faith with all sovereign states in the spirit of cooperative federalism.

2:31 PM Chairman Luick opened the meeting on SCR 4017. Members present: Chairman Luick, Vice Chairman Myrdal, Senator Lemm, Senator Hogan, Senator Weston, Senator Weber.

Discussion Topics:

- Bill review

2:31 Chairman Luick reviewed the bill

2:32 PM Chairman Luick adjourned.

Brenda Cook, Committee Clerk

TESTIMONY

SCR 4017

COMMISSIONER
DOUG GOEHRING

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NORTH DAKOTA
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Testimony of Eric Delzer
Pesticide and Fertilizer Division Director
House Energy and Natural Resources Committee
Coteau AB
March 16, 2023

Chairman Porter, and members of the House Energy and Natural Resources Committee, my name is Eric Delzer, Pesticide and Fertilizer Division Director here on behalf of Commissioner Doug Goehring. The Commissioner supports Concurrent Resolution 4017 and would like to emphasize how important this issue is to agriculture and industry in North Dakota.

Ever since the EPA has abandoned previous administration's policy against sue and settlement it has put activists in the driver's seat when it comes to federal policy and the environmentalists that have been appointed to run the EPA are actively conspiring with them. In the last two years we've seen friendly lawsuit settlements reopen and in some cases overturn sound registration review decisions previously made by the agency. As a result, numerous pesticide chemistries that have been safely used in North Dakota for decades will now be saddled with additional use restrictions and in some cases uses will be completely canceled.

Now the EPA is proposing unworkable and unenforceable land use restrictions on pesticide labels in the guise of Endangered Species

protection which will have to be enforced by state agencies. When these unworkable, dictated land management practices do not achieve their desired result it will make it that much easier for environmentalists to bring additional citizen suits that will bring further restrictions.

The Commissioner has been very engaged with other state leaders and our Congressional Delegation in efforts to push back against these new unworkable policies. Attached with my testimony is some example information as well as correspondence from Commissioner Goehring to the EPA regarding some recent decisions.

Commissioner Goehring urges you to please consider this resolution and give it a do pass. Thank you, Chairman Porter, and committee members. I would be happy to answer any questions you might have.

COMMISSIONER
DOUG GOEHRING

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NORTH DAKOTA
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February 14, 2023

SUBMITTED ONLINE VIA https://www.regulations.gov/

Public Comments Processing
Attn: EPA-HQ-OPP-2022-0908
U.S. Environmental Protection Agency

Administrator Michael S. Regan
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460-0001

RE: North Dakota Department of Agriculture (NDDA) comments on U.S. Environmental Protection Agency (EPA) proposal to adopt the 2022 Appendix to the Endangered Species Act (ESA) Workplan Update: Nontarget Species Mitigation for Registration Review and Other FIFRA Actions EPA-HQ-OPP-2022-0908

Dear Administrator Regan,

The EPA proposes to promulgate the ESA Workplan Update. For the reasons stated herein, NDDA strongly opposes this ESA Workplan Update. NDDA recommends EPA withdraw its ESA Workplan Update in its entirety. If EPA does not withdraw the ESA Workplan Update in its entirety, NDDA recommends that EPA substantially revise it.

North Dakota producers require safe and effective crop protection tools. NDDA supports the continued development of reliable pesticides that efficiently protect crops and that are environmentally conscious. The ESA Workplan Update is unbalanced. Its newly proposed restrictions are highly unwarranted and will have devastating impacts on growers, pesticide applicators, the state's agriculture industry[1], and food security.

[1] North Dakota agriculture contributes considerably over 30 billion dollars in economic activity annually to the state. As a prime exporter of agricultural products, North Dakota is often cited as the "breadbasket of the world." North Dakota is the country's 10th largest agricultural exporting state. North Dakota produces over 50 different commodities. North Dakota farmers lead the nation in the production of more than a dozen important commodities, among them spring and durum wheat, rye, food grains, assorted beans, barley, flaxseed, canola, honey, sunflowers, pulse crops and more. Of North Dakota's approximately 775,000 residents, only about three percent are farmers and ranchers. Nonetheless, agriculture broadly supports nearly 25 percent of the state's workforce, which is higher than the national average of 19 percent. Agriculture remains the leading industry in North Dakota.

Any workplan must be feasible and serve to help protect endangered and threatened species, while not hampering responsible and lawful use of essential crop protection tools. The proposed ESA Workplan Update was unnecessarily rushed, is consequently defectively drafted, and ultimately misses the mark.

Upon implementation, the proposed ESA Workplan Update would not provide regulatory certainty, nor would it adequately ensure growers have ready access to critical crop production tools to properly manage pests. The ESA Workplan Update serves to misuse the ESA and the effective long-established pesticide Registration Review process to unnecessarily restrict pesticides and unduly burden North Dakota farmers.

EPA's proposed interim ecological mitigation and other proposed label language.

Section III of the ESA Workplan Update details EPA's proposed interim ecological mitigation and other proposed label language. The proposed label restrictions are overly conservative and reduce availability of necessary pesticides without increased species protection.

On page 8 of the ESA Workplan Update, EPA states: "Thus, EPA will be placing a greater emphasis on addressing ecological risks while still balancing pesticide benefits and the potential impacts of mitigation." In practice, the ESA Workplan Update simply attempts to decrease EPA's statutory responsibilities regarding endangered species by highly negatively impacting responsible and safe pesticide use.

In short, EPA has casually proposed "off the shelf" mitigation measures instead of using much more effective targeted analysis of usage data, siting information, and use-specific considerations that collectively would conscientiously and scientifically eliminate many areas where such mitigation measures would be necessary.

Pesticide products currently on the market appropriately balance ecological risk-mitigation with effective pest management. Notwithstanding, there is currently still a lack of effective products to manage insects, for example in relation to sunflowers and sugar beets. Growers require critical crop protection tools that are affordable, effective, and safe. The ESA Workplan Update will promote the exact opposite.

Pesticides remain essential to protect crops. North Dakota farmers can face significant crop loss or financial ruin if they are unable to access or cannot effectively apply the only crop protection tools approved for their respective crops against targeted pests. Pesticides are also essential components to many important conservation practices, including no-till and cover crops. In many cases, the ESA Workplan Update would compel growers to use crop protection alternatives that are substantially less effective and much more expensive.

Continually exaggerating ecological risks will result in over-complicated and difficult to understand pesticide labels, more pesticide-use exclusion areas, and increased pest resistance. The ESA Workplan Update will adversely impact North Dakota producers and applicators, and result in lost revenue, future difficulties in managing resistant pests, and potentially even foster improper pesticide use.

Instead of advancing and promulgating its proposed ideological ESA Workplan Update, EPA should instead consistently strive to maintain a fair, reasonable, and balanced scientific approach to pesticide registration decisions – one that fully considers actual risks, crop protection benefits, and targeted pest resistance.

FIFRA interim ecological mitigation measures.

Section III of the ESA Workplan Update discusses a menu of FIFRA interim ecological mitigation measures for conventional and biological pesticides used on agricultural crops. It proposes a mitigation measure requiring surface water protection statements for pesticide users, when precipitation occurs or is forecasted, professedly to reduce ecological risk from movement of pesticides off the field through runoff or erosion.

This proposed artificial mitigation measure would be of exceedingly limited usefulness and should be either entirely deleted or substantially revised. Moreover, as a practical matter, this proposed mitigation measure generally would be unenforceable by a FIFRA inspector.

Overbroad spray drift buffers.

The ESA Workplan Update also proposes numerous overbroad spray drift buffers:

- Spray drift buffers from aquatic habitats (e.g., lakes, reservoirs, rivers, permanent streams, wetlands or natural ponds, estuaries, and commercial fish farm ponds) and conservation areas (e.g., public lands and parks, Wilderness Areas, National Wildlife Refuges, reserves, conservation easements).

- Conservation buffers (small areas or strips of land in permanent vegetation designed to intercept pollutants and manage other environmental concerns) and other conservation measures to reduce ecological risk from movement of pesticides off the field through runoff or erosion.

This proposed label statement is not authorized under FIFRA. EPA should not propose broad, vague, and unenforceable drift label language such as "could cause harm" and "could cause an adverse effect," etc., or "do not drift," which would be utterly impossible to achieve under all reasonable circumstances. EPA should instead propose to implement a general straightforward, informative, and enforceable drift statement such as "Follow label directions to reduce the potential for drift incidents."

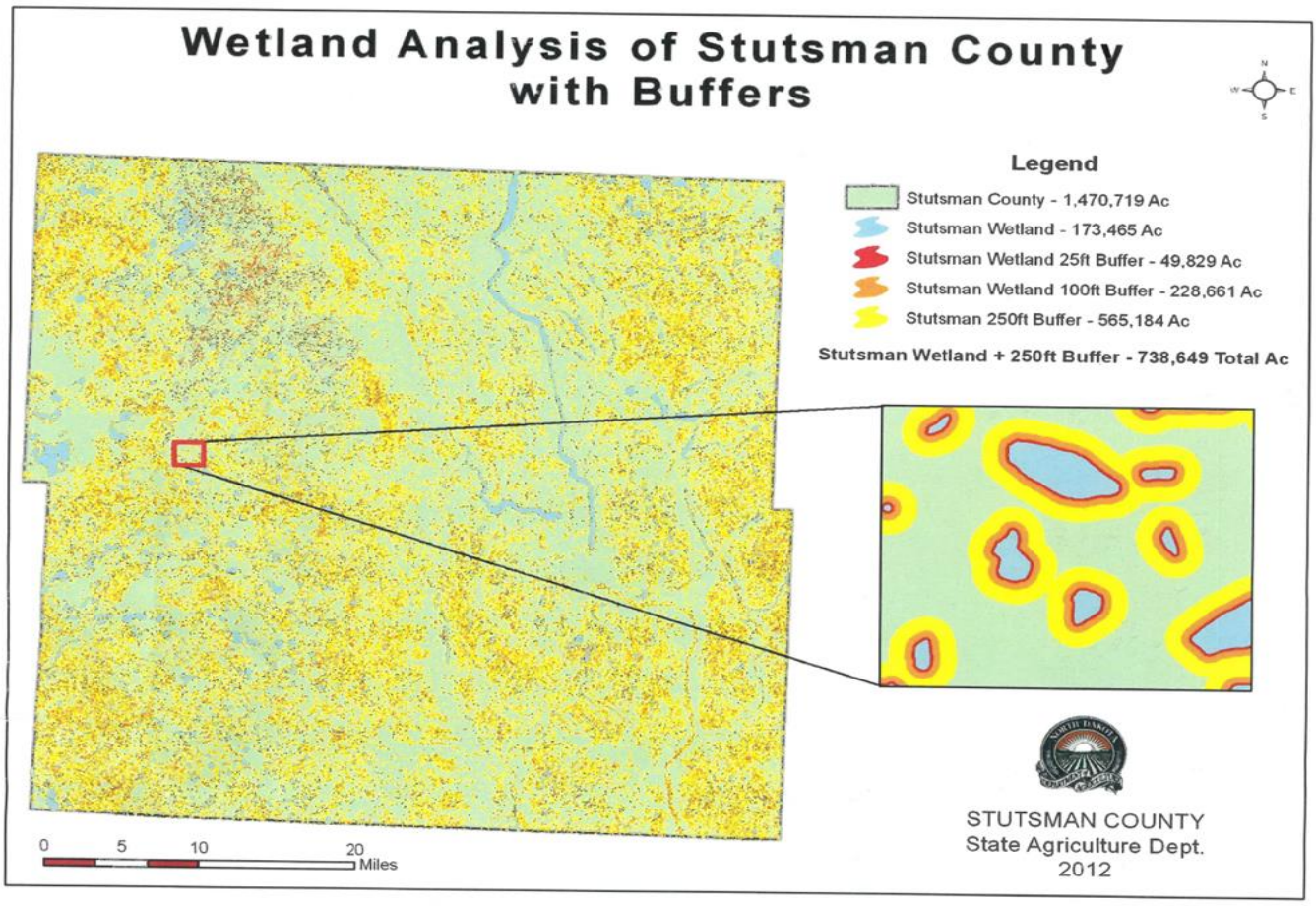
What's more, buffers around some waters in North Dakota might be appropriate for a small number of pesticides. However, applying this label language broadly to almost all pesticides is highly unwarranted and accordingly very problematic.

It is vital that EPA realistically characterizes and quantifies the risks associated with pesticide drift specific to particular terrain, and consequently takes proper and limited

regulatory actions that avoid negative, unnecessary impacts to agriculture. A one-size-fits-all conservation buffer approach is entirely unworkable.

Mitigation measures that might work in Hawaii or New York probably are much less likely to be of any significant benefit within Nebraska or Florida. In this vein, EPA-proposed mitigation measures such as spray drift buffers are almost entirely unworkable in North Dakota. For example, North Dakota is home to the prairie pothole region with more acres of small surface waterbodies than many states combined.

The below map provides additional context as to why mitigation measures must be better tailored to specific localities and why general national standards are not practical. This map displays acreages in just one county of North Dakota. Stutsman county contains over a million acres of high-quality farmland and lies directly in the heart of the prairie pothole region.



Stutsman county contains 1,470,719 total acres. There are 173,465 acres of wetlands in Stutsman county. Mandating a 25-foot buffer around all waterbodies in Stutsman county would equate to a buffer land use of 49,829 acres. This is nearly 50,000 acres of land taken out of effective agriculture production.

Even more impractical, requiring a 100-foot buffer around all waterbodies would equate to 228,661 acres of land solely used for spray drift buffers. That would comprise well over 15% of the total acreage in the county and over 17% of the total land area in Stutsman county – essentially taking almost one quarter million acres of agricultural land taken out of viable production in one North Dakota county alone.

To be sure, this is just one example of one county taken out of North Dakota's 53 counties. The ESA Workplan Update would inevitably result in unnecessary negative impacts to all counties throughout the state and throughout the country.

Prohibiting responsible pesticide use on tens of millions of acres of agricultural land in North Dakota, by creating arbitrary and unnecessary buffer zones, would substantially lower crop production, greatly decrease profitability for producers, create pest resistance, and potentially even foster irregular or irresponsible pesticide use.

Application of similar ecological mitigation to pesticides with similar exposure pathways, uses, and risk profiles.

Page 10 of the ESA Workplan Update states:

> Applying similar ecological mitigation to pesticides with similar exposure pathways, uses, and risk profiles also ensures that, when choosing pesticide products, pesticide users have repeated and consistent incentives to use pesticides with fewer ecological risks overall. This is because, in general, the mitigation options are more stringent for pesticides with higher ecological risks than for those with lower ecological risk.

This above statement is highly disingenuous. Pesticide users already responsibly utilize Integrated Pest Management (IPM) and consequently choose applicable products based upon such germane factors as efficacy on target pests, terrain, persistence, weather conditions, ease of application, soil conditions, manufacturer service and support, and cost. Myopically compelling a pesticide user to use only those products with purported lower "environmental risk" would consequently lead to significantly increased costs, increased pests, and decreased yields.

Mitigation measures to apply broadly to herbicides with similar fate and effects profiles.

Page 16 of the ESA Workplan Update states "Because individual herbicides do not necessarily share the same fate properties and potential for effects, EPA expects to develop two or more suites of mitigation measures to apply broadly to herbicides with similar fate and effects profiles."

Applying merely a couple of overly broad "one size fits all" mitigation measure suites will lead to unnecessary and unrealistic restrictions in large parts of the country. Two suites of mitigation measures would be far from adequate, would be exceedingly ineffective, and would unavoidably frustrate both FIFRA regulators and pesticide users.

EPA should include many more flexible mitigation measures when there is a lack of other products with similar efficacy and/or cost available for that pest and/or that crop. Additionally, EPA should develop realistic mitigation measures that consider and appropriately balance the benefit of the pesticide in relation to its potential impact to nontarget species.

Feedback on standardized Bulletins Live Two (BLT) language.

Page 21 of the ESA Workplan Update requests feedback on standardized Bulletins Live Two (BLT) language. Applicators have used the longstanding BLT system for years. It allows small scale, precise restrictions to protect specific threatened and endangered species rather than imposing heavily conflated blanket restrictions. EPA should prioritize BLT instead of attempting to create overly broad, nationwide, complicated multi-chemical label restrictions.

EPA should significantly improve the BLT system by:

(1) Working directly with states when designing bulletins;

(2) Having more precise and locality specific restrictions at the county level; and

(3) Permitting growers more time to plan for planting needs, given that most growers plan and decide on pesticide use at least 9-12 months in advance.

- Six months is entirely insufficient for growers to purchase inputs or necessary equipment to change tillage, planting, or application methods. EPA should provide a minimum of 12 months, so producers can reasonably and effectively plan at least a year in advance.

Additional criteria for proposing mitigation that EPA should consider.

Page 24 of the ESA Workplan Update requests specific feedback on several questions:

- Regarding the surface water protection statements, are there additional criteria for proposing mitigation that EPA should consider?

Yes. Specifically, if a state has current, accurate pesticide monitoring data showing the chemical in question is not an issue in that state, EPA consequently should sensibly remove unnecessary related pesticide restrictions entirely.

Descriptions of the pick list mitigation measures.

The ESA Workplan Update requests the following feedback:

- Are the descriptions of the pick list mitigation measures in Section 4 clear? If not, please suggest alternative language.

If EPA does not responsibly withdraw its proposed ESA Workplan Update, the pick list mitigation measures require substantial revision. Several of the descriptions in the picklist are entirely unworkable in North Dakota.

Field terracing, contour farming, grassed waterways, riparian buffer zones, runoff retention ponds, strip cropping, and ally cropping are highly impractical, and in many cases, impossible to utilize in numerous areas of North Dakota – given its unique landscape and terrain, current farm technology, and equipment limitations.

However, when these several pick-list options are consequently *de facto* removed from the list because they are not feasible, North Dakota growers consequently have few to no remaining available remaining choices. Accordingly, EPA should provide many more applicable alternative realistic mitigation options for producers to accommodate these risk reduction measures.

Moreover, the listed pick list mitigation measures are highly suspect. EPA does not adequately quantify or otherwise explain any cognizable benefits to the environment obtained through using any of these proposed mitigation measures. EPA does not provide any technical evidence of efficacy or necessity for any of them. To bolster its credibility and foster better cooperation by producers, EPA should thoroughly explain its reasoning and solidly detail the science underlying such measures.

North Dakota has a robust pesticide surface water monitoring program and many pesticides that may utilize this label language are not problematic in our state and accordingly these proposed label restrictions remain entirely unnecessary in the state. EPA should explicitly exempt North Dakota, and all other such inapplicable states, from all unnecessary label restrictions.

Other measures that are effective in controlling dissolved runoff.

The ESA Workplan Update further asks:

- Are there other measures that are effective in controlling dissolved runoff that should be included in the pick list? Please include supporting data with any suggestions.

Yes. If a state has monitoring data or a practical method to evaluate the pesticide and can show the applicable chemical has minimal or no risk, EPA should reasonably entirely forego the proposed pick list mitigation measure requirements. As mentioned earlier, North Dakota has a robust pesticide surface water monitoring program and many pesticides that may utilize this label language are not problematic in the state and consequently these label restrictions are completely unnecessary.

North Dakota, and many other states, readily have data and practical methods to evaluate pesticides and related risks. EPA should accordingly rightly defer to state assessments and not pursue its proposed overly broad one-size-fits-all proposed structure.

Overly detailed and complex requirements for mitigation measures.

Furthermore, placing the burden on FIFRA inspectors to inspect and enforce complex, overly detailed requirements for these mitigation measures as part of pesticide labeling is inherently irresponsible. For example, in the vegetative filter strip language, the ESA Workplan Update says:

> Establish and maintain vegetative filter strips such that the area immediately upslope must eliminate or substantially reduce concentrated flow and promote surface sheet flow runoff. The design and maintenance must consider a 10-year lifespan for the vegetative filter strip. Where there is water moving across a field that is likely to move soil, structural elements must be added within the field to prevent erosion and promote sheet flow across the filter strip.

This requirement would be impossible to effectively and fairly enforce. A field inspector would be unable to verify all of these conditions during a field visit. Nor would a field inspector be able to verify similar applicable conditions for other mitigation measures proposed in the ESA Workplan Update.

Additionally, neither the EPA, nor states, should issue FIFRA violations for failing to use, or improperly implementing, these types of mitigation measures. This proposed verbiage is well outside the scope of acceptable pesticide label language, pesticide use, and likely outside many states' legal authorities.

Mitigation checklist is not readily available.

Moreover, EPA laxly referring pesticide users to an external website to view a checklist is unnecessarily confusing and inconvenient to the user. EPA can do much better. All pertinent information regarding pesticide use and regulation should be clearly written, understandable, and readily accessible to the pesticide applicator or user.

Superfluous ecological risk reductions from spray drift – spray drift buffers.

Page 39 of the ESA Workplan Update discusses ecological risk reductions from spray drift. Spray drift is already unlawful and it is not an issue when pesticide products are used per label requirements by competent, trained applicators. NDDA concurs with reasonable drift reducing label restrictions such as wind speed restrictions and release height restrictions.

However, NDDA does not support spray drift buffers around aquatic habitats or wildlife conservation areas. As previously discussed, a large portion of North Dakota contains tens of thousands of prairie potholes. Unnecessary no-spray buffers around aquatic habitats would take substantial amounts of cropland in North Dakota out of production. It would increase pest pressure, drive pest resistance, and understandably frustrate producers.

Exemption 4, regarding proposed exemptions for the no-spray buffers around wild conservation areas, is unworkable, and raises serious concerns. The purely bureaucratic

requirement to obtain a consultation, when the wildlife conservation area is not critical habitat for any threatened or endangered species, is pointless.

Moreover, the U.S. Fish and Wildlife Service (USFWS) is not adequately staffed to timely conduct and provide this huge number of additional consultations. This buffer requirement would only serve to create hostility between the USFWS and landowners adjacent to USFWS-managed lands.

Any requirement to mandate no-spray buffers around wildlife conservation areas is exceedingly short-sighted and inevitably would lead to antagonism from adjacent landowners and producers, foster improper pesticide use, cause land devaluation, reduce yields and revenue, and hinder relationships between growers, FIFRA agencies, and the USFWS.

NDDA strongly recommends EPA remove from ESA Workplan Update the proposed no-spray buffers language in its entirety.

Feedback on example language for mitigation.

Page 40 of ESA Workplan Update states "EPA seeks feedback on the example label language for this mitigation detailed in the table below. Additionally, EPA is requesting specific feedback on the following questions:"

- EPA is exploring using wind-directional buffers more broadly as they are less impactful to users by reducing the instances where spray drift buffers are needed to minimize ecological risk. A wind-directional buffer means that a user need only apply a drift buffer in the direction the wind is blowing, rather than all sides of a fields. Should EPA shift to requiring wind-directional buffers to reduce spray drift associated with aerial, ground boom, and/or airblast applications? Why or why not? Please be specific and support your position with data where available.

  Further, are there circumstances where it is more desirable to have wind-directional buffers than others? Historically, to address ecological risk (and human health risk) under FIFRA, EPA has required spray drift buffers that apply to all sides of a field that are adjacent to a water body and/or conservation area, regardless of the wind direction.

  More recently, however, wind-directional buffers have been proposed as mitigation measures to address listed species exposure (e.g., methomyl PID) and have been included in FWS and NMFS biological opinions for malathion.

  The spray drift buffers in the table below apply to all sides of a field that are adjacent to aquatic habitats and/or conservation areas; however, pending public comment on wind directional drift buffers, EPA may propose wind-directional buffers. Example language for a wind-directional buffer would be the following:

- "Do not apply within [X] feet of aquatic habitats (such as, but not limited to, lakes, reservoirs, rivers, permanent streams, wetlands or natural ponds, estuaries, and commercial fish farm ponds) when the wind is blowing toward the aquatic habitat."

- "Do not apply within [X] feet of any conservation areas (e.g., public lands and parks, wilderness areas, national wildlife refuges, reserves, conservation easements) when the wind is blowing towards the conservation area."

In almost all instances, NDDA opposes mandated no-spray buffers and recommends they not be implemented. Buffers are impractical, frustrating for applicators, do little to protect neighboring areas, and create increased pest pressure and pest resistance. NDDA strongly recommends they not be required.

In the alternative, if buffers are going to be required, they must be wind-directional only and not hinder effective crop protection. EPA must fully recognize that certified pesticide applicators receive extensive training and conscientiously already consistently and responsibly utilize drift reduction best practices.

Reduced distances for spray drift buffers when other drift reduction technology is used.

EPA in its ESA Workplan Update further asks if it should consider reduced distances for spray drift buffers when other drift reduction technology is used (e.g., drift reducing agents/adjuvants). It then asks, if so, to what extent do other drift reduction technologies reduce spray drift such that buffer distances can be reduced?

Of course, EPA must consider this. This appears to be a strawman request for predetermined feedback. EPA asks feedback for the obvious in an apparent artificial attempt to bolster its ultimate proposal for spray drift buffer requirements.

In this regard, the requested and utterly obvious feedback follows:

> Growers and applicators conscientiously expend substantial time and resources investing in precision agriculture and should consequently be properly incentivized for doing so. Growers routinely utilize precision agriculture and integrated pest management (IPM). They apply precise amounts of pesticide in specific GPS-mapped areas to best mitigate risk. If precision agriculture and IPM is utilized, any mandated buffer area should be accordingly concomitantly proportionally reduced.

However, to emphasize once again, mandating spray drift buffers is entirely unworkable in North Dakota. North Dakota should be fully exempted for any such requirement. Easements, land-use agreements, and any other conservation program with enrolled acres on private land must be expressly excluded. If any spray drift buffers are

promulgated, they should be modified to include only wildlife conservation areas under exclusive federal jurisdiction or management.

Pesticide-treated seed.

Page 46 of the ESA Workplan Update discusses pesticide-treated seed. EPA considers additional labeling requirements and seeks a FIFRA section 3(a) rule to allow for enforcement of the misuse of pesticide-treated seeds. NDDA opposes any such changes to the current pesticide-treated seed laws, rules, or practices. EPA must be much clearer regarding requirements to manage treated seed.

Farmers should not be responsible for seed company practice requirements in terms of adding dust reduction or fluency agents or be responsible for any additional seed treatment additives creating unintended contamination of farm fields, especially given the current sensitivity toward some chemical additives like PFAS. EPA-listed proposed burial depths for spilled seed are entirely impractical and should be substantially revised. Producers should continue to be permitted to recover spilled seed.

Proposed ESA pesticide label language.

EPA proposes the following overstated language be included on all pesticide labels:

> *It is a Federal offense to use any pesticide in a manner that results in an unauthorized "take" (e.g., kill or otherwise harm) of an endangered species and certain threatened species, under the Endangered Species Act section 9.*

In proposing this overbroad language, EPA patently seeks to weaponize the ESA in order to significantly unnecessarily restrict pesticide use or even *de facto* ban certain pesticide use. The language is also deliberately misleading without the inclusion of additional pertinent language of what would specifically constitute an "authorized take" in the use of the pesticide.

The ESA requires EPA to ensure that registered pesticides do not unreasonably harm federally listed threatened or endangered species. However, it also requires that species conservation should be accomplished in a way that responsibly minimizes adverse impacts to agriculture production.

This above EPA-proposed label language is ill-conceived scaremongering. It is designed to highly exaggerate threats of criminal prosecution, needlessly stoke public fear, foment regulatory uncertainty, and create legal vulnerability among agriculture producers and pesticide applicators. EPA should withdraw this proposed extremely over-stated and irresponsible label language in its entirety.

Conclusion and recommendation.

NDDA <u>opposes</u> EPA's proposed ESA Workplan Update.

Without certain pesticide products, North Dakota producers will have substantial difficulty growing crops that feed Americans and public health agencies will lack the essential tools needed to combat insect-borne diseases. EPA's workplan, as currently proposed, overly streamlines ESA consultations and accordingly does not operate to better balance wildlife protection with responsible and safe pesticide usage.

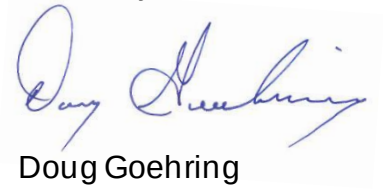
This proposed ESA Workplan Update does not serve to conserve wildlife while allowing North Dakota producers ready access to the safe, affordable, and critical tools they require to produce our nation's food, feed, fuel and fiber dependably and efficiently.

ESA-based pesticide labeling restrictions must be precise, detailed, effective, and common-sense mitigation measures, not a nationwide over-broad one-size-fits-all approach that makes crop protection applications much more difficult while providing negligible if any benefit to threatened and endangered species.

NDDA strongly recommends that EPA withdraw its ESA Workplan Update in its entirety. If EPA unreasonably declines to do so, NDDA recommends EPA significantly revise its proposed ESA Workplan Update to make it much less ideological and instead much more scientific, balanced, effective, enforceable, and workable.

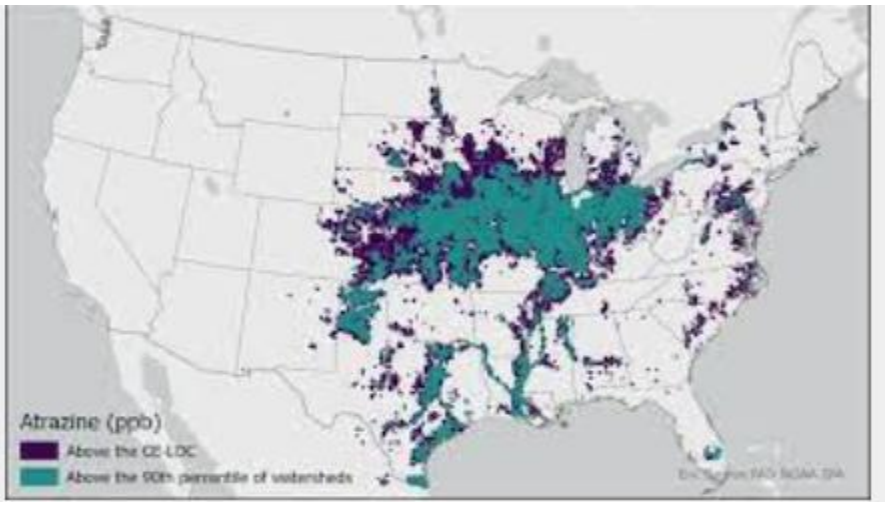
NDDA strongly recommends EPA return back to the drawing board and coordinate closely and in good faith with agriculture producers as well as with other core agriculture stakeholders such as pesticide manufacturers, distributors, and applicators. NDDA recommends that EPA then conscientiously develop and consequently propose a substantially modified and much more effective ESA Workplan that will protect endangered species while fully recognizing and supporting the responsible use of pesticides.

Sincerely,

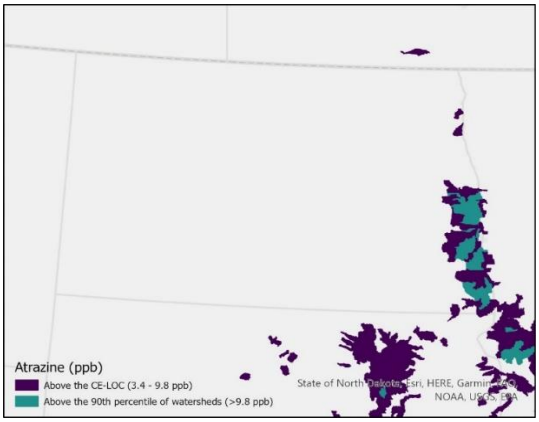


Doug Goehring
North Dakota Agriculture Commissioner

- EPA's proposed **atrazine use restrictions** will have a huge impact on agriculture
    - Used a court case to reopen previous decision and cited rejected science documents as basis for their decision and ignored EPA-appointed scientific advisory panel
    - Atrazine is safe & effective (over 7000 studies show it is)
    - Most new EPA-proposed mitigation measures are unenforceable
    - Over 72% of U.S. corn acres would be out of compliance if proposal goes through
    - Entire Corn Belt and Sorgum Belt are affected by new restrictions
    - No one in EPA will give a clear definition of "highly erodible" land



Areas subject to new EPA restrictions and extensive new mitigation measures in ND are on the <u>lower SE border part of the state</u> which are some of the flattest, least runoff prone areas in the country



- Proposed Restrictions include:
  - Banning all aerial applications
  - Prohibiting applications to "saturated" soil
  - Prohibiting applications if rain is forecasted within 48 hours of application
  - Restricting rates and forcing growers to choose from a pick list of options to reduce runoff

Atrazine – Sue & Settle

Sep 2020, EPA finalized re-registration regulations for safe herbicide atrazine bringing regulatory certainty to producers

Nov 2020, several environmental activist groups sued EPA in 9th Circuit, saying EPA failed to follow FIFRA

EPA could have easily fought and won this lawsuit – instead it put its hands in the air and immediately surrendered – it gave up and chose not to defend itself

Gave entirely into demands of environmental groups to "reassess" atrazine

Even though completed assessment less than two years earlier, EPA now proposing huge restrictions that will, in effect, ban atrazine in many areas of U.S.

<u>NDDA will be providing comments to EPA on proposed atrazine restrictions</u>

EPA Sue & Settle lawsuits

EPA misses most of its regulatory deadlines.

When deadline missed, a citizen suit can be filed against EPA (made by environmental activist groups). Then, in a "run around' sue & settle, EPA negotiates a settlement with the activist group to promulgate an EPA rule or to take other action.

Court agrees with settlement – limits other stakeholder participating in rulemaking

EPA Again permits "sue & settle" and "friendly lawsuits"

Last Administration -

EPA 2017 policy memorandum stopped EPA sue & settle lawsuits. It prohibited EPA from regulating through litigation by participating in "friendly lawsuits" and engaging in cozy "sue & settle" litigation practices

New Biden administration –

March 18, 2022, current EPA Administrator Regan rescinded EPA's 2017 policy memorandum.

- Sue & Settle lawsuits may once again drive EPA regulatory rulemaking.
- EPA may again enact regulations by exploiting litigation pending against it as cover
- EPA can advance rulemaking that otherwise, under even-handed administrative processes, would be much more difficult to do.

The U.S. Congress, House Committee on Oversight and Reform

- currently investigating EPA Administrator Regan's decision to rescind EPA's previous 2017 policy memorandum

- on July 28, 2022, thirty-six members of Congress demanded Administrator Regan provide them, by tomorrow (Aug 11, 2022) all documents and communications relating to:

  (1) EPA 2022 recission of the previous EPA 2017 memo

  (2) current litigation against US regarding sue and settle cases; and,

  (3) EPA and any outside groups that is applicable in any way to sue and settle litigation.

STATE OF NORTH DAKOTA
DEPARTMENT OF AGRICULTURE
600 E BOULEVARD AVE, DEPT 602
BISMARCK, ND 58505-0020

DOUG GOEHRING
COMMISSIONER

August 11, 2022

SUBMITTED ONLINE VIA https://www.regulations.gov/

Public Comments Processing
Attn: EPA-HQ-OPP-2013-0266-1622
U.S. Environmental Protection Agency

The Honorable Michael Regan
Administrator, U.S. Environmental Protection Agency
U.S. Environmental Protection Agency Docket Center (EPA/DC)
1200 Pennsylvania Ave. NW
Washington, DC 20460-0001

Re: North Dakota Department of Agriculture comments on U.S. Environmental Protection Agency proposal to completely revise its previously established, finalized, and published 2020 atrazine re-registration through its current 2022 "Proposed Revisions to the Atrazine Interim Registration Review Decision, Case Number 0062" (Federal Register/Vol. 87, No. 127/Tuesday, July 5, 2022/Proposed Rules / 39822 - 39824)

Dear Administrator Regan,

The Environmental Protection Agency (EPA) once again proposes to impose severe unnecessary label restrictions on the use of the safe and effective herbicide atrazine. EPA recently released for public comment its many proposed additional strict limiting revisions to its previous already established and settled atrazine Interim Decision (2020 ID). EPA finalized and published this 2020 ID less than two years ago in September 2020 pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

The North Dakota Department of Agriculture (NDDA)[1] submits these comments in response to these EPA 2022 Proposed Revisions to the Atrazine Interim Registration Review Decision

[1] North Dakota agriculture contributes considerably over 30 billion dollars in economic activity annually to the state. As a prime exporter of agricultural products, North Dakota is often cited as the "breadbasket of the world." North Dakota is the country's 10th largest agricultural exporting state. North Dakota produces over 50 different commodities. North Dakota farmers and ranchers lead the nation in the production of more than a dozen important commodities, among them spring and durum wheat, rye, food grains, assorted beans, barley, flaxseed, canola, honey, sunflowers, pulse crops and more. Of North Dakota's approximately 775,000 residents, only about three percent are farmers and ranchers. Nonetheless, agriculture broadly supports nearly 25 percent of the state's workforce, which is higher than the national average of 19 percent. Agriculture remains the leading industry in North Dakota.

(2022 PRAIRRD), Case No. 0062. EPA in its recently published 2022 PRAIRRD proposes to place numerous arbitrary and capricious labeling restrictions on the agricultural use of atrazine.

For the reasons stated herein, NDDA strongly opposes this 2022 PRAIRRD. These newly proposed restrictions are highly unwarranted, are not based upon the best science available, and will have devastating impacts on North Dakota farmers and our nation's food supply.

NDDA strongly recommends and requests that EPA **not** arbitrarily enact and implement its unsupported and unnecessary proposals to:

(1) Prohibit application of atrazine when a storm event (likely to produce runoff from the treated area) is forecasted to occur within 48 hours following application;
(2) Prohibit all aerial applications of all formulations;
(3) Restrict for growers of sorghum, sweet corn and field corn, annual application rates to 2 pounds per acre or less per year; and,
(4) Slash the acceptable regulatory level of atrazine in watersheds – called the concentration-equivalent level of concern (CE-LOC)[2] – to an ultra-low 3.4 parts per billion (ppb), well below EPA's previously established threshold of 15 ppb CE-LOC.

More specifically, NDDA strongly recommends and requests that EPA withdraws its 2022 PRAIRRD, in its entirety. NDDA further recommends and requests EPA then proposes a safe, sound, and science-based higher CE-LOC above 15 ppb – between the range of 16 ppb and 27 ppb or higher. In the alternative, NDDA recommends and requests EPA to reaffirm and return to its previous atrazine 2020 ID.

If EPA does not withdraw its misguided 2022 PRAIRRD, before EPA implements any portion of it, EPA must "seek [meaningful] external peer review of the risks to the aquatic plant community that underlies this proposed risk management strategy"[3] by immediately convening a formal independent trusted Scientific Advisory Panel (SAP), open to the public, to determine whether the best science available supports EPA's proposed exceedingly low CE-LOC revision and its other proposed mitigation measures further unreasonably limiting atrazine use.

I. Atrazine provides safe and effective weed control.

Atrazine is a safe and highly effective pre- and post-emergent triazine herbicide used to control numerous broadleaf and pest grassy weeds. Atrazine remains a critical and safe pesticide in a North Dakota farmer's weed control toolbox. Appropriate use of atrazine supports agricultural production, soil health and conservation, water and natural resource quality, conservation tillage, and a healthy sustainable environment.

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[2] The atrazine concentration-equivalent level of concern (CE-LOC) is a 60-day average exposure level used when assessing potential risk to aquatic eco-systems (rivers, lakes, streams, etc.) to determine what, if any, additional monitoring or pesticide registrant label mitigation measures may be appropriate.

[3] *EPA Seeks Public Comment on Additional Ecological Mitigation Measures for Atrazine*, June 30, 2022, https://www.epa.gov/pesticides/epa-seeks-public-comment-additional-ecological-mitigation-measures-atrazine.

It is largely used by growers to control invasive broadleaf and grassy weeds by effectively disrupting their ability to properly photosynthesize. Throughout the entire growing season, it efficiently prevents these destructive weeds from competing with and consequently stifling agricultural crops.

Atrazine is tremendously time-tested. This herbicide was first registered well over sixty years ago in 1958. For over six decades, atrazine has been a safe, effective, and dependable crop protection tool to significantly improve crop yields and control the spread of resistant weeds – allowing farmers to efficiently grow crops innovatively and productively, in ways that are both environmentally and economically sound.

Atrazine is the most scientifically studied and exhaustively tested agricultural herbicide in world history, with overwhelming data showing it to be safe and effective. Atrazine has passed and continues to pass some of the most rigorous safety testing ever conducted. Numerous EPA-reviewed studies consistently show that atrazine does not cause cancer nor does atrazine drinking water exposure negatively affect human health.[4] No agriculture herbicide has been studied more thoroughly or has a longer safety record.

There are well over 7,000 individual academic, government, industry, and private scientific studies in the U.S. and abroad that have scrutinized atrazine's safety and efficacy. This mountain of technical research studies has consistently shown that atrazine is safe. EPA has not rebutted or otherwise reliably disputed the validity of this considerable compendium of scientific safety research and data.

Food-related crops across the nation must compete with thousands of species of weeds. Generally, weeds grow faster than food crops and, unless properly controlled, will substantially reduce yields. These and other weeds drastically reduce productivity, taint crops, interfere with harvests, and destroy native habitats. Crop agriculture, to be productive and successful, requires a variety of effective tools to kill destructive weeds.

Many agriculture producers in North Dakota regularly must fight against a significant number of hard-to-control herbicide resistant weeds like palmer amaranth, waterhemp, and other varieties of pigweed, as well as kochia.[5] These and other herbicide resistant invasive weeds can easily wreak severe havoc on a crop and sabotage its yield potential. Without atrazine, density of these weeds and other problematic pest grass and broadleaf weeds within numerous crops will inevitably dramatically increase.

The safe use of atrazine significantly increases productivity on North Dakota farms because properly treated crops do not have to fight pre-emergent and emerging weeds for limited crop area resources like water, light, growing space, and soil nutrients. Effective weed control, with continued availability of atrazine, remains critical in the modern production of crops and for many farmers' economic sustainability.

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[4] See generally *U.S. EPA Atrazine Updates*, https://archive.epa.gov/pesticides/reregistration/web/html/atrazine_update.html.

[5] See generally *A Guide to North Dakota Noxious and Troublesome Weeds* (revised April 2020), NDSU Extension, https://www.ndsu.edu/agriculture/sites/default/files/2022-06/w1691.pdf.

II. Atrazine is critical to North Dakota agricultural production.

EPA should prudently withdraw its atrazine 2022 PRAIRRD and return to its 2020 ID, completed pursuant to FIFRA. In its 2020 ID, EPA – as part of its standard 15-year rolling re-evaluation – thoroughly and properly considered both risks and benefits arising from an atrazine re-registration. Atrazine is both very low-risk and very high benefit. So, in late 2020, EPA rightly re-registered it.

Atrazine continues to be one of the best low-application rate and reasonably-priced herbicides available to North Dakota farmers – who produce a good solid portion of the nation's "four Fs" – food, feed, fiber, and fuel. The loss of this trusted crop protection tool will significantly increase weed control costs and, more notably, take away a highly effective mode of action that producers critically need today to manage or mitigate the growing number of resistant weeds.

Atrazine has many practical and effective uses. Approximately 75% of all corn acres in North Dakota are protected by atrazine. Across the U.S., it protects an estimated over 70 million acres of domestic agricultural crops each year from yield-reducing weeds. It is applied on more than half of all U.S. corn acres, two-thirds of U.S. grain sorghum acres, and up to 90 percent of U.S. sugar cane. In all, more than 400,000 U.S. corn, sorghum and sugar cane growers steadfastly rely upon atrazine. This highly critical weed killer is also used effectively on a variety of other crops like canola as well as in non-agriculture settings, including nurseries, ornamentals, and turf grass.

EPA's unjustified 2022 PRAIRRD newly-proposed atrazine restrictions, if enacted, will negatively affect the economic viability of not only North Dakota farmers, but the entire U.S. agriculture economy. These recently proposed labeling requirements will impose arduous new controls and application limitations on atrazine. These restrictions will dramatically and unreasonably overly-ration when farmers may apply the product and how much of the product farmers may use. These highly ill-advised proposed restrictions will, in large part, outright ban this key crop protection tool in many fertile agricultural regions of the U.S.

Because atrazine is proven safe, economical, long-acting, and highly effective against a broad spectrum of weeds, including many herbicide-resistant weeds, it remains the second-most applied herbicide in the U.S. It can be used alone or, for optimal efficiency, in combination with other herbicides. Atrazine, when mixed with other herbicides, has a positive compounding effect that can significantly increase efficacy in mitigating herbicide resistance. For example, it safely can be mixed with other broadleaf herbicides to significantly enhance its effectiveness and more efficiently manage continually developing herbicide-resistant and other hard-to-control weeds. In spite of atrazine's long and consistent safety record and its many tangible benefits, EPA once again proposes numerous unworkable restrictions on its use.

These newly EPA-proposed atrazine application constraints could not come at a worse time. North Dakota agriculture is still recovering from substantial drought over the past two years, followed this Spring by excessive precipitation, continuing significant fertilizer shortages, and sky-high input costs. Coupled with current unprecedented inflationary high fuel and labor costs, volatile commodity prices, and resulting ever decreasing profit margins in an utterly brutal national economic recession, many North Dakota farmers continue to struggle to break even.

On top of all this, if EPA enacts its 2022 PRAIRRD, farming without atrazine – due to resulting yield loss, added weed pressure, and having to use much more expensive herbicides – could unjustifiably cost state producers up to an additional $60 per acre. EPA's proposed atrazine restrictions, with no cost-effective and viable alternatives available, sets many North Dakota farmers up for failure and could put many of these industrious farmers out-of-business.

Atrazine remains a vital tool in agricultural production. It permits these hard-working growers to increase yields with fewer resources, creating economic benefits for farmers and their surrounding communities – resulting in a bountiful, affordable, and safe food and feed supply to meet the needs of our increasing global population.

EPA would much better serve both the public at large and the regulated community by comprehensively reviewing, meaningfully reconsidering, and then duly withdrawing its exceedingly ill-advised and unsound atrazine restriction proposal.

III. EPA's proposed atrazine restrictions are scientifically unsound.

EPA has provided no legitimate or coherent scientific justification for its currently proposed 2022 PRAIRRD with its proposed substantial restrictions on atrazine – a highly effective and safe product that permits North Dakota growers to raise crops economically and sustainably. Moreover, EPA's proposed new restrictions do not properly consider that North Dakota farmers and all farmers necessarily must rely on a robust and diverse toolbox of weed control products.

Considering both risks and benefits arising from the re-registration, EPA recently reauthorized responsible atrazine use less than two years ago in September 2020. Despite that a solid foundation of peer-reviewed research demonstrates a safe aquatic life CE-LOC at 26 ppb or greater, EPA, as part of its atrazine re-registration review process,[6] approved, finalized, and published a much more conservative CE-LOC level of 15 ppb. In this 15-year reauthorization, EPA established this very conservative 15 ppb CE-LOC as a safe parameter for atrazine use.

Any reasonable CE-LOC is meant to be an acceptable scientific-based regulatory threshold imposed to adequately protect aquatic ecosystems from potential herbicide injury. The CE-LOC measures the 60-day average rolling concentration of atrazine in aquatic environments. No CE-LOC unjustifiably should be set so low that, for most regions of the country, it is unachievable. Any CE-LOC not solidly supported by the best science available is arbitrary and capricious.

However, after the change in presidential administrations, EPA then chose to reevaluate the atrazine 15 ppb CE-LOC it previously set and established less than two years earlier in late 2020. Less than eighteen months into this new administration, EPA issued its newly proposed scientifically unsupported atrazine restrictions.

Despite that there has been no subsequent change in the science – and with apparently little to no feedback from the public, states, farmers and other members of the regulated community,

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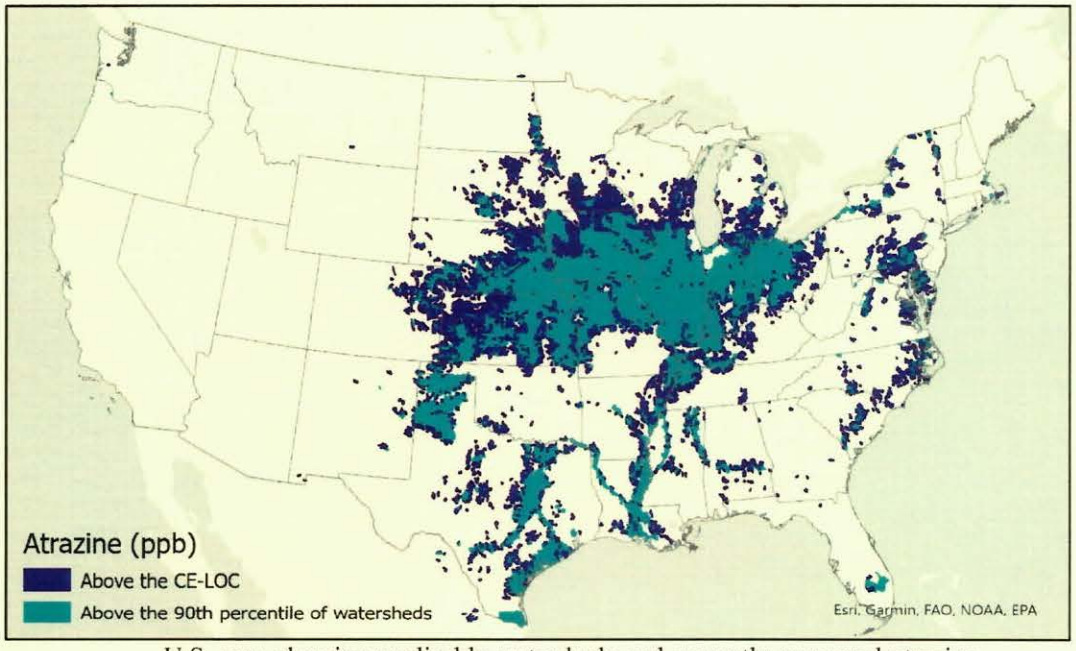
[6] Since 2006, FIFRA requires EPA every 15 years to re-evaluate the registrations of all currently registered pesticides. 7 U.S.C. § 136a(g)(1(A).

outside scientific advisors, industry, the U.S. Department of Agriculture, or any other primary stakeholders – EPA, deliberating in strict self-imposed isolation, determined the atrazine aquatic ecosystem CE-LOC in watersheds should be substantially reduced to an ultra-low level of 3.4 ppb.

In so doing, EPA proposes to reset the atrazine CE-LOC so restrictive that it is no longer commercially viable. If EPA's proposed 3.4 ppb CE-LOC threshold is made the regulatory standard, in many cases, atrazine cannot be used effectively.

EPA data indicates about one half of corn acres are over 9.8 ppb and another quarter of corn acres exceed its proposed ultra-low 3.4 ppb aquatic CE-LOC. Consequently, EPA's proposed hyper-low CE-LOC would place three quarters of U.S. corn acres, the whole Corn Belt, out of compliance. Likewise, across the nation's entire Sorghum Belt, atrazine will also be near impossible to apply.



- U.S. map showing applicable watersheds and currently measured atrazine ppb throughout the Corn Belt and Sorghum Belt.

With a designated unjustifiably low 3.4 ppb CE-LOC, many, if not most, farmers will be unable to apply atrazine. EPA's proposed 3.4 ppb CE-LOC is unsupported and entirely unreasonable. It would prohibit almost all safe labeled uses of atrazine. That being so, it readily appears EPA is determined to impose this *de facto* atrazine ban, eliminating every effective use of this critical product. The consequent impact upon corn and sorghum producers across the country will be substantial and unprecedented.

EPA's draconian proposal to limit atrazine use is scientifically unsound. It will drastically reduce production yields and result in substantial decreases in substantiable farming practices. EPA's current flawed and extremely low CE-LOC 3.4 ppb standard will destructively harm the nation's agriculture economy and environment.

Moreover, throughout EPA's recent highly truncated atrazine reevaluation process resulting in reducing the CE-LOC to an extreme, unprecedented, and unjustified 3.4 ppb, EPA was neither open nor transparent. Before reaching its proposed revised ultra-low CE-LOC of 3.4 ppb, EPA did not assemble any public meetings, nor did it meaningfully solicit or accept any public input.

In its current analysis EPA conducted entirely behind closed doors, EPA used flawed science from highly questionable and discredited studies rightly dismissed by even the most recent SAP that previously thoroughly reviewed atrazine. EPA precipitously cherry-picked its data and then selectively used and referenced only a few potentially unreliable studies. EPA, to reach its desired pre-determined parochial outcome, sweepingly disregarded thousands of past scientific studies spanning several decades demonstrating that atrazine is both safe and effective.

During its entirely internal premeditations, EPA largely ignored the expert advice of the many past expert SAPs it had previously convened to scientifically review atrazine. These past SAPs had consistently provided EPA solid objective analysis and scientifically defensible conclusions.

However, EPA arbitrarily rejected any previous sound, peer-reviewed atrazine research that showed atrazine's safety and efficacy. It is readily apparent that EPA did not thoroughly consider the most robust and best science available when developing and proposing its new highly extreme atrazine restrictions.

EPA's complete lack of transparency, and its utter disregard of the solid data-driven science standing before it establishes a highly dangerous and unreliable precedent, that inevitably will dramatically undermine public trust in EPA's entire regulatory framework. EPA's proposed needlessly hyper-conservative CE-LOC of 3.4 ppb diminishes public confidence in the integrity of EPA's reoccurring herbicide re-registration process.

EPA's atrazine re-registration must be scientifically sound, objective, and comprehensive. It must utilize the best available scientific data in a wide-ranging rigorous scientific review. To be credible and publicly accepted, it must openly, impartially, and broadly look at both environmental risk and public benefit in relation to the assessed product. Here, however, in its proposed 2022 PRAIRRD, EPA entirely missed the mark.

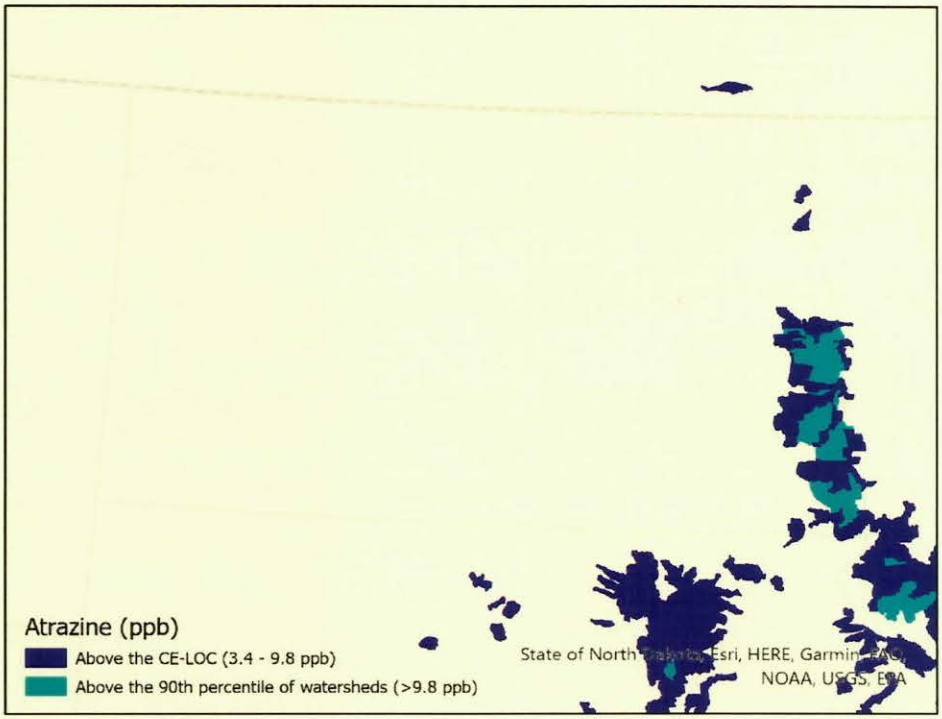
IV. EPA's proposed flawed revisions will severely impact North Dakota agriculture.

NDDA consistently conducts river and stream surface water monitoring. This annual monitoring consists of sampling 30 - 31 sites across North Dakota, six times from April through October.[7] From 2018-2021, NDDA collected 716 samples. In these, atrazine was detected 18 times above 1.0 ppb with levels ranging from 1.0 to 4.4 ppb. Atrazine was detected above 3.0 ppb three times. These three detections were 3.4, 3.7, and 4.4 ppb.

[7] NDDA annual water monitoring reports can be found at: https://www.nd.gov/ndda/pesticide-program/pesticide-water-quality-program.

2018-2021 Surface Water Sampling Results	Number of samples collected	Number of atrazine detections	Number of times atrazine was present below the reporting limit	Number of times atrazine was present above 1 ppb	Range of detections above 1 ppb	Detections above 3.0 ppb
2018	175	170	5	9	1.0-4.4	3.4, 4.4
2019	184	180	4	2	1.4, 1.5	
2020	183	172	11	2	1.8, 2.4	
2021	174	158	14	5	1.0-3.7	3.7
Total	716	680	34	18	1.0-4.4	
Percent of Samples		95.0%	4.7%	2.5%		

North Dakota surface water atrazine levels generally remain below EPA's arbitrary and capricious newly proposed 3.4 ppb CE-LOC. Nonetheless, there were samplings when atrazine was detected at or above EPA's newly proposed hyper-low 3.4 ppb CE-LOC standard. Consequently, especially in the southeastern Red River Valley border region of North Dakota, large highly productive growing areas would be fully subject to EPA's proposed extremely unreasonable restrictions on atrazine use.



- North Dakota map showing applicable watersheds and currently measured atrazine ppb throughout the state

V. EPA's proposed "picklist" is unworkable for most applicable portions of North Dakota.

To continue to use atrazine, producers in these specified heavily agricultural areas within North Dakota would be required to implement various arbitrary and irrational practices they must select from EPA's curiously constructed, highly complex, and extremely vague "picklist".

EPA's current picklist is not feasible in North Dakota. EPA's badly designed and overly complicated atrazine picklist, containing extensive undefined and overbroad terminology (such as "highly erodible" land), includes pre-emergence application prohibition, filter strips, grassed waterways, field borders, irrigation water management, cover crops, contour buffer strips, contour farming, terrace farming, strip cropping, no tillage/reduced tillage, among others, to be employed dependent on specific crops and cropland features.

The most affected regions in North Dakota are in the south-eastern border area of the state which are some of the flattest, least runoff prone areas in the country. Nonetheless, depending upon tested atrazine concentrations in those affected areas, producers are still required to either implement two or four runoff reduction practices from EPA's proposed picklist. However, these many affected producers will have substantial difficulty implementing two such runoff reduction practices, must less four.

EPA's picklist options, in aggregate, remain unworkable for North Dakota. For example, no pre-emergence applications will simply lead to more costs, increased application rates, and more treatments later in the season. Filter strip designations take significant acreage out of production, create weed/pest breeding grounds, and are not feasible around North Dakota's over thirty thousand prairie potholes.

Additionally, the option of contour buffer strips is only available to a few growers, also takes large tracts of land out of production, and reduces production income. The affected mitigation portion of eastern North Dakota is too flat for either terrace farming or contour farming. Grassed waterways are only a viable option where North Dakota growers have such waterways on their lands. Irrigation management is not conducive when only a small percentage of applicable North Dakota acres are irrigated.

Strip cropping and soil incorporation remain highly expensive, require specialized equipment, and are not time efficient. Many farmers in eastern North Dakota, due to ultra-rich dark heavy clay soil and other pertinent growing conditions, typically must rely on traditional tillage to assist in mitigating weed pressure. For these growers to implement no-till or reduced till, they would have to completely change the way they traditionally and effectively farm.

This tangled unworkable picklist is merely a patent subterfuge EPA proposed only to permit it to spuriously claim it is not proposing an outright atrazine ban. EPA's currently proposed limited picklist practices remain entirely unrealistic and, as a practical matter, generally is unenforceable. EPA's proposed 2022 PRAIRRD, if enacted, would impose upon many North Dakota's growers convoluted, unnecessary, and burdensome governmental over-regulation.

If EPA does not withdraw its 2022 PRAIRRD, it should sensibly and reasonably jettison its proposed highly impractical picklist – and then garner salient input from all interested stakeholders and develop something much more coherent and workable.[8]

VI. EPA proposed atrazine restrictions will negatively impact the environment.

Farmers consistently maintain ethics of environmental stewardship and conservation to promote clean and healthy water, air, soil, and wildlife. North Dakota farmers dutifully share the goal of protecting the state's environment. Nobody cares more about the environment. North Dakota producers live here, work here, drink the local water, and raise their children here. North Dakota farmers are active environmentalists. North Dakota farmers – those who depend upon healthy soils, clean water, and clean air for their very livelihood – are highly responsible and stalwart stewards of the lands and waters on which they operate within the state.

Farmers resolutely care about clean water and preserving the land, both of which are essential to producing healthy food and fiber and ensuring future generations can do the same. Farmers remain committed to protecting the environment and implementing on-farm soil health practices like planting cover crops, reducing tillage, and carefully managing crop residue. Many farmers have increased the use of buffer strips to prevent pesticides and excess fertilizer from reaching waterways. They are experimenting with implementing new technologies to filter water as it drains beneath fields and continually work to bolster other clean water protections.

North Dakota farmers consistently demonstrate a deep commitment to stewarding the state's waterways and conscientiously preserving its lands. Farmers increasingly utilize precision agriculture which both benefits the environment and decreases input costs. Precision agriculture incorporates soil mapping, soil testing, and historical harvest data to precisely spread fertilizer and herbicides at much more conservative rates, applying these products only where and when they are needed. Producers consistently and responsibly keep land, rivers, and ponds safe for their families, neighbors, and communities – for this and future generations.

In this vein, farmers selectively and properly use all pesticides to successfully produce healthy and bountiful crop yields. Applications of atrazine play a highly significant role in this environmental stewardship. Many growers depend on this essential crop protection tool. Nonetheless, EPA proposes to place unreasonable use restrictions on atrazine that would, in effect, operate as a *de facto* ban of the herbicide in huge portions of United States farmland. EPA, in its 2022 PRAIRRD, seeks to regulate atrazine out of existence.

Yet, this EPA proposal, preventing atrazine from being used in much of our nation's farm country, would consequently result in significant harm to the environment. EPA's unreasonable atrazine limitations may result in many farmers across the country necessarily reducing

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[8] Nonetheless, if EPA wrongly chooses to retain its proposed highly complex, costly, and burdensome picklist, NDDA recommends producers be required to undertake only two or less of these mitigation options for all land types. NDDA also recommends EPA properly defines its ambiguous and vague picklist terminology. NDDA further recommends, for more producer flexibility, the picklist be pragmatically expanded and include several added feasible mitigation options such as: (1) atrazine may not be applied on highly erodible land in consecutive years; and, (2) split pre-emergence and post-emergence applications with reduced rates and tank mixes.

conservation tilling with concomitant negative environmental impact. This reduction would dramatically adversely impact carbon savings across all acres where atrazine was previously safely applied.

As a result, EPA's newly proposed atrazine restrictions would consequently be solely responsible for instigating a huge step backwards for many currently used agricultural conservation measures. This retreat could significantly upsurge agriculture carbon emissions, increase fossil fuel use, negatively impact soil health through substantial soil degradation, cause increased soil erosion, and damage water quality due to resulting increased sediment in surface waters.

Additionally, potentially millions of conservation acres may subsequently necessarily be put back into agriculture production to make up the deficit caused by inevitable decreased yields. Furthermore, the resulting use of larger quantities of less effective alternative herbicides may result in further unforeseen negative environmental impacts.

It follows that EPA's proposed action to ban atrazine is neither forward-thinking, nor environmentally sound. EPA's myopically proposed atrazine restrictions do not adequately consider the predictable second and third order negative environmental effects of those ill-founded restrictions. Overall, if EPA enacts its proposed atrazine restrictions, EPA will subsequently trigger a huge net-negative for the environment it is charged to preserve and protect.

A. Reduced use of atrazine may lead to reduced use of no-till conservation farming.

EPA's proposed 2022 PRAIRRD remains exceedingly short-sighted. EPA's proposed atrazine limits will take away viable tilling options from producers. EPA's proposed restrictions will make certain optional conservation tilling methods much less feasible for many producers across the country. Although farmers in other states will certainly be much more negatively affected, many North Dakota farmers who currently opt to farm no-till and reduced till also will be less able to viably continue to choose these options.

In North Dakota, among several tillage options, many farmers have so chosen to adopt low-till, no-till practices, and other conservation tillage farming practices to control weeds without disking, full tilling, or heavy cultivating. However, this widely used sustainable agriculture practice causing less soil disturbance greatly relies on herbicide crop protection tools for long-acting effective weed control.

The safe application of atrazine consistently meets this need by killing existing visible weeds and subsequently preventing their seeds from spreading and sprouting. Equally important, it also effectively provides early-season weed management by combating weeds that have not yet emerged.

Optional no-till and other conservation-based tillage farming methods have been shown to be valuable sustainable farming practices. Minimum tillage and no-till systems are generally designed to build healthier and more robust soil, conserve moisture, reduce or eliminate tillage trips, protect soil from water and wind erosion, protect water quality, reduce pesticide runoff,

reduce carbon emissions, improve wildlife habitat, and limit output of labor, fuel and machinery.

If EPA arbitrarily removes atrazine from the farmer's toolbox, EPA in effect takes the option of reduced tillage away from many farmers. These farmers may be required to then use increased tillage as a weed control practice and also increase the use of other herbicides that lack atrazine's proven safe track record. These many farmers may be compelled to subsequently revert to heavy disc tillage and mechanical weeding to combat weeds – with concomitant highly increased fossil fuel and soil carbon emissions into the atmosphere.

Atrazine remains crucial to those North Dakota producers who desire to implement optional no-till and reduced-till practices. As the most widely used herbicide in these conservation no-till and reduced-tillage practices, EPA should sensibly and fully consider that atrazine remains a critical herbicide-program component enabling the continued adoption of optional environmentally advantageous conservation tilling practices.

If EPA ultimately enacts its ill-advised proposed atrazine restrictions, due to the reduced effectiveness of the very limited remaining chemistries at their disposal, many producers would be unable to maintain acres currently in these optional conservation no-till systems nor would they be able to place additional acres in these optional systems.

It stands to reason that overarching EPA regulatory policy decisions pragmatically should strongly encourage optional reduced-till and no-till conservation practices. However, EPA's current proposal to severely restrict atrazine use accomplishes exactly the opposite. In many cases, it entirely injudiciously takes away this environmentally sustainable option.

B. Reduced use of atrazine may negatively affect non-GMO crop production, decrease crop yields, and decrease wildlife habitat.

Atrazine can be used effectively on both non-GMO and GMO crops. As market demand continues to grow for non-GMO commodities, producers who choose to grow these crops will inevitably require cost-effective and safe chemistries to control weeds that otherwise will invariably take root and grow among these crops. It follows that removing atrazine from the non-GMO crop weed-control tool box subsequently may mean much fewer non-GMO food products on grocery shelves.

Because atrazine effectively controls weeds, its safe use significantly increases crop yields. When using atrazine, U.S. farmers safely produce approximately six more bushels of corn per acre and thirteen more bushels per acre in grain sorghum. This consequent substantial gain in crop productivity permits hundreds of thousands of acres of other land to be used for purposes other than growing crops, such as for sustaining critical wildlife habitat.

However, if EPA bans atrazine, these substantially increased crop yields are simply extinguished. Correspondingly, at least a million additional cropland acres across the country would then likely be required to be planted to make up for this EPA-created deficit.

Because prime cropland acreage across the country generally is already developed and currently in crop production, this additional million acres of farmland will most likely have to come from more marginal agricultural land that is not now in production, but instead currently banked in active land resource preservation programs.

EPA must more thoroughly consider these and the many other follow-on negative consequences that will manifestly result from implementing its 2022 PRAIRRD. These many significant and foreseeable adverse environmental impacts of EPA's proposed unjustified atrazine restrictions are not desirable. EPA's proposed atrazine restrictions are overall counterproductive to conservation.

VII. EPA's proposed action will increase weed herbicide resistance.

As EPA is acutely aware, weeds continually evolve. EPA limiting atrazine use, whether in combination with other products or in rotation with other products, will unavoidably cause the development and increase in populations of herbicide resistant weeds. Due to weed pressure resulting from ever-evolving herbicide resistance, farmers must be ever vigilant and increasingly innovative. Without atrazine, farmers will be forced to rely on a much smaller and less effective weed control toolbox.

Herbicides, depending upon the circumstances, may place significant selection pressure on various weed populations. Reducing atrazine use rates unnecessarily will greatly complicate herbicide resistance management. By increasing selection pressure in various cropping systems, it will make atrazine much less effective as a tool to control weeds that are resistant to other herbicides.

If the same herbicide with the same mode of action is repeatedly used against a particular weed population, over time herbicide-tolerant weed varieties of that same weed population are more likely to emerge. In other words, after herbicide application, certain select surviving weeds can still go on to thrive having already developed some degree of immunity against subsequent applications of that same herbicide. This is a primary reason why many producers prudently regularly rotate herbicides.

Atrazine effectively combats weed herbicide resistance. It has a significantly different mode of action than other herbicides and accordingly can markedly mitigate or even entirely break the resistance cycle. In this way, atrazine greatly increases practical options for North Dakota farmers to continually combat the perpetual rise of herbicide resistant weeds. Some of the worst weeds are resistant to other herbicides, but not to atrazine. As a result, the effective application rate of atrazine is one of the last lines of defense farmers have against weeds that are resistant to other herbicides.

EPA's proposed atrazine restrictions further fail to adequately consider that atrazine makes other herbicides much more effective. Effective resistant weed control usually requires a producer to not singularly rely upon one product only. Instead, farmers either systematically rotate herbicide use among several different products or use a mixed combination of herbicide products.

For this reason, a great number of premixed herbicide formulations contain, as a base ingredient, the herbicide atrazine. When atrazine is a component to herbicide mixes, it acts to reduce the potential for weeds to develop future resistance to the other herbicides used in these premixes. Notwithstanding, because atrazine is a key component of almost a hundred commercial herbicide mixtures, EPA's ill-considered proposed atrazine restrictions will effectively and unreasonably ban all these highly effective mixes – with no other viable and cost-effective alternatives available.

With ever increasing resistant weed problems, losing atrazine will then unnecessarily place more application burden on other significantly more expensive and much less effective products. No atrazine subsequently would mean that much more expensive products with significantly higher rates of applications would be required to be applied. As inevitable resistance to those few remaining products with lower efficacy develops, eventually there will no remaining products with which to rotate.

Without atrazine, farmers likely would be compelled to apply more potent herbicide chemistries or higher quantities of other herbicides that are likely less effective and potentially more threatening to soil health – with added possibility to negatively impact the land and water. In view of this, EPA's proposed unnecessary atrazine restrictions continue to lack practical foresight.

VIII. There are no available adequate cost-effective alternatives similar to atrazine.

EPA has not sufficiently considered that no equivalent effective, economical, and safe herbicide currently exists that can replace the key herbicide atrazine. In its proposed atrazine restrictions, EPA suggests cavalierly that farmers may simply instead use the very few currently available alternatives to atrazine. However, estimates of increases in farmers' cost of production, resulting from the use of these few more expensive and less effective alternatives, range from $30 to $60 more per acre. To a producer, these additionally imposed costs simply are not economically viable.

Moreover, EPA has not properly considered that no comparably efficacious, safe, and cost-effective alternative herbicide chemistry is currently even close to commercial market ready. If EPA unreasonably limits the use of and access to atrazine, farmers will likely be waiting at least a decade for any similar herbicide that adequately can take its place. Of course, this presumes that, in coming years, the pesticide industry can even effectively commercially develop and then market any such workable replacement herbicide.

Simply put, no adequate substitute for atrazine currently exists. Once again, if EPA enacts its newly proposed atrazine rules, producers will be forced to rely on a much smaller, more expensive, and much less effectual toolbox of existing weed control products. It follows, to maintain effective weed control, those growers would then be compelled to use higher quantities of the scarce and much more costly remaining alternative herbicides – with potential concomitant additional negative environmental impacts. In its regulatory policy decision-making, EPA must much better anticipate and take into account these and all other consequent effects of its proposed atrazine restrictions.

IX. EPA's proposed atrazine restrictions readily appear heavily tainted by partisan politics.

EPA should consistently, objectively, and accurately assess and follow solid science, fully removed from transitory partisan politics. Here, evidenced by how EPA has hastily developed and pushed forward its 2022 PRAIRRD, it unfortunately appears that EPA may be guided more by political concerns than by science.

Since it was first registered in 1958, using sound peer-reviewed research and proven science, EPA has repeatedly previously determined that atrazine is safe. Three separate SAPs convened by EPA, in 2007, 2009, and 2012, upon collecting and reviewing the best available science, all determined atrazine to be safe.

In 2013, the routine re-registration process for atrazine began again. This herbicide re-registration regulatory review is conducted every 15 years. In the several years that followed, EPA used sound peer-reviewed research and exhaustive science to thoroughly assess the risks of atrazine and weigh its benefits. In 2019, EPA published a technical science-based regulatory update methodically setting the atrazine CE-LOC at 15 ppb.

In September of 2020, EPA confirmed its 2019 regulatory update. After nearly a decade of highly intensive scientific study considering both risks and benefits arising from the re-registration, EPA finalized, approved, and published its re-registration review of atrazine in its 2020 ID. In this published decision, EPA reasonably and objectively set the atrazine CE-LOC at 15 ppb as a safe parameter for atrazine use. EPA did not mandate any changes to atrazine use rates.

Despite EPA imposing a rather low 15 ppb CE-LOC while safe ranges were scientifically supported well upwards of 26 ppb, agriculture producers still applauded EPA – for at long last responsibly bringing a significant measure of regulatory certainty in relation to the safe herbicide atrazine.

This regulatory certainty was short-lived. Almost immediately, in November of 2020, several environmental activist groups sued EPA in the U.S. Ninth Circuit Court of Appeals challenging this solid EPA decision. In their lawsuit, these groups did not challenge EPA's 2020 15 ppb CE-LOC determination. These groups instead broadly contended before the Ninth Circuit that EPA failed to follow FIFRA and did not adequately assess highly generalized risks potentially posed by atrazine.

Based upon the previous more than six years of exhaustive scientific assessment solidly supporting the 2020 ID atrazine re-registration and reauthorizing it for the following fifteen years, this lawsuit brought by activist-groups should have been one in which, without difficulty, EPA would confidently fight it and then win handily. EPA could easily defend its standing well-supported 2020 ID re-registration decision before the Ninth Circuit and summarily prevail.

In January of 2021, however, there was a change in presidential administration. Because of this shift in national politics, in August of 2021 – instead of zealously fighting a meritless lawsuit pending in the Ninth Circuit – EPA simply gave up. It just rolled over and chose not to defend itself.

By EPA designedly unconditionally surrendering in this lawsuit against it, EPA displayed its underlying ulterior motive. EPA intended to misuse this lawsuit as an opportune vehicle to permit it to administratively flip-flop and overturn its very recent and standing 2020 ID regulatory decision reauthorizing the use of atrazine.

To further this improper purpose, entirely on its own accord – and despite that no change had occurred in the science – EPA in a voluntary remand request asked the Ninth Circuit to order that EPA must revisit and reconsider its 2020 previous finalized atrazine re-registration decision. In this complete about-face, EPA took inappropriate advantage of an activist-groups' lawsuit against it to manipulatively circumvent and curtail the enduring standard 15-year administrative reevaluation period.

In December of 2021, the Ninth Circuit inevitably granted EPA's provincial do-over request. This culminated in exactly the outcome – occurring entirely outside of conventional administrative regulatory processes – EPA had previously contrived *sub rosa*. Between EPA's previous 2020 ID and the Ninth Circuit granting EPA's voluntary remand request, the facts and science on atrazine had not changed. Instead, it must be said, the only change was that EPA was now under a different presidential administration.

In this same vein, a few months later on March 18, 2022, current EPA Administrator Regan formally rescinded EPA's standing highly principled 2017 policy memorandum. This 2017 policy memorandum had expressly and rightly stopped and prohibited EPA from deigning to regulate through litigation by means of participating in "friendly lawsuits" and engaging in cozy "sue & settle" litigation practices.[9]

Due to EPA radically dropping its established fair and open administrative process standards by rescinding its past ban on friendly lawsuits and sue and settle litigation, these types of highly suspect lawsuits may once again drive EPA regulatory rulemaking. EPA may again pursue excessive and dubious regulation by means of exploiting litigation pending against it as cover – advancing EPA rulemaking that otherwise, under well-established even-handed administrative processes, would not be as feasible to propose, move forward, and finalize.

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[9] The U.S. Congress, House Committee on Oversight and Reform, is currently investigating EPA Administrator Regan's recent decision to formally rescind EPA's previous 2017 policy memorandum – that expressly prohibited EPA from regulating through litigation (i.e., engaging in "sue & settle" litigation practices or participating in "friendly lawsuits"). Just recently, on July 28, 2022, thirty-six members of Congress demanded Administrator Regan provide them pertinent information including all documents and communications relating to:

(1) EPA 2022 recission of the previous EPA 2017 memo banning EPA from conducting "sue & settle" litigation practices and taking part in "friendly lawsuits";
(2) current Biden Administration policy regarding litigation against executive agencies, including sue and settle cases; and,
(3) EPA and any outside groups that is applicable in any way to sue and settle litigation.

Administrator Regan is mandated to provide all these requested documents and communications to Congress no later than August 11, 2022. (Attachment).

From January 2022 to June 2022, EPA reassessed its 2020 ID. During this highly rushed and irregular rereview, EPA permitted and considered no outside input. EPA conducted its entire "reevaluation" internally, in secret and completely closed to the public. On June 30, 2022, despite a complete lack of any new or additional science to review, EPA consequently finished its one-sided reassessment of its previously established aquatic ecosystem CE-LOC of 15 ppb reauthorization decision it had less than two years earlier scientifically established and published.

Upon completing its highly abridged and cloistered pre-determined reassessment, EPA issued its administrative regulatory notice to entirely reverse its science-based 2020 ID. It proposed to drastically reduce the 15 ppb CE-LOC to an ultra-low 3.4 ppb along with numerous other proposed atrazine restrictions – despite that these proposals are not supported by credible robust scientific evidence, are entirely inconsistent with the existing regulatory record, and despite the self-evident devastating impact they will have on agriculture. After mis-purposing pending litigation against it by not zealously and properly defending its 2020 ID in court, EPA now proposes a regulatory mandate that will, in effect, ban atrazine in many cropland areas within the U.S.

The cornerstone of any EPA regulatory decision must always be sound science, not self-indulgent agency groupthink. Peer-reviewed solid science must always drive environmental policy and administrative rulemaking, not ideological or partisan policy prejudices. The overall public benefits of any assessed product must be sufficiently and fairly considered.

EPA must base each of its regulatory decisions on a foundation of empirical science and not condescend to rewrite its administrative rulemaking playbook to align with or placate environmental activist alarmism or other agenda-driven political pressure. EPA's atrazine registration review is required to be well-founded upon sound science, not highly theoretical and unsupported risk models.

Here, EPA arbitrarily discounted 7,000 past rigorous high-quality scientific studies, ignored its own science, and abruptly reversed course on its recently established and finalized atrazine 2020 ID herbicide re-registration decision. EPA's 2022 PRAIRRD, and the underlying chronology of this unilateral agency action, obviously are highly disconcerting.

It remains readily apparent to any honest observer what transpired. It is reasonable to conclude that EPA chose to follow partisan politics, not objective facts and scientific rigor. In so doing, EPA heavily politicized its administrative regulatory process by disingenuously using the court system to facilitate the overturning of a settled and sound science-based administrative regulatory decision.

To maintain any credibility and trust with the public, EPA must consistently and objectively operate its pesticide registration review processes in the same unbiased science-based manner across presidential administrations. Here, EPA patently chose not to do so. EPA's 2022 PRAIRRD reflects poorly on EPA as an objective supposedly apolitical federal agency. This agenda-based autonomous decision is neither a good look nor good governance

X. If EPA does not withdraw its 2022 PRAIRRD, it must convene a Scientific Advisory Panel.

Based upon the foregoing, EPA's 2022 PRAIRRD Case No. 0062 readily appears politically tainted, scientifically flawed, and ecologically unsound. Understandably, EPA should withdraw its 2022 PRAIRRD in its entirety.

If it chooses not to, before EPA implements any new atrazine restrictions, EPA must take immediate steps to reestablish and maintain scientific integrity and to regain public trust in its regulatory rulemaking process. It must do – exactly what it has already committed in its proposed revision it will do. EPA must "seek external peer review of the risks to the aquatic plant community that underlies this proposed risk management strategy."

To be clear, EPA must immediately convene a formal independent expert impartial SAP, open to the public, to correctly develop, compile and interpret the existing scientific data on atrazine. This external SAP should be charged with transparently, comprehensively, and objectively reviewing the latest applicable peer-reviewed studies. Upon meticulously following the science, this SAP could then determine whether high-quality replicable research, valid technical evidence, and a *bona fide* scientific foundation legitimately support EPA's proposed 2022 PRAIRRD atrazine CE-LOC revision and its many other overly restrictive measures.

If EPA truly stands behind its atrazine risk assessment, as unbiased and solidly rooted in sound empirical science, it must conduct an external transparent review that candidly, systematically, and objectively re-evaluates the herbicide. This external peer review is essential to the rebuilding of fidelity and transparency within the EPA FIFRA atrazine re-registration process. EPA must base its atrazine registration and review process conclusions on trustworthy well-founded research as determined by an external unbiased highly technically proficient scientific panel. The public must be well assured that EPA is getting the science right, unaffected by partisan politics. EPA's credibility and the long-term sustainability of U.S. agriculture depends on it.

In particular, it is imperative that EPA remains open and accountable and that it diligently and appropriately follows the science in relation to what is the appropriate CE-LOC for aquatic organisms. An inaccurate or scientifically unjustified low CE-LOC level will severely impact farming and many producer-driven land environmental stewardship practices.

Only upon receiving and duly considering the SAP's neutral and detached guidance and recommendations solidly founded upon the best science available, may EPA make fully informed, soundly reliable, impartial, and aboveboard pesticide registration decisions – fulfilling its FIFRA duties and responsibilities as Congress intended and mandated.

XI. Conclusion.

North Dakota producers remain entirely committed to the safe and prudent use of all herbicides, including atrazine. Here, EPA's newly proposed atrazine restrictions in its 2022 PRAIRRD are wholly unwarranted, not sufficiently supported by science, and disturbingly tainted by politics. EPA's 2022 PRAIRRD is arbitrary and capricious.

For the foregoing reasons, NDDA again strongly recommends and requests EPA withdraw its 2022 PRAIRRD in its entirety.

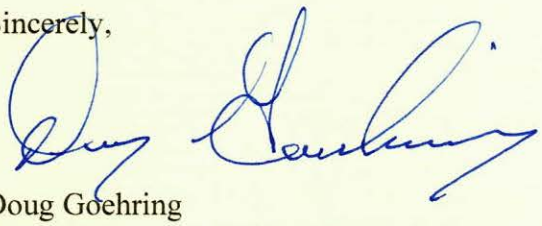
Upon withdrawing its 2022 PRAIRRD, NDDA further requests and recommends EPA propose, as consistent with the best existing science available a safe, empirically sound, and reasonable atrazine CE-LOC, in the range between 16 ppb and 27 ppb, or higher as supported by credible science.

If EPA does not do so, in the alternative, NDDA strongly recommends and requests EPA returns to and makes permanent its previously published science-based atrazine 2020 ID.

If EPA declines to withdraw its 2022 PRAIRRD, before EPA enacts and makes effective any part of it, EPA must first immediately convene a formal, independent, transparent, and unbiased SAP to conscientiously follow the science – and analytically and accurately determine whether the best science available supports EPA's proposed extreme CE-LOC revision and other proposed atrazine restrictions.

Please let us know if we may provide you any additional information or provide you any further assistance.

Sincerely,



Doug Goehring
North Dakota Agriculture Commissioner

Attachment:
Letter from 36 Members of Congress to EPA Administrator Regan, dated July 28, 2022, with referenced attachments

cc:
The Honorable Thomas J. Vilsack, U.S. Secretary of Agriculture
The Honorable John H. Hoeven, U.S. Senator for North Dakota
The Honorable Kevin J. Cramer, U.S. Senator for North Dakota
The Honorable Kelly M. Armstrong, U.S. Representative for North Dakota
The Honorable Douglas J. Burgum, Governor of North Dakota
The Honorable Drew H. Wrigley, Attorney General of North Dakota
The Honorable Larry E. Luick, Interim President Pro Tempore of the ND State Senate
The Honorable Rich P. Wardner, ND State Legislature Senate Majority Leader
The Honorable Joan M. Heckaman, ND State Legislature Senate Minority Leader
The Honorable Kim A. Koppelman, Speaker of the ND State House of Representatives
The Honorable Chet A. Pollert, ND State Legislature House Majority Leader
The Honorable Joshua A. Boschee, ND State Legislature House Minority Leader
Director David D. Glatt, North Dakota Department of Environmental Quality

Congress of the United States

Washington, DC 20515

July 28, 2022

Honorable Michael S. Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Administrator Regan:

We are investigating the recent decision by the U.S. Environmental Protection Agency (EPA) to allow special interest groups to "sue and settle" with federal agencies without the input of the public and stakeholders.[1] During the Trump Administration, EPA implemented an order to ensure that the public and other stakeholders had visibility into "sue and settle" cases.[2] The practice of "sue and settle" allows special interest groups to achieve regulatory goals through litigation—in secret—and bypass the legislative and regulatory processes. The Biden Administration's decision to reverse course and allow special interest groups to make policy without stakeholder input is troubling. We are requesting documents and information regarding the decision to rescind the prior order.

"Sue and settle" is the practice in which a federal agency "accepts a lawsuit from outside advocacy groups that effectively dictates the priorities and duties of the agency through legally-binding, court-approved settlements negotiated behind closed doors—with no participation by other affected parties or the public."[3] Often times these cases affect state-level considerations while shutting out the states and other critical stakeholders from the decision-making process.[4] Previously, federal agencies had transparency tools that allowed every entity—state legislatures, private companies, interest organizations, and others—affected by the regulation at issue to have the opportunity to participate in the decision-making process. The U.S. Chamber of Commerce found the Trump Administration's EPA policy to be "well-founded."[5] However, after the Biden

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[1] Brugger, Kelsey, *EPA revokes Trump-era 'sue and settle' memo,* E&E NEWS (Mar. 24, 2022).
[2] Memorandum from E. Scott Pruitt, EPA Administrator, to All Staff, *Adhering to the Fundamental Principles of Due Process, Rule of Law, and Cooperative Federalism in Consent Decrees and Settlement Agreements* (Oct. 16, 2017) available at https://www.epa.gov/sites/default/files/2017-10/text_of_memo_from_epa_administrator_scott_pruitt_to_epa_managers_adhering_to_the_fundamental_principles_of_due_process_rule_of_law_and_cooperative_federalism_in_consent_decrees_and_settlement_agreements_october_16_2.txt.
[3] U.S. Chamber of Commerce, *Sue and Settle Updated: Damage Done* (May 2017) *available at* https://www.uschamber.com/assets/documents/u.s._chamber_sue_and_settle_2017_updated_report.pdf.
[4] *Id.*
[5] *Id.*

Administration changed the policy, special interest groups are now essentially taking taxpayer dollars without any public or stakeholder participation.

The EPA memorandum released on March 18, 2022, offers no protection for taxpayers. The EPA memorandum states, the agency is "committed to fair, transparent, and efficient resolution of environmental claims brought against the EPA."[6] The next sentence, however, states that "[t]o help fulfill these commitments, I am revoking the… 'Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements.'"[7] The agency claims to be fair, transparent, and efficient but its memorandum favors special interest groups over the American people.

EPA's actions raise new questions about the Biden Administration's commitment to transparency and accountability. To assist the Republicans on the Committee in conducting oversight of the effects of the March 18, 2022, EPA Memorandum, please produce the following documents and information no later than August 11, 2022:

1. All documents and communications referring or relating to the March 18, 2022 EPA Memorandum;

2. All documents and communications referring or relating to Biden Administration policy regarding litigation against executive agencies, including what is referred to as sue and settle cases;

3. All documents and communications between EPA and any groups or individuals outside the agency regarding what is referred to as sue and settle practices.

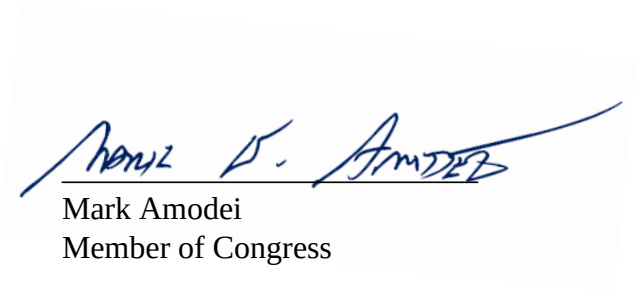
To make arrangements to deliver documents or ask any related follow-up questions, please contact the Committee on Oversight and Reform Republican Staff at 202-225-5074. The Committee on Oversight and Reform is the principal oversight committee of the U.S. House of Representatives and may investigate "any matter" at "any time" under House Rule X. Thank you for your cooperation with this inquiry.

Sincerely,

James Comer
Ranking Member
Committee on Oversight and Reform

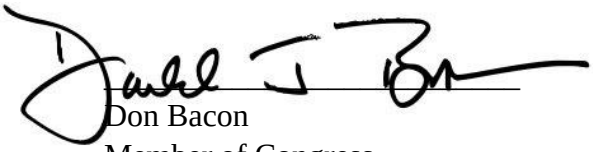
Dan Newhouse
Chairman
Congressional Western Caucus

[6] Memorandum from Michael S. Regan, EPA Administrator, to All Staff, *Consent Decrees and Settlement Agreements to Resolve Environmental Claims Against the Agency* (Mar. 18, 2022) *available at* https://www.epa.gov/system/files/documents/2022-03/ogc-22-000-2698_0.pdf
[7] *Id.*



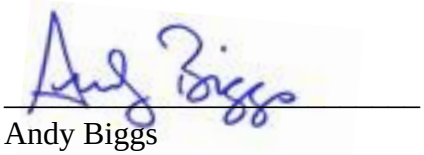
Mark Amodei
Member of Congress

Kelly Armstrong
Member of Congress

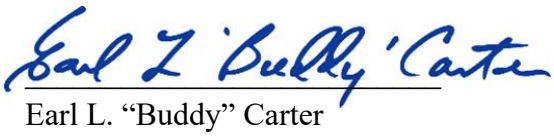


Don Bacon
Member of Congress

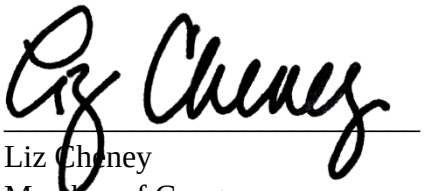
Cliff Bentz
Member of Congress



Andy Biggs
Member of Congress

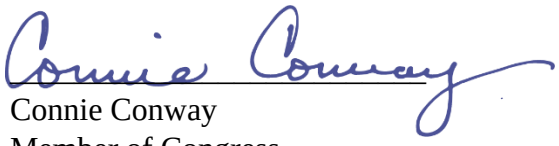


Earl L. "Buddy" Carter
Member of Congress

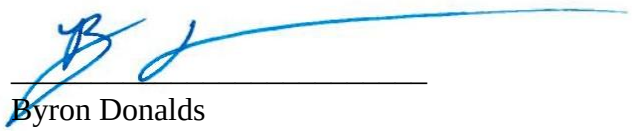


Liz Cheney
Member of Congress

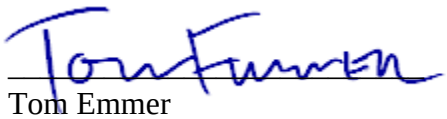
Michael Cloud
Member of Congress



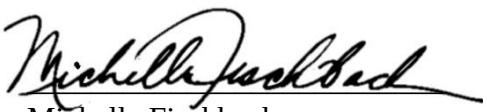
Connie Conway
Member of Congress



Byron Donalds
Member of Congress

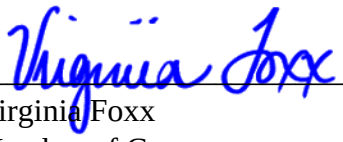


Tom Emmer
Member of Congress

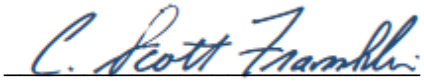


Michelle Fischbach
Member of Congress

Mike Flood
Member of Congress



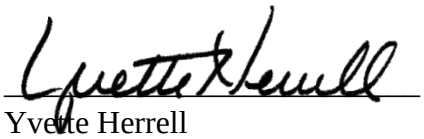
Virginia Foxx
Member of Congress



C. Scott Franklin
Member of Congress

Bob Gibbs
Member of Congress

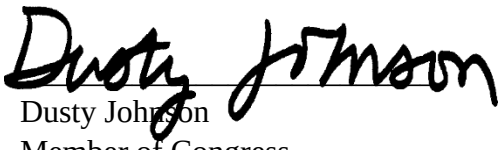
Glenn Grothman
Member of Congress



Yvette Herrell
Member of Congress

Jody Hice
Member of Congress

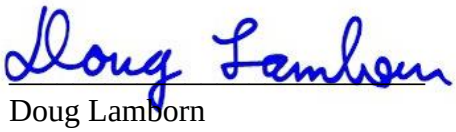
Darrell Issa
Member of Congress



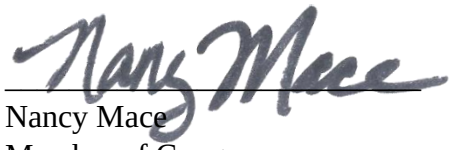
Dusty Johnson
Member of Congress

Fred Keller
Member of Congress

Doug LaMalfa
Member of Congress



Doug Lamborn
Member of Congress

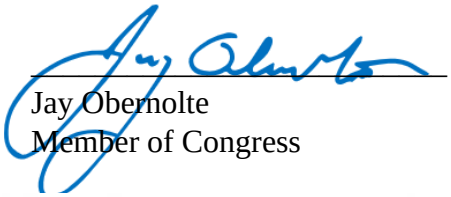


Nancy Mace
Member of Congress

Tom McClintock
Member of Congress

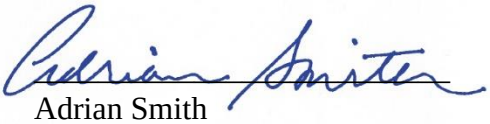
Mariannette Miller-Meeks
Member of Congress

Blake D. Moore
Member of Congress



Jay Obernolte
Member of Congress

Aumua Amata Coleman Radewagen
Member of Congress



Adrian Smith
Member of Congress

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cc: The Honorable Carolyn Maloney, Chairwoman
Committee on Oversight and Reform

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 18 2022

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Consent Decrees and Settlement Agreements to Resolve Environmental Claims Against the Agency

From: Michael S. Regan

To: Deputy Administrator
General Counsel
Assistant Administrators
Inspector General
Chief Financial Officer
Chief of Staff
Associate Administrators
Regional Administrators

As Administrator of the U.S. Environmental Protection Agency, I am committed to the fair and efficient resolution of environmental claims brought against the EPA. I am also committed to transparency for the American people, including those in environmental justice communities, in settling such claims.

To help fulfill these commitments, I am revoking the memorandum "Adhering to the Fundamental Principles of Due Process, Rule of Law and Cooperative Federalism in Consent Decrees and Settlement Agreements" and the accompanying "Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements," both issued on October 16, 2017, and replacing them with this memorandum.

In enacting environmental laws, Congress included tools to ensure that the EPA carries out its vital mission to protect human health and the environment for all. In environmental statutes, and in tandem with the Administrative Procedure Act, Congress commonly has adopted provisions authorizing judicial action against the EPA, such as citizen suits to enforce deadlines and judicial review processes related to final agency action. At the same time, parties, including federal agencies, frequently enter into settlements to avoid expensive and resource-intensive litigation, where appropriate. Settlements can preserve resources of the parties and the courts; in many instances they can be the most practical, economical and efficient path forward while also serving the public interest. Appropriate settlement of environmental claims against the EPA

preserves agency resources to focus on the vital work the agency carries out under the environmental statutes.

Through the decades, and in close coordination with the Department of Justice, the EPA has appropriately settled environmental claims brought by affected individuals, organizations, regulated entities, states and others. There are, however, constraints on the federal government's – including the EPA's – ability to enter into settlements. For example, longstanding Department of Justice policy disfavors consent decrees or settlements that convert a discretionary duty into a mandatory one in the context of regulatory action and requires associate or deputy attorney general approval for any such agreement. In addition, in entering into consent decrees or settlements, the EPA has always considered the amount of time it will need to fulfill applicable public notice-and-comment requirements and adequately consider public feedback and, as appropriate, incorporate it into its final rules and decisions.

The prior administration issued the aforementioned memorandum and directive regarding agency settlements in October 2017. That memorandum and directive contained inaccurate characterizations of the agency's settlement practices as well as of EPA attorneys and staff who have for decades appropriately negotiated settlements to resolve litigation. I want to emphasize that the EPA's dedicated career staff have exemplified the utmost nonpartisan professionalism in settling lawsuits in accordance with the law and agency practice.

Further, the memorandum and directive established procedural requirements inappropriately favoring certain stakeholders in settling environmental claims brought against the EPA. Lastly, the memorandum and directive gave little weight to the well-understood value of settlements in appropriate cases.

Consistent with my commitment to the fair and efficient resolution of environmental claims and transparency for the American people, I am pleased to announce that the Office of General Counsel is taking simple yet effective steps to enhance public awareness of such claims against the agency and to provide an opportunity for public review and comment on proposed settlements of them. These steps, which go beyond the requirements of law and the past practice of the agency, include the following[1]:

- posting new Notices of Intent to Sue the Agency, petitions for review, complaints and proposed settlements (consent decrees and settlement agreements) to OGC's website for public awareness;

- maintaining a public email listserv for automated email notice of newly posted NOIs, petitions for review, complaints and proposed settlements; and

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[1] These steps are intended to apply to notices of intent to sue the EPA, petitions for review, complaints and settlements that are based on the environmental statutes that the EPA administers and in tandem with the Administrative Procedure Act, where applicable, that authorize judicial action against the agency, such as citizen suits and judicial review related to final agency action. These steps do not apply to enforcement-related cases and attorney fee settlements.

- making proposed settlements available for public review and comment after they have been conditionally approved by government decision-makers, for at least 30 days unless a different period of time is required by law.

OGC will continue to develop and refine these steps based on its experience. If the general counsel determines with regard to a specific matter that circumstances warrant a departure from these steps, such as time sensitivity or an imminent need to avoid an adverse environmental outcome, OGC will make the final agreement available to the public by posting it on OGC's website.

These steps do not supersede or replace Section 113(g) of the Clean Air Act, which requires notice in the *Federal Register* before the EPA enters into certain consent decrees and settlement agreements under that act.[2]

These steps advance open communication and transparency and allow the EPA to settle cases when doing so is a fair and efficient resolution of the claims at issue and in the public interest.

[2] The steps included in this memorandum are intended to assist with agency management and do not create a right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, the EPA, its officers or employees, or any other person.

TO: Assistant Administrators
Regional Administrators
Office of General Counsel

FROM: E. Scott Pruitt
Administrator

DATE: October 16, 2017

SUBJECT: Adhering to the Fundamental Principles of Due Process, Rule of Law, and Cooperative Federalism in Consent Decrees and Settlement Agreements

In the past, the U.S. Environmental Protection Agency has sought to resolve litigation through consent decrees and settlement agreements that appear to be the result of collusion with outside groups.[1] Behind closed doors, EPA and the outside groups agreed that EPA would take an action with a certain end in mind, relinquishing some of its discretion over the Agency's priorities and duties and handing them over to special interests and the courts.[2] When negotiating these agreements, EPA excluded intervenors, interested stakeholders, and affected states from those discussions. Some of these agreements even reduced Congress's ability to influence policy.[3] The days of this regulation through litigation are terminated.

"Sue and settle," as this tactic has been called, undermines the fundamental principles of government that I outlined on my first day: (1) the importance of process, (2) adherence to the rule of law, and (3) the applicability of cooperative federalism. The process by which EPA adopts regulations sends an important message to the public: EPA values the comments that it receives from the public and strives to make informed decisions on regulations that impact the lives and livelihoods of the American people. The rule of law requires EPA to act only within the confines of the statutory authority that Congress has conferred to the Agency, and thereby avoid the uncertainty of litigation and ultimately achieve better outcomes. Finally, EPA must honor the vital role of the states in protecting the public health and welfare under the principle of cooperative federalism as prescribed by the Constitution and statutory mandate.

* * *

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[1] When litigants enter into a consent decree, they agree to resolve the litigation through a judicially enforceable court order; if one party fails to abide by the terms of a consent decree, that party risks being held in contempt of court. A settlement agreement generally resolves legal disputes without a court order; if one party fails to abide by the terms of a settlement agreement, the aggrieved party must petition a court for a judicial remedy.

[2] These outside groups often file lawsuits in federal district courts that the litigants believe will give them the best chance of prevailing - not necessarily in the forum where the agency action at issue is most applicable - and ask the court to enjoin the agency action on a nationwide basis. Nationwide injunctions, in general, raise serious concerns about the validity and propriety of these district court actions.

[3] The sue-and-settle phenomenon results in part from statutes that empower these outside groups to file a lawsuit against a federal agency when that agency fails to meet a statutory deadline and then reward these individuals by allowing them to recover attorney's fees for "successful" lawsuits.

This memorandum explains the sue-and-settle directive that I established within the Agency and also describes how the past practice of regulation through litigation has harmed the American public.

Regulation Through Litigation Violates Due Process, the Rule of Law, and Cooperative Federalism

When an agency promulgates a new regulation or issues a decision, the agency should take that action consistent with the processes and substantive authority that the law permits. An agency, therefore, should ordinarily zealously defend its action when facing a lawsuit challenging that action. If an agency agrees to resolve that litigation through a consent decree or settlement agreement, however, questions will necessarily arise about the propriety of the government's determination not to defend the underlying regulation or decision. Indeed, sue and settle has been adopted to resolve lawsuits through consent decrees in a way that bound the agency to judicially enforceable actions and timelines that curtailed careful agency consideration. This violates due process, the rule of law, and cooperative federalism.

A. The Importance of Process

EPA risks bypassing the transparency and due process safeguards enshrined in the Administrative Procedure Act[4] and other statutes[5] when it uses a consent decree or a settlement agreement to bind the Agency to proceed with a rulemaking with a certain end in mind on a schedule negotiated with the litigants. Congress enacted the Administrative Procedure Act to provide the American public with notice of a potential agency action, to encourage public participation in the rulemaking process, and to afford federal agencies with the framework to perform careful consideration of all the associated issues before taking final agency action. Following the legal processes for agency action provides predictability for all stakeholders, ensures that the agency will receive input from all interested parties, and increases the defensibility of an action when facing a procedural challenge.

A sue-and-settle agreement, however, undermines these safeguards. Using this tactic, the agency and the party that filed the legal challenge agree in principle on the terms of a consent decree or settlement before the public has the opportunity to review the terms

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[4] Pursuant to the Administrative Procedure Act, an agency must publish a general notice of proposed rulemaking in the Federal Register and include the following information: "(1) a statement of the time, place, and nature of public rulemaking proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. SS 553(b). Additionally, the agency "shall give interested persons an opportunity to participate in the rulemaking through a submission of written data, views, or arguments with or without opportunity for oral presentation." Id. SS 553(c).

[5] The statutes include the Paperwork Reduction Act (44 U.S.C. SS 3506), the Regulatory Flexibility Act (5 U.S.C. SS 603), and the Unfunded Mandates Reform Act (2 U.S.C. SS 1535).

of the agreement.[6] An agency can also use consent decrees and settlement agreements as an end-run around certain procedural protections of the rulemaking process. Even when an agency attempts to comply with these procedural safeguards, the agency typically agrees to an expedited rulemaking process that can inhibit meaningful public participation. This rushed rulemaking process can lead to technical errors by the agency, insufficient time for stakeholders to submit rigorous studies that assess the proposal, the inability of the agency to provide meaningful consideration of all the evidence submitted to the agency, a lack of time for the agency to reconsider its initial proposal and issue a revised version, and the failure to take into account the full range of potential issues related to the proposed rule.

Sue and settle, therefore, interferes with the rights of the American people to provide their views on proposed regulatory decisions and have the agency thoughtfully consider those views before making a final decision. By using sue and settle to avoid the normal rulemaking processes and protections, an agency empowers special-interests at the expense of the public and parties that could have used their powers of persuasion to convince the agency to take an alternative action that could better serve the American people.[7]

B. Adherence to the Rule of Law

As an agency in the executive branch of the United States, EPA must faithfully administer the laws of the land and take actions that are tethered to the governing statutes. The authority that Congress has granted to EPA is our only authority. EPA must respect the rule of law. The Agency must strive to meet the directives and deadlines that Congress set forth in our governing environmental statutes. But we must not surrender the powers that we receive from Congress to another branch of government - lest we risk upsetting the balance of powers that our founders enshrined in the Constitution.[8] Sue and settle

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[6] In certain circumstances, the Agency must permit the public to comment on the proposed settlement. See, e.g., Clean Air Act Section 113(g), 42 U.S.C. SS 7413(g) (requiring that "[a]t least 30 days before a consent decree or settlement agreement of any kind under [the Clean Air Act] to which the United States is a party (other than enforcement actions) . . . is final or filed with a court, the Administrator shall provide a reasonable opportunity by notice in the Federal Register to persons who are not named as parties or intervenors to the action or matter to comment in writing"). While the Agency has made changes to proposed consent decrees in response to comments receiving during this process, the Agency understands that numerous stakeholders lack faith in the effectiveness of this comment opportunity because the Agency and the settling litigants have already agreed in principle to the proposed settlement.

[7] "The greatest evil of government by consent decree . . . comes from its potential to freeze the regulatory processes of representative democracy. At best, even with the most principled and fair-minded courts, the device adds friction. . . . As a policy device, then, government by consent decree serves no necessary end. It opens the door to unforeseeable mischief; it degrades the institutions of representative democracy and augments the power of special interest groups. It does all of this in a society that hardly needs new devices that emasculate representative democracy and strengthen the power of special interests." Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1136-37 (D.C. Cir. 1983) (Wilkey, J., dissenting).

[8] In The Federalist Number 47, James Madison wrote: One of the principal objections inculcated by the more respectable adversaries to the constitution, is its supposed violation of the political maxim, that the legislative, executive and judiciary departments ought to be separate and distinct. In the structure of the federal government, no regard, it is said, seems to have been paid to this essential precaution in favor of liberty. The several departments of power are distributed and blended in such a manner, as at once to

disrespects the rule of law and improperly elevates the powers of the federal judiciary to the detriment of the executive and legislative branches.[9]

In the past, outside groups have sued EPA for failing to act by a deadline prescribed under the law. EPA would then sign a consent decree agreeing to take a particular action ahead of other Agency actions that the public and other public officials considered to be higher priorities. We should not readily cede our authority and discretion by letting the federal judiciary dictate the priorities of the Administration and the Agency.

Taken to its extreme, the sue-and-settle strategy can allow executive branch officials to avoid political accountability by voluntarily yielding their discretionary authority to the courts, thereby insulating agency officials from criticisms of unpopular actions. Equally troubling, sue and settle can deprive Congress of its ability to influence agency policy through oversight and the power of the purse. Sue-and-settle agreements can also prevent subsequent administrations from modifying a particular policy priority, approach, or timeline.[10] The founders of our nation did not envision such an imbalance of power among the federal branches of government.

EPA must always respect the rule of law and defend the prerogatives of its separate powers. EPA, therefore, shall avoid inappropriately limiting the discretion that Congress authorized the Agency, abide by the procedural safeguards enumerated in the law, and resist the temptation to reduce the amount of time necessary for careful Agency action.

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destroy all symmetry and beauty of form; and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of other parts. No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty than that on which the objection is founded. The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal constitution therefore really chargeable with this accumulation of power or with a mixture of powers having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. I persuade myself however, that it will be made apparent to every one, that the charge cannot be supported, and that the maxim on which it relies, has been totally misconceived and misapplied. In order to form correct ideas on this important subject, it will be proper to investigate the sense, in which the preservation of liberty requires, that the three great departments of power should be separate and distinct. The Federalist No. 47 (James Madison) (emphasis added).

[9] "The leading principle of our Constitution is the independence of the Legislature, Executive and Judiciary of each other." Thomas Jefferson to George Hay, 1807. FE 9:59 (emphasis added). "The Constitution intended that the three great branches of the government should be co-ordinate and independent of each other. As to acts, therefore, which are to be done by either, it has given no control to another branch. . . . Where different branches have to act in their respective lines, finally and without appeal, under any law, they may give to it different and opposite constructions. . . . From these different constructions of the same act by different branches, less mischief arises than from giving to any one of them a control over the others." Thomas Jefferson to George Hay, 1807. ME 11:213 (emphasis added).

[10] "The separation of powers inside a government - and each official's concern that he may be replaced by someone with a different agenda - creates incentives to use the judicial process to obtain an advantage. The consent decree is an important element in the strategy. . . . It is impossible for an agency to promulgate a regulation containing a clause such as 'My successor cannot amend this regulation.' But if the clause appears in a consent decree, perhaps the administrator gets his wish to dictate the policies of his successor." Frank Easterbrook, Justice and Contract in Consent Judgments, 1987 U. Chi. L. Forum 19, 33-34 (1987).

C. Embracing Cooperative Federalism

Many environmental statutes empower the states to serve as stewards of their lands and environments.[11] Embracing federalism, EPA can work cooperatively with states to encourage regulations instead of compelling them and to respect the separation of powers.[12] Past sue-and-settle tactics, however, undermined this principle of cooperative federalism by excluding the states from meaningfully participating in procedural and substantive Agency actions.

When considering a consent decree or settlement agreement to end litigation against the Agency, EPA should welcome the participation of the affected states and tribes, regulated communities, and other interested stakeholders. This should include engagement even before lodging the decree or agreement, where appropriate. These additional participants to the negotiations can voice their concerns that the agreed-upon deadlines will be reasonable and fair, permitting adequate time for meaningful public participation and thoughtful Agency consideration of comments received. EPA must also seek to collaborate with the states and remain flexible when ensuring compliance with environmental protections.

Conclusion

By emphasizing the importance of process, adhering to the rule of law, and embracing cooperative federalism, EPA increases the quality of, and public confidence in, its regulations. Through transparency and public participation, EPA can reassure the American public that the rules that apply to them have been deliberated upon and determined in a forum open to all. Finally, the federal government must continue to improve engagement with the states, tribes, interested stakeholders, and regulated communities, especially when resolving litigation. The steps outlined in my directive today will help us achieve these noble goals and continue to improve us as an Agency.

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[11] Both the Clean Air Act and the Clean Water Act contain specific provisions that enlist the states to take primary responsibility of environmental protection.

[12] In Federalist Number 51, James Madison wrote: In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself. Second. It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. The Federalist No. 51 (James Madison) (emphasis added).

SUE AND SETTLE UPDATED:

DAMAGE DONE

2013–2016

U.S. CHAMBER OF COMMERCE
Environment, Technology & Regulatory Affairs

No. 10 in a Series of Regulatory Reports | May 2017

ACKNOWLEDGMENTS

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U.S. CHAMBER OF COMMERCE

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.

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Contents

Executive Summary

William L. Kovacs
U.S. Chamber Senior Vice-President for
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Four years ago, the U.S. Chamber of Commerce began an effort to document how environmental advocacy groups use the "sue and settle" tactic to influence federal environmental policy. We wanted to understand the impacts sue and settle agreements have on businesses, communities, and state and local governments. We wanted to see who wins and who loses when agencies negotiate with advocacy groups in secret and affected parties are shut out of the process.

Our research showed that stakeholders left out of the sue and settle process often lose and that **the states** are among the biggest losers. The Chamber's July 2012 report, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs*,[1] illustrated how the U.S. Environmental Protection Agency (EPA) uses sue and settle agreements with environmental advocates to override state decisions—and force its preferred, more burdensome, requirements on states. Likewise, our May 2013 report, *Sue and Settle: Regulating Behind Closed Doors*,[2] described situations where agreements entered into by EPA forced stringent new regulatory schemes on the states, despite concerns and objections asserted by the states. Our August 2016 report, *The Growing Burden of Unfunded EPA Mandates on the States*,[3] demonstrated how EPA has taken unilateral action on policies—some originating in sue and settle agreements—that imposed sweeping impacts on states without providing additional federal resources to the states.[4]

The Chamber's research documented the extent of sue and settle as a problem for the states, for business, and for the public's ability to see and understand what federal agencies are doing. Even EPA's Administrator, Scott Pruitt has now publicly acknowledged that sue and settle is a serious problem. In an interview, Administrator Pruitt stated that he intends to stop the sue and settle practice at EPA,[5] noting

[1] U.S. Chamber of Commerce, EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs (July 2012) available at https://www.uschamber.com/sites/default/files/documents/files/1207_ETRA_HazeReport_lr_0.pdf.

[2] U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors* (May 2013) *available at* https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf.

[3] U.S. Chamber of Commerce, *The Growing Burden of Unfunded EPA Mandates on the States* (August 2016) *available at* https://www.uschamber.com/sites/default/files/documents/files/022879_etra_epa_coercive_federalism_report_fin.pdf

[4] *Id.* at 1517.

[5] Kimberley A. Strassel, *A Back-to-Basics Agenda for EPA*, WALL ST. J., February 18, 2017.

"there is a time and place to sometimes resolve litigation, but don't use the judicial process to bypass accountability." As the Attorney General of Oklahoma, Mr. Pruitt was on the receiving end of more than one sweetheart deal between EPA and advocacy groups, including an onerous regional haze sue and settle that imposed $282 million in additional regulatory costs on Oklahomans for visibility "benefits" too slight to be noticed.[6]

Administrator Pruitt's concern that sue and settle has been used to bypass accountability is well founded. The Chamber's updated analysis shows that after 2012, advocacy groups relied on sue and settle as a way to influence state policies behind the scenes—and to undermine state decision-making. While most of the agreements we documented in our May 2013 report involved new ***federal*** regulatory programs, more recent agreements often involve outside groups pressuring EPA to overrule ***state-level*** environmental decisions.

In addition, our updated analysis reveals that the use of sue and settle after 2012 did not diminish—it actually expanded. Between January 2013 and January 2017, EPA entered into **77** consent decrees, compared with the **60** agreements the agency made between 2009 and 2012. Thus, in 8 years the Obama administration's EPA welcomed far more Clean Air Act (CAA) settlements (**137**) than previous administrations did over a 12 year period (93).

Since 2013, EPA has turned to Federal Implementation Plans (FIPs) as an everyday tool, increasingly relying on them to take direct control of state and local level environmental decision-making. The Obama administration imposed vastly more FIPs on states than any prior administration. These include **17** FIPs dealing with regional haze (all in the wake of sue and settle agreements), **9** FIPs relating to greenhouse gas permitting programs, **28** FIPs for the cross-state air pollution rule, and **1** FIP for oil and gas activities in Indian Country (land located within the boundaries of federally-recognized Indian reservations).

Despite the fact that sue and settle agreements increasingly affect state-level decisions, the states continue to be shut out of negotiations and have new responsibilities forced upon them without commensurate new resources. And up until now, EPA has resisted calls by Congress to be more transparent and participatory in sue and settle negotiations. This combination of factors seriously erodes the working relationship between EPA and the states, threatening a partnership that has served the country for decades. As one state environmental agency official has noted,

> **[W]e also see "sue and settle" appearing on the EPA's menu more and more frequently. As we states are more often asked to navigate the increasingly litigious "green" lobby fighting hand in hand with the EPA, we states are left to wonder if this vocal special interest currently occupies the seat at the table that was once was reserved for us … When the states are disenfranchised, so is the truth of our federalist democracy, and the people WE represent."**
>
> ***—Becky Keogh***
> *Director, Arkansas Department of Environmental Quality (March 2016)*

[6] U.S. Chamber of Commerce, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs* (July 2012) *available at* https://www.uschamber.com/sites/default/files/documents/files/1207_ETRA_HazeReport_lr_0.pdf at 24.

Since January 2013, special interest groups have notified EPA of their intent to file **more than 180** lawsuits under the Clean Air Act or the Clean Water Act (CWA). Although not all of these Notices of Intent become lawsuits that in turn become sue and settle agreements, experience shows that some will.

Because EPA is out of compliance with the CAA's statutory deadlines virtually all of the time, advocacy groups are free to pick and choose the rules they believe should be a priority. This gives third-party interests a way to dictate EPA priorities and budgetary agendas, particularly when the agency is receptive to settlements. Instead of being able to use its discretion as to how best utilize its limited resources—***and, indirectly, the resources of the states***—the agency agrees to shift these resources away from critical duties in order to satisfy the narrow demands of outside groups.

Recommendations

EPA Should Make Information Publicly Available About Negotiated Settlements of Lawsuits Where the Agency Is the Defendant. EPA needs to make this critical information routinely available to the public—especially to the states. In addition, EPA needs to amend its regulations to ensure that a state or states affected by a potential settlement agreement is given notice: (1) that EPA has been sued on an issue involving that state; and (2) that the agency is meeting with outside groups in the settlement context. States then should be given the opportunity to participate. This information should include details of any attorneys' fees and/or costs paid to outside groups.

EPA Should Review the Federal Implementation Plans It Imposed on the States and Evaluate Whether They Should Be Repealed. EPA should review the 55 FIPs it has issued since 2009 and evaluate whether, under the Trump administration, they remain appropriate. EPA should not use the drastic tactic of imposing FIPs on states unless all efforts to work cooperatively and collaboratively have failed.

Congress Should Enact the Sunshine for Regulatory Decrees and Settlements Act. This legislation would: (1) require agencies to give notice when they receive Notices of Intent to sue from private parties; (2) afford affected parties an opportunity to intervene *prior to the filing* of the consent decree or settlement with a court; (3) publish notice of a proposed decree or settlement in the *Federal* Register, and take (and respond to) public comments at least 60 days prior to the filing of the decree or settlement; and (4) provide the court with a copy of the public comments at least 30 days prior to the filing of the decree or settlement. The legislation would also require agencies to do a better job of showing that a proposed agreement is consistent with the law and in the public interest. While Congress is considering legislation EPA should implement administratively those portions of the legislation that it can do administratively, such as placing on-line all of the received Notices of Intent to sue, all complaints, all draft Consent Decrees and take comments on the draft Consent Decrees and present them to the court prior to asking for approval of the Consent Decree.

Congress should assume a more formalized role in overseeing deadline suits. The provisions in various environmental statutes that allow for deadline suits to be filed against EPA and other agencies should be re-codified into Title 28 of the U.S. Code. This simple step would provide the House and Senate Judiciary Committees direct

jurisdiction over such lawsuits and allow Congress to properly oversee the effect these suits are having on the judiciary system.

Congress should extend/stagger the deadlines contained in the Clean Air Act and the Clean Water Act. As discussed above, EPA has chronically missed statutory deadlines since Congress wrote the major environmental laws in the 1970s. The modern-day impact of nondiscretionary deadlines established in major environmental statutes written decades ago is critically important, because it is the fuel that drives the sue and settle approach to policymaking. Accordingly, Congress must either extend or stagger the numerous action deadlines it wrote into statutes in the 1970s so as to give EPA a reasonable chance to comply. Congress should also provide EPA with an affirmative defense to deadline suits, under which a plaintiff must show the agency acted in bad faith in missing a deadline.

Congress Should Redefine the term "mandate" in the Unfunded Mandates Reform Act. The Unfunded Mandates Reform Act ("UMRA")[7] requires federal agencies to assess the likely effects of new federal mandates of $100 million or more per year on state and local governments where federal funding will not be provided to implement the mandate. In essence, UMRA is intended to prevent federal agencies from shifting the costs of federal programs to the states. The definition of a "mandate" should be redefined as "any federal requirement that obligates a state or a subdivision of a state to expend state or local resources to comply."

Federal agencies should be required to perform an analysis of probable unfunded mandate impacts. Employing the new definition of mandate above, agencies need to calculate the costs of implementing federal rules that will be borne by state and local government bodies. Principles of transparency embedded in other administrative analytical requirements, such as Executive Order 12,866, should be extended to the requirements of the UMRA analysis. Further, if a new regulation will impose a new unfunded mandate, then agencies should consult with states before drafting a notice of proposed rulemaking. This consultation should be clearly documented and placed in the rulemaking record.

States should have a right to obtain judicial review of agency failures to conduct UMRA cost analyses. The states should have the ability to challenge the federal government in court when it imposes new unfunded mandates and does not conduct a cost analysis calculating and disclosing the burdens its new requirements are anticipated to impose on state and local governments.

[7] Pub. L. 104-4, 109 Stat. 48 (1995).

Report

Over the past four years, the U.S. Chamber of Commerce has sought to better understand how environmental advocacy groups use the "sue and settle" tactic to influence federal environmental policy in secret, outside of the normal regulatory process. We wanted to understand the impacts sue and settle agreements have on businesses, communities, and state and local governments.

1. Understanding how federal agencies override states' regulatory discretion through "sue and settle" agreements (July 2012)

2. Understanding how private parties control agency actions through the "sue and settle" process (May 2013)

3. Understanding how EPA ignores the states when it imposes new unfunded mandates on the states, including mandates arising out of "sue and settle" agreements

What Is Sue and Settle? "Sue and settle" occurs when an agency such as EPA accepts a lawsuit from outside advocacy groups that effectively dictate the priorities and duties of the agency through legally-binding, court-approved settlements negotiated behind closed doors—with no participation by other affected parties or the public.

What Did Previous Chamber Reports Reveal about Sue and Settle?

Previous Chamber reports documented the unprecedented rise in sue and settle agreements between federal agencies and special interest groups since 2009. These agreements have profoundly affected states, businesses, and consumers, yet agencies shut out those who are most affected by the deals.

- The Chamber's May 2013 report, *Sue and Settle: Regulating Behind Closed Doors*,[8] catalogued scores of sue and settle agreements that imposed major new regulatory burdens on the states, often without the knowledge or consent of the states themselves. In total, the report found that between 2009 and 2012, a total of **71** lawsuits against EPA and other federal agencies were settled under circumstances that categorize them as sue and settle cases. These agreements resulted in over **100** new regulatory actions, with some of these actions imposing **$1 billion or more** in annual costs and burdens on states,[9] along with businesses, consumers, and local communities.

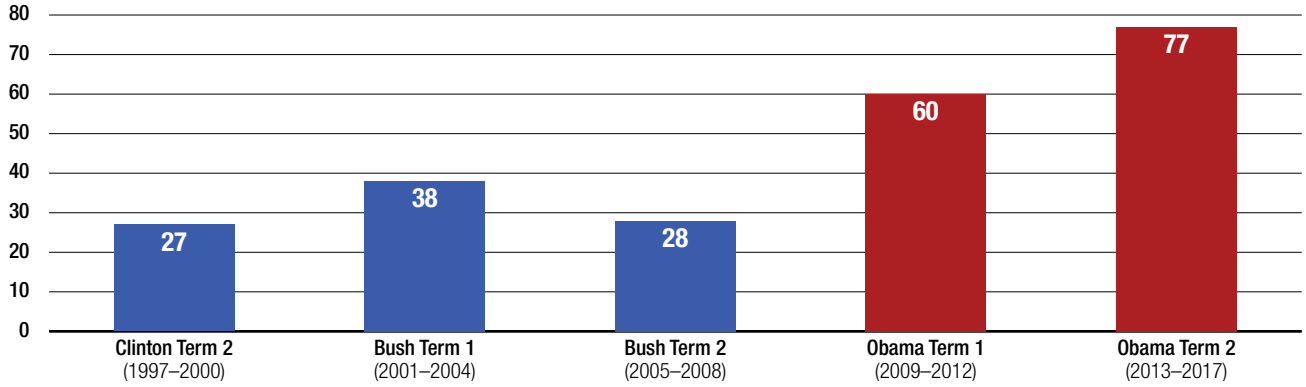
- Earlier, the Chamber's July 2012 report, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs*,[10] documented how EPA has used sue and settle agreements to enable the federal agency to override state-developed regional haze plans—thereby forcing states to implement far more costly requirements that yield negligible visibility improvements. EPA negotiated with advocacy groups in secret and chose to settle cases directly impacting

[8] U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors* (May 2013) *available at* https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf.

[9] *Id.* at 15-20.

[10] U.S. Chamber of Commerce, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs* (July 2012) *available at* https://www.uschamber.com/sites/default/files/documents/files/1207_ETRA_HazeReport_lr_0.pdf.

Figure 1: Clean Air Act Sue and Settle Cases Between 1997 and 2017



Source: EPA, *Federal Register*

specific states without notifying the affected state(s) or allowing them to participate. In fact, EPA actively sought to ***block*** states from participating in settlements on issues critical to them. The agency refused to be transparent and inclusive, frustrating states that are supposed to be EPA's regulatory partners.

- Our August 2016 report, *The Growing Burden of Unfunded EPA Mandates on the States*,[11] illustrated how EPA takes unilateral actions—**many originating in sue and settle agreements**—that impose significant new responsibilities on states while providing **no** additional resources to the states.[12]

Among other impacts, our reports have clearly shown that regulatory actions arising out of sue and settle agreements between EPA and advocacy groups impose particularly heavy burdens **on the states**.

Sue and Settle Developments Since 2013

Based on proposed Clean Air Act (CAA) settlements published in the *Federal Register*, our May 2013 study *Sue and Settle: Regulating Behind Closed Doors*, reported that the Obama administration's EPA negotiated **60** CAA sue and settle agreements between 2009 and 2012.[13]

Subsequently, between 2013 and January 2017, advocacy groups continued to rely heavily on sue and settle agreements to transform their policy objectives into federal law. As shown in Figure 1, between January 2013 and January 2017, EPA entered into an **additional 77** CAA consent decrees.[14] Thus, over 8 years the Obama administration's EPA welcomed substantially more CAA settlements (**137**) than previous administrations did over a 12-year period (**93**). **The individual CAA agreements are listed in Appendix A.**

[11] U.S. Chamber of Commerce, *The Growing Burden of Unfunded EPA Mandates on the States* (August 2016) *available at* https://www.uschamber.com/sites/default/files/documents/files/022879_etra_epa_coercive_federalism_report_fin.pdf

[12] *Id.* at 15-17.

[13] U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors* (May 2013) *available at* https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf at 14.

[14] Note that in the list of notices of proposed consent decrees and settlement agreements in Appendix A, there are 78 listed notices for only 77 actual consent decrees and settlement agreements. This is because the notice for the consent decree in Sierra Club, et al. v. EPA, No. 2:15-cv-3798-ODW (ASx) (C.D. Cal.) was published in the Federal Register on two separate occasions, 80 Fed. Reg. 63,782 (October 21, 2015) and 80 Fed. Reg. 79,338 (December 21, 2015).

EPA Imposes Major Costs on the States through Sue and Settle Agreements, but Provides No New Federal Funding

Sue and Settle Agreements Result In Costly New State Burdens

- Florida Nutrient Rule - Estuaries/Flowing Waters – up to **$632 million** annual costs.[17]
- Chesapeake Bay Clean Water Act rules – up to **$6 billion** cost for states to comply.[18]
- 2013 Revision to the PM2.5 NAAQS – up to **$350 million** annual costs.[19]
- 2015 Clean Power Plan – between **$5.1 billion and $8.4 billion** annual costs.[20]
- 2015 Startup, Shutdown & Malfunction (SSM) rule – nearly **$ 12 million** annual costs.[21]
- 2011–2016 Regional Haze rules – more than **$5 billion** additional cost to comply.[22]
- 2016 OSM Stream Protection rule – **$3-$6 billion** in lost state tax revenues on coal.[23]

[17] EPA, Nutrient Standards for Florida's Coastal, Estuarine & South Florida Flowing Waters (Nov. 2012).

[18] Chesapeake Bay Program, Funding and Financing, "State Funding" (2012), see www.chesapeakebay.net/about/how/funding (the six states and the District of Columbia anticipated combined expenditures of $2.4 billion in their 2011 milestone, or as much as $6 billion over a decade).

[19] EPA, "Overview of EPA's Revisions to the Air Quality Standards for Particulate Matter" (2012).

[20] EPA, Regulatory Impact Analysis, Clean Power Plan Final Rule, Exec. Summary (October 23, 2015) at ES-9..

[21] North Carolina Department of Environmental Quality, Division of Air Quality, *Fiscal and Regulatory Analysis for Amendments Concerning SSM Operations* (May 12, 2016) available at https://ncdenr.s3.amazonaws.com/s3fs-public/Environmental Management Commission/EMC Meetings/2016/May2016/Attachments/AttachmentB_to16-20_SSM_SIP_Call.pdf. EPA did not conduct a regulatory impact analysis for the Startup, Shutdown & Malfunction (SSM) SIP Call, saying it could not estimate how each state will act to revise its SIP. However, North Carolina estimated that the SIP Call revisions would cost the state air agency and affected facilities $337,700 annually to comply. Assuming that North Carolina is representative of the affected states, assigning North Carolina's costs to the 35 affected states gives an annual cost of the SSM SIP Call of about $12 million.

[22] U.S. Chamber of Commerce, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs* (July 2012); Testimony of William Yeatman before the House Committee on Science, Space and Technology, Subcommittee on Environment (March 29, 2016), available at: https://cei.org/content/testimony-william-yeatman-%E2%80%9Cepa%E2%80%99s-regional-haze-program%E2%80%9D-subcommittee-environment-committee.

[23] National Mining Association, *Economic Analysis of Proposed Stream Buffer Protection Rule* (October 2015) http://www.ourenergypolicy.org/wp-content/uploads/2015/10/Final-SPR-Economic-Impact-Report-NMA.pdf.

These agreements involved CAA rulemakings, which carry most of the costs of **all** EPA regulatory actions.[15] In fact, the costs of CAA rules issued between 2004 and 2015 represented **94.3% of the cost of all EPA rules** issued during that period.[16] These sue and settle agreements resulted in new rules that heavily impact businesses, communities, and, as shown below, **states**.

[15] U.S. Chamber of Commerce, *The Growing Burden of Unfunded EPA Mandates on the States* (August 2016) available at https://www.uschamber.com/sites/default/files/documents/files/022879_etra_epa_coercive_federalism_report_fin.pdf at 16.

[16] *Id.* at 16, Figure 5.

While much of the costs of these new rules will be borne by businesses and consumers, states will be responsible for a significant portion of the burden. Many of the major sue and settle agreements entered into since 2009 are only now having impacts that can be felt, particularly at the state level.

For example, in December 2010, EPA entered into a sue and settle agreement that obligated the agency to issue a rule limiting greenhouse gas (GHG) emissions from electric utilities.[24] The GHG rules finalized by EPA in 2015 under the Clean Power Plan will, under EPA's ***own*** economic analysis, impose between **$5.1 billion and $8.4 billion** in annual compliance costs on states, businesses, and communities.[25]

Likewise, in March 2010, the Department of the Interior's Office of Surface Mining (OSM) entered into a settlement with advocacy groups to revise its Stream Protection Rule affecting coal mining operations near streams. OSM published the final Stream Protection Rule on December 20, 2016.[26] The National Mining Association estimated that the Stream Protection Rule could cost between 112,757 and 280,809 mining-related jobs in coal-producing states. Equally important, the rule was estimated to eliminate between **$3.1 billion and $6.4 billion in tax revenues for governments**, including already hard-hit state and local governments in states like Kentucky and West Virginia.[27] Ultimately, the Congressional Review Act (CRA) was used to revoke the stream protection rule, with President Trump signing it into law on February 16, 2017.

As the result of a lawsuit filed by environmental groups, EPA agreed in May 2010 to impose costly new requirements on the six states and the District of Columbia that contribute most of the runoff to the Chesapeake Bay.[28] The Chesapeake Bay Program has estimated the total cost for the states to comply with new federal requirements to be as much as **$6 billion**.[29] These states must impose more stringent operating requirements on farmers, businesses and other sources within the watershed. For example, Pennsylvania has to "implement over 22,000 acres of additional forest and grass buffers" to meet federal pollutant load requirements.[30] In other words, the state must place land use limits on 22,000 acres to satisfy new federal requirements the state was prevented from having any role in crafting.

Perhaps most important, while earlier sue and settle agreements were aimed at forcing major new ***federal*** regulatory programs, advocacy groups are increasingly using agreements to pressure EPA

[24] EPA, Notice of Proposed Settlement Agreement, 75 Fed. Reg. 82,392 (Dec. 30, 2010).

[25] EPA, Regulatory Impact Analysis, Clean Power Plan Final Rule, Executive Summary (October 23, 2015) at ES-9. It is possible that the review and potential revision or repeal of the Clean Power Plan under the Trump administration would substantially reduce or eliminate these compliance costs.

[26] 81 Fed. Reg. 93,066 (December 20, 2016). The Stream Protection Rule was subsequently disapproved by Congress under the Congressional Review Act. See H. J. Res. 38 (February 2, 2017).

[27] National Mining Association, Economic Analysis of Proposed Stream Buffer Protection Rule (October 2015) http://www.ourenergypolicy.org/wp-content/uploads/2015/10/Final-SPR-Economic-Impact-Report-NMA.pdf.

[28] *Fowler v. EPA*, No. 10-00005 (settled May 10, 2010).

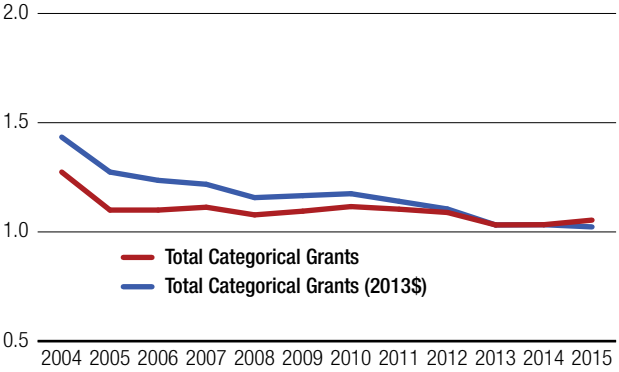
[29] Chesapeake Bay Program, *Funding and Financing*, "State Funding" (2012), *see* www.chesapeakebay.net/about/how/funding (the six states and the District of Columbia anticipated combined expenditures of $2.4 billion in their 2011 milestone, or as much as $6 billion over a decade).

[30] *See* EPA, Interim Evaluation of Pennsylvania's 2014–2915 Milestones and WIP [Watershed Improvement Program] Progress (June 10, 2015) *available at* https://www.epa.gov/sites/production/files/2015-07/documents/pennsylvania2014-2015interimmilestoneevaluation_61015.pdf at 3.

to override ***state-level*** environmental decisions. Thus, special interest groups are more frequently using sue and settle to achieve their policy priorities at the state level.

To make matters worse, as detailed in the Chamber's recent report, *The Growing Burden of Unfunded EPA Mandates on the States*,[31] EPA provides no additional funding to the states to implement the costly new mandates it assigns to them. As shown in Figure 2, yearly budget data collected by the Congressional Research Service between 2004 and 2015 confirms that EPA categorical grant dollars to the states have been flat or, in real terms, steadily declining since 2004.[32] In 2015, categorical grants to the states were actually about **29% lower** in inflation-adjusted dollars than they were in 2004.

Figure 2: EPA Categorical Grants to States from 2004 to 2015



Source: Congressional Research Service

Sue and Settle Agreements Also Impose Heavy Administrative Burdens on the States

Sue and settle agreements not only force states to redirect their scarce program dollars to satisfy the preferred policies of outside advocacy groups, they require state programs to reassign personnel to complete administrative tasks that are made a priority because of a court-approved sue and settle deadline.

Many of the major rulemakings finalized between 2004 and 2016 require state agencies to rewrite state rules, revise implementation plans, conduct additional air quality monitoring and/or modeling, and revise and reissue permits to individual sources. These activities require large amounts of state agency staff time and resources. For example, the Startup, Shutdown, and Malfunction rule revision[33]—finalized in 2015 as the result of a sue and settle agreement on a 2011 petition for rulemaking—has forced **45 state and local air pollution agencies** located in 36 states rewrite more than 110 individual administrative codes.[34] Rewriting state administrative codes requires public notice and comment, hearings, significant staff and counsel time to prepare code language, and approval of the revised regulatory provisions by EPA. This process can take months and ties up significant amounts of the time of state agency personnel.

[31] U.S. Chamber of Commerce, *The Growing Burden of Unfunded EPA Mandates on the States* (August 2016) *available at* https://www.uschamber.com/sites/default/files/documents/files/022879_etra_epa_coercive_federalism_report_fin.pdf

[32] Likewise, a 2013 Government Accountability Office report noted that "annual appropriations for these grants have decreased by approximately $85 million between fiscal year 2004 and fiscal year 2012." GAO, *Funding for 10 States' Programs Supported by Four Environmental Protection Agency Categorical Grants*,13-504R Information on EPA Categorical Grants (May 6, 2013).

[33] EPA, "State Implementation Plan Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction," 80 Fed. Reg. 33,840 (June 12, 2015).

[34] The states are Maine, Rhode Island, New Jersey, Delaware, Virginia, West Virginia, Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, Illinois, Indiana, Michigan, Minnesota, Ohio, Arkansas, Louisiana, New Mexico, Oklahoma, Texas, Iowa, Kansas, Missouri, Colorado, Montana, North Dakota, South Dakota, Arizona, California, Alaska, Washington, and the District of Columbia.

It is worth considering the comments of state officials themselves regarding the impacts of these agreements—and their frustration at being saddled with such mandates they played no part in developing.

> **The deadlines related to the [Clean Power Plan, Cross-State Air Pollution Rule, and the Startup, Shutdown, and Malfunction State Implementation Plan Call] overlap (and in some cases conflict with) deadlines regarding compliance with regional haze rules, and sulfur dioxide and ozone National Ambient Air Quality Standards. We estimate that complying with all these deadlines will require the devotion, above and beyond what would otherwise be required to conduct core functions, of as many as eleven full time employees, in an agency of less than 425 total employees.**
>
> ***—Gary Rickard***
> *Executive Director, Mississippi Department of Environmental Quality (February 8, 2016)*

The additional workloads forced on states by sue and settle agreements is significant, because according to the Environmental Council of the States (ECOS), the states implement approximately **96.5%** of federal environmental laws through delegated programs.[35] State agencies also conduct **90%** of all environmental inspections, enforcement actions, and collection of environmental data, and issue the vast bulk of the permits needed to build or operate a facility.[36] Despite this workload, as noted above, the states receive federal grant assistance at levels that are flat or even declining since 2001. This has prompted ECOS to publically state that "[o]ver nearly two decades, federal funding of state environmental programs has remained essentially flat. ***It is time for this to change.*** New and existing regulatory requirements must come with the fiscal resources for states to carry them out."[37]

Also, when states get new mandates to implement and enforce through an EPA sue and settle, they must reorder their program priorities and put other pressing objectives on the back burner. An unreasonable deadline for one rule draws resources from other regulations that may also be under deadlines. Resulting delays invite advocacy groups to further reorder an agency's priorities when they in turn sue to enforce the other rules' deadlines.

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[35] Testimony of Teresa Marks, Director, Arkansas Department of Environmental Quality and President, Environmental Council of the States, before the House Energy and Commerce Committee, Subcommittee on Environment and the Economy (February 15, 2013) *available at* http://docs.house.gov/meetings/IF/IF18/20130215/100242/HHRG-113-IF18-Wstate-MarksT-20130215.pdf) at 3.

[36] *Id.*

[37] Letter from Commissioner John Line Stine, ECOS President to Myron Ebell, President-Elect Trump Transition Team, Priority Areas for a Time of Political Transition (December 2, 2016) at 2 *(emphasis in the original)*.

When Consent Decrees between EPA and plaintiffs require states to change their [state] rules to incorporate new requirements—often without the input of states on either the substance or timing of those changes—states must necessarily adjust their programs to meet the new requirements and deadlines. In Indiana, and in other states, diverting resources to meet these unexpected federal requirements often comes at the expense of other pressing environmental priorities.

—Thomas Easterly
Commissioner, Indiana Department of Environmental Management (June 2013)[38]

This phenomenon has been clearly illustrated by sue and settle agreements entered into between environmental advocacy groups and the U.S. Fish and Wildlife Service (FWS). In May and July 2011, FWS agreed to two consent decrees which required the agency to propose adding more than 720 new candidates to the list of endangered species under the Endangered Species Act.[39] Agreeing to a "mega-listing" of this many species all at once imposed an overwhelming new burden on the agency, which required redirecting resources away from other—often more pressing—priorities. According to the director of the FWS, in FY 2011 the FWS was allocated $20.9 million for endangered species listing and critical habitat designation, but the agency was obligated to spend more than 75% of this allocation ($15.8 million) undertaking the substantive actions required by court orders or settlement agreements resulting from litigation.[40] The same thing can be expected to happen to states that are overwhelmed by new mandates arising out of sue and settle agreements.

Special Interest Groups and EPA Increasingly Use Sue and Settle to Exert Direct Control over the States

The Chamber's 2012 report, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs*,[41] documented how EPA used sue and settle agreements to override state-level decisions reserved to the states by the Clean Air Act.[42] Since 2012, EPA and advocacy groups have increasingly used sue and settle agreements to exert direct control over state decision making.

[38] Testimony of Thomas Easterly, Commissioner, Indiana Department of Environmental Management, before the House Judiciary Committee, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Hearing on H.R. 1493, the "Sunshine for Regulatory Decrees and Settlements Act of 2013" (June 5, 2013).

[39] 16 U.S.C. §§ 1531-1544. See U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors* (May 2013) *available at* https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf at 21-22.

[40] Testimony of Hon. Dan Ashe, Director, U.S. Fish and Wildlife Service before the House Natural Resources Committee (December 6, 2011). Sue and settle agreements requiring "mega-listings" of candidate became such a logistical problem for FWS that the agency was forced to change its rules. On September 27, 2016, FWS revised the filing procedures for public petitions to FWS and the National Marine Fisheries Service (NMFS) to list candidate species. 81 Fed. Reg. 66,462 (September 27, 2016). The final rule requires that a petition for listing must be limited to just one species, and that each petition must have sufficient scientific data to support a listing for that species.

[41] U.S. Chamber of Commerce, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs* (July 2012) *available at* https://www.uschamber.com/sites/default/files/documents/files/1207_ETRA_HazeReport_lr_0.pdf.

[42] *Id.* at 4-6.

While many of the sue and settle agreement negotiated between 2009 and 2012 involved major new federal rulemakings sought by special interest groups (e.g., revising the 2008 Ozone National Ambient Air Quality Standards, the Mercury and Air Toxics Standard, the Chesapeake Bay cleanup plan), **recent agreements more often involve an advocacy group putting pressure on EPA to reject state-level environmental decisions**.

Recent examples of these kind of sue and settle agreements include petitions for EPA to object to a state's issuance or renewal of an individual facility's Title V operating permit. EPA agrees to grant or deny the petition within a specified date—and most often subsequently requires the state to modify the permit to satisfy the advocacy group(s). These agreements give EPA and special interest groups a way to rewrite facility permits, thereby exerting direct control over the states.

Other recent sue and settle agreements involve EPA pressuring the states to prioritize specific actions on State Implementation Plans (SIPs), regardless of existing state priorities. As was the case with **federal** agency resource priorities and agendas, special interests now increasingly use sue and settle as a way to reprogram **state** resources and policy agendas.

On June 30, 2011, Sierra Club filed a petition asking EPA to find inadequate and correct a number of SIPs that allegedly "threaten states' ability to achieve and maintain compliance with NAAQS." EPA agreed, even though many of the provisions in question clearly did not preclude areas from meeting ambient standards.

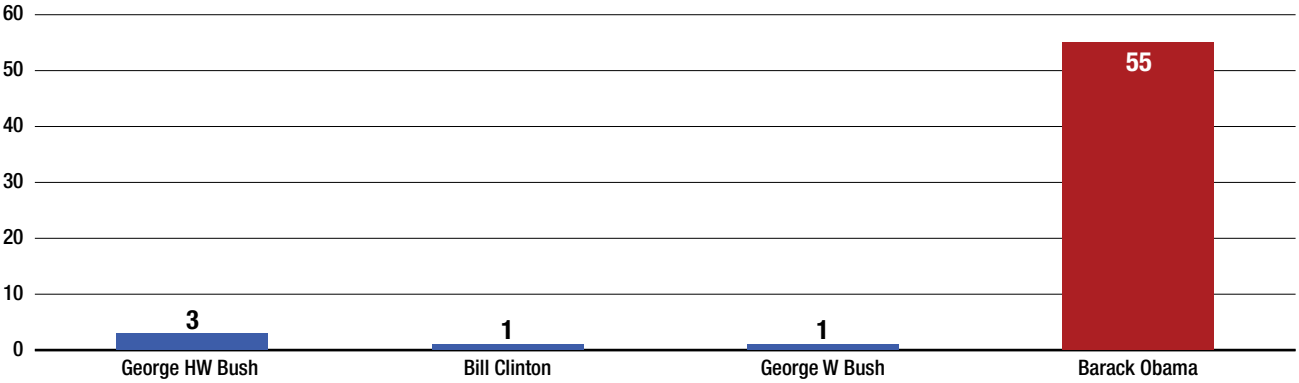
—Chuck Carr Brown
Secretary, Louisiana Department of Environmental Quality (February 8, 2016)

Among the most egregious of direct federal actions imposed upon the states via sue and settle is EPA's widespread imposition of **Federal Implementation Plans (FIPs)**. Under the Clean Air Act, the FIP is designed as a "last-ditch" federal backstop to be used only where a state is unwilling or is unable to develop a required SIP. As noted in our 2012 report *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs*, however, EPA is choosing to impose FIPs on states in order to compel specific policy outcomes. Our 2012 report focused on Regional Haze FIPs that EPA imposed on the states of Arizona, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, and Wyoming.[43] These FIPs allowed EPA to federalize actions that Congress intended to be decided by the states.[44]

[43] U.S. Chamber of Commerce, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs* (July 2012).

[44] *Id.* at 5.

Figure 3: CAA FIPs by Administration (1989–2016) *# of FIPs Imposed on States*



Source: William Yeatman, Competitive Enterprise Institute; Federal Register

Since 2013, EPA by no means limited itself to the eight FIPs discussed in our report. Instead, the agency has turned to the FIP as an everyday tool, increasingly relying on it as a means to take direct control of state- and local-level environmental decision making. The state of Arkansas, for example, has recently complained that:

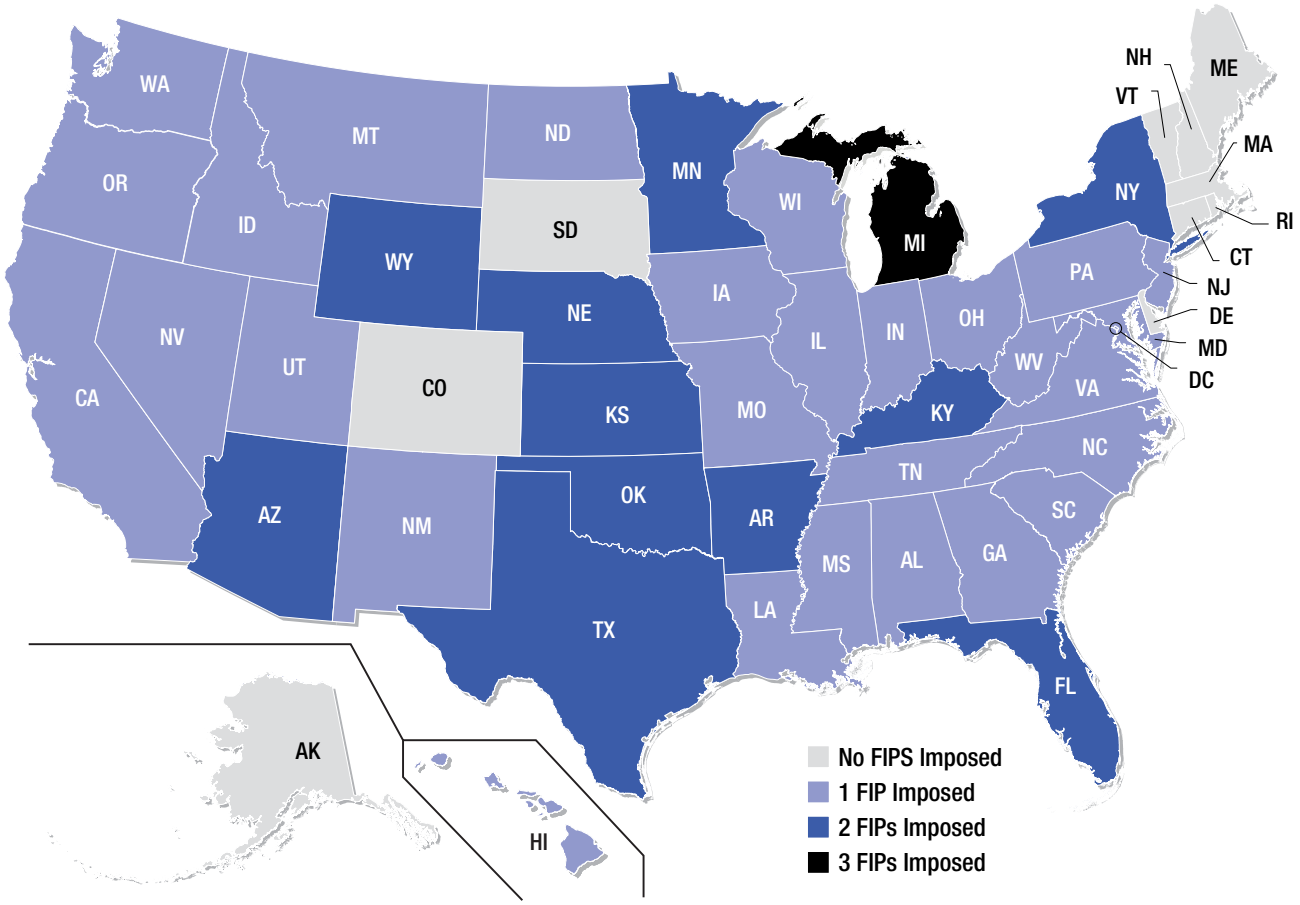
> Historically FIPs were used as the weapon of last resort for our EPA partner, its nuclear option for States that were unfaithful to the partnership or denied the marriage outright. FIPs are used as an everyday tool (often of dubious origin) in the EPA's vast arsenal. … [I]t is worth noting that in the past seven years the States have experienced more of these federal hostile takeovers, known as FIPs, than were delivered in the prior three administrations combined, ten times over.
>
> ***—Becky Keogh***
> *Director, Arkansas DEQ (March 2, 2016)(emphasis added)*

As Figure 3 clearly shows, the Obama Administration imposed vastly more FIPs on states than has any prior administration. As shown in **Appendix C**, these include **17** FIPs dealing with regional haze (all in the wake of sue and settle agreements), **9** FIPs relating to greenhouse gas permitting programs, **28** FIPs for the cross-state air pollution rule, and **1** FIP for oil and gas activities in Indian Country (land located within the boundaries of federally-recognized Indian reservations).

As the U.S. map at right clearly illustrates, EPA has not only imposed a very large number of FIPs since 2010, the agency has also imposed FIPs across a wide geographic swath, literally from coast to coast. **Forty states** have been hit with at least one FIP since 2010.[45]

[45] While many of the FIPs imposed on states have subsequently been removed, the willingness of EPA to rely so heavily on FIPs to impose its will on states is noteworthy.

Figure 4: Federal Implementation Plans Imposed on States (2010–2016)



Source: Federal Register

Although EPA might be expected to shoulder the entire administrative burden of implementing a FIP, much of that burden still falls on the states. State environmental agencies still have to expend state resources to accommodate the requirements of sue and settle-driven FIPs. States are still responsible for conforming state administrative codes to reflect mandated requirements, updating State Implementation Plans, ensuring compliance with the FIP, and coordinating with EPA. Besides diminishing the states' role to one that is subordinate to EPA, these FIPs as a practical matter have imposed more than **$5 billion** in new costs on 17 states and several utilities located in those states.[46]

Lacking additional federal funds to implement new federal mandates—including those imposed through numerous FIPs—states have no choice but to make up the shortfall through higher taxes, greatly increased fees or by transferring appropriated dollars from other programs.

[46] U.S. Chamber of Commerce, *EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs* (July 2012); *see also* Testimony of William Yeatman before the House Committee on Science, Space and Technology, Subcommittee on Environment (March 29, 2016), *available at*: https://cei.org/content/testimony-william-yeatman-%E2%80%9Cepa%E2%80%99s-regional-haze-program%E2%80%9D-subcommittee-environment-committee.

Many More Potential Sue and Settle Lawsuits Are In the Pipeline

In the months that followed publication of the Chamber's 2013 *Sue and Settle: Regulating Behind Closed Doors* report,[47] the Senate Environment and Public Works (EPW) Committee persuaded EPA to make certain agency documents related to the sue and settle process publicly available for the first time,[48] including copies of the notices EPA receives indicating an outside group's intent to file a lawsuit against the agency for missing a deadline or otherwise failing to act (known as a "Notice of Intent" to sue).

Since January 2013, based on EPA's list of Notices of Intent to sue, advocacy groups have notified EPA of their intent to file **more than 180** lawsuits under the Clean Air Act or the Clean Water Act, with more than **125** under the CAA.[49] **See Appendix B**. While not all of these Notices of Intent become lawsuits that, in turn, become sue and settle agreements, experience shows that many do.

EPA's Failure to Meet Statutory Deadlines Drives Most Sue and Settle Cases

Under several of the major environmental laws, such as the CAA, and the CWA, the EPA is required to promulgate regulations or review existing standards under specific statutory deadlines. The EPA overwhelmingly fails to meet those deadlines, however. For example, according to a 2014 *Harvard Journal of Law & Public Policy* article, "[i]n 1991, the EPA met only **14%** of the hundreds of congressional deadlines" imposed upon it.[50]

Another study by the Competitive Enterprise Institute (CEI) examined the EPA's timeliness to promulgate regulations or review standards under three programs administered through the CAA: the National Ambient Air Quality Standards, the National Emissions Standards for Hazardous Air Pollutants, and the New Source Performance Standards.[51] The 2013 CEI study concluded that since 1993, "**98 percent of EPA regulations (196 out of 200) pursuant to these programs**

[47] U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors* (May 2013) *available at* https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf.

[48] Senator David Vitter, Press Release, "Viiter, EPW Republicans Get Major Agreements from EPA on 5 Transparency Requests" (July 9, 2013) available at https://www.vitter.senate.gov/newsroom/press/vitter-epw-republicans-get-major-agreements-from-epa-on-5-transparency-requests.

[49] *See* EPA, "Notices of Intent to Sue the U.S. Environmental Protection Agency Documents," *available at* https://www.epa.gov/noi.

[50] Henry N. Butler and Nathaniel J. Harris, *Sue, Settle, and Shut Out the States: Destroying Environmental Benefits of Cooperative Federalism*, Harvard Journal of Law & Public Policy, Vol. 37, No. 2 at 599 (2014) (available at http://www.harvard-jlpp.com/wp-content/uploads/2014/05/37_2_579_Butler-Harris.pdf) (citing Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law* 54 Law & Contemp. Probs. 311, 323 (1991) (available at http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1158&context=facpub). According to Lazarus, "the 14% compliance rate refers to all environmental statutory deadlines, 86% of which apply to EPA." *Id.* at 324.

[51] William Yeatman, "EPA's Woeful Deadline Performance Raises Questions about Agency Competence, Climate Change Regulations, "Sue and Settle" July 10, 2013 (*emphasis added*)(available at https://cei.org/web-memo/epas-woeful-deadline-performance-raises-questions-about-agency-competence-climate-change-re).

were promulgated late, by an average of 2,072 days after their respective statutorily defined deadlines."[52] Historically, EPA has consistently failed to meet the vast majority of its action deadlines, even when the agency has enjoyed staffing and budget levels well above current levels.[53] Given the myriad of interrelated statutory deadlines—some dependent on the completion of others—and the procedural requirements that are a prerequisite to agency action, it is almost technically impossible for EPA to meet its continuous deadlines (even if it were not already hopelessly mired in long-passed missed deadlines).

When EPA misses deadlines—as it almost always does—advocacy groups can sue the agency via the citizen suit provision in the CAA[54] for failure to promulgate the subject regulation or to review the standard at issue. Because EPA is out of compliance with the CAA's statutory deadlines virtually all of the time, advocacy groups are free to pick and choose the rules they believe should be a priority. This gives third party interests a way to dictate EPA priorities and budgetary agendas, particularly when the agency is receptive to settlements. Instead of being able to use its discretion as to how best utilize limited resources—***and, indirectly, the resources of the states***—the agency agrees to shift these resources away from critical duties in order to satisfy the narrow demands of outside groups.

> **Litigation can also accelerate implementation schedules, thereby depriving permitting authorities of compliance options that would otherwise be available … An agreement between the EPA and Sierra Club and NRDC to resolve litigation concerning the deadline for completing SO2 designations … effectively precludes LDEQ from demonstrating compliance with the 1-hour SO2 NAAQS via ambient air monitoring, despite the fact that this option is expressly available for other areas per EPA's SO2 Data Requirements Rule.**
>
> ***—Chuck Carr Brown***
> *Secretary, Louisiana Department of Environmental Quality (February 8, 2016) (emphasis added)*

EPA Refused to Consult with States before Imposing Sue and Settle Burdens on Them

States increasingly complain that EPA does not consult with them before taking actions that profoundly affect them. In most of the sue and settle cases related to regional haze discussed in the Chamber's 2012 report, EPA didn't notify affected states that it was actively negotiating with advocacy groups—and chose not to consult with a state before agreeing to settlement terms that would adversely affect the state's interests. As one Nevada official noted recently:

[52] *Id.*

[53] According to EPA, its largest budget ($10.3 billion) was in FY2010, while its biggest staff roster (18,110) was in FY1999. In FY2016, EPA's budget was $8.1 billion, with 15,376 employees. See https://www.epa.gov/planandbudget/budget.

[54] 42 USC § 7604.

Like they have done before, environmental groups are trying to work out a side-deal with the EPA that leaves everyone else, including Nevadans, without a seat at the table. We want to ensure that is not the outcome this time. When the EPA misses a deadline, that should not provide environmental groups with an opportunity to impose new regulations on the state through special settlements, especially without providing a meaningful opportunity for the state to represent all Nevadans in the settlement.

—Adam Paul Laxalt
Nevada Attorney-General (August 3, 2015)

EPA Has Been Non-Transparent about Sue and Settle

Because sue and settle agreements obligate EPA to take actions that can affect the rights and responsibilities of stakeholders—especially the states—that are not represented in settlement negotiations, principles of transparency and open government require EPA to publicly disclose these negotiations well in advance of the date such an agreement takes legal effect.

And EPA has publicly committed itself to such transparency. In the wake of President Obama's Presidential Memorandum titled, "Transparency and Open Government,"[55] EPA's then-Administrator Lisa Jackson issued a Memorandum to all EPA employees titled "Transparency in EPA's Operations."[56] The EPA Memorandum states that:

The American public will not trust us to protect their health or their environment if they do not trust us to be transparent and inclusive in our decision-making. To earn this trust we must conduct business with the public openly and fairly.[57]

Significantly, the Memorandum provides that "EPA is engaged in a wide range of litigation. **The conduct of litigation by the Agency should reflect the principles of fairness and openness that apply to other EPA activities.**"[58]

Despite these strong public commitments to transparency and fairness, EPA chose to keep the details of its settlement negotiations secret and actively worked to prevent states and other stakeholders from participating. In mid-2013, the Senate EPW Committee expressed serious concerns about "the lack of transparency surrounding EPA's sue-and-settle agreements with environmental activist groups that were driving much of EPA's regulatory activities."[59] The committee persuaded EPA to make certain agency documents relating to the sue and settle

[55] 73 Fed. Reg. 4.685 (Jan. 21, 2009). The Memorandum directed federal agencies to take steps to ensure an open federal government. Specifically, the Memorandum states that "[m]y Administration will take appropriate action, consistent with law and policy, to disclose information rapidly in forms that the public can readily find and use."

[56] Memorandum for All EPA Employees from Administrator Lisa Jackson, "Transparency in EPA's Operations" (April 23, 2009).

[57] *Id.* at 1.

[58] *Id.* at 4. (emphasis added).

[59] Letter from Senate Committee on Environment and Public Affairs to EPA Administrator Gina McCarthy (September 7, 2016) *available at* www.epw.senate.gov/public/_cache/files/047620af-edf3-4593-82ef-b1be8eb3c250/09.07.2016-epw-majority-to-mccarthy-re-litigation-and-reg-transparency.pdf.

process publicly available for the first time,[60] including (1) petitions to take action on an EPA rule or take other specific rulemaking action, (2) notices of a party's intent to file a lawsuit against EPA for missing a deadline or otherwise failing to act ("Notices of Intent" to sue), and (3) updated information about rulemakings under development by the agency.

Despite EPA's public assurances in 2013 that it will be more open and transparent, on September 7, 2016, the Senate EPW Committee sent a letter to EPA Administrator Gina McCarthy, complaining that the agency has not kept its promises. The committee noted that EPA's website is both out of date and incomplete, and that the agency has not fulfilled its pledge to be more open.[61] Specifically, the agency website does not accurately list Petitions and Notices of Intent received by EPA or rulemakings under development, nor does it provide a comprehensive listing of ongoing litigation involving the agency.

Accordingly, the EPW Committee has asked that EPA provide: (1) a list of all actions on rulemakings underway as part of the Action Development Process; (2) a complete list of all pending administrative or judicial litigation involving the agency; (3) a complete list of all petitions to issue, amend, or repeal a rule currently pending before the agency since January 1, 2016; (4) a complete list of all Notices of Intent to file suit received by the agency since January 1, 2016; (5) a complete list of all delegations of authority issued, amended, or revoked since January 1, 2016; and (6) copies of all mass emails, guidance, briefings, or memoranda distributed to EPA staff concerning planning for the upcoming transition in administrations.[62]

The Chamber agrees that EPA should make all of this critical information routinely available to the public—especially to the states. We are hopeful that EPA will now make transparency and accountability the agency's highest priority.

Conclusion

Sue and settle agreements are a threat to the states and their ability to perform the jobs that Congress assigned to them in the cooperative federalism scheme. It has recently been observed that

The use of sue-and-settle has diminished both the States' involvement in statutorily-created roles and the States' right to participate in notice-and-comment rulemaking. These consent decrees have not just caused intangible harm to state involvement, they have actually resulted in real harm to society.[63]

As one state environmental official noted in 2016, the atmosphere of distrust between EPA and the states because of sue and settle, "is an unhealthy dynamic."[64] Commenting on the disruptive effect

[60] Senator David Vitter, Press Release, "Viiter, EPW Republicans Get Major Agreements from EPA on 5 Transparency Requests" (July 9, 2013) *available at* https://www.vitter.senate.gov/newsroom/press/vitter-epw-republicans-get-major-agreements-from-epa-on-5-transparency-requests.

[61] Letter from Senate Committee on Environment and Public Affairs to EPA Administrator Gina McCarthy (September 7, 2016) *available at* www.epw.senate.gov/public/_cache/files/047620af-edf3-4593-82ef-b1be8eb3c250/09.07.2016-epw-majority-to-mccarthy-re-litigation-and-reg-transparency.pdf.

[62] *Id.* at 5-6.

[63] Henry Butler and Nathaniel Harris, *Sue, Settle, and Shut Out the States: Destroying the Environmental Benefits of Cooperative Federalism*, 37 *Harvard. Journal of Law & Public Policy* 579, 621 (May 13, 2014).

[64] Jim Macy, Director, Nebraska Department of Environmental Quality to Senator James M. Inhofe, Chairman, Senate Committee on Environment and Public Works (March 2016).

the agreements have on states, the official added, "[t]he diversion of resources away from meeting permitting responsibilities, addressing complaints from the public and general community and regulatory outreach creates animosities that do not bode well for future success."

Recommendations

- ***EPA Should Make Information Publicly Available About Negotiated Settlements of Lawsuits Where the Agency Is the Defendant.*** EPA needs to make this critical information routinely available to the public—especially to the states. In addition, EPA needs to amend its regulations to ensure that a state or states affected by a potential settlement agreement is given notice: (1) that EPA has been sued on an issue involving that state; and (2) that the agency is meeting with outside groups in the settlement context. States then should be given the opportunity to participate. This information should include details of any attorneys' fees and/or costs paid to outside groups.

- ***EPA Should Review the Federal Implementation Plans It Imposed on the States and Evaluate Whether They Should Be Repealed***. EPA should review the 55 FIPs it has issued since 2009 and evaluate whether, under the Trump administration, they remain appropriate. EPA should not use the drastic tactic of imposing FIPs on states unless all efforts to work cooperatively and collaboratively have failed.

- ***Congress Should Enact the Sunshine for Regulatory Decrees and Settlements Act.*** This legislation would (1) require agencies to give notice when they receive Notices of Intent to sue from private parties; (2) afford affected parties an opportunity to intervene *prior to the filing* of the consent decree or settlement with a court; (3) publish notice of a proposed decree or settlement in the *Federal Register*, and take (and respond to) public comments at least 60 days prior to the filing of the decree or settlement; and (4) provide the court with a copy of the public comments at least 30 days prior to the filing of the decree or settlement. The legislation would also require agencies to do a better job of showing that a proposed agreement is consistent with the law and in the public interest.

Congress should assume a more formalized role in overseeing deadline suits. The provisions in various environmental statutes that allow for deadline suits to be filed against EPA and other agencies should be re-codified into Title 28 of the U.S. Code. This simple step would provide the House and Senate Judiciary Committees direct jurisdiction over such lawsuits and allow Congress to properly oversee the effect these suits are having on the judiciary system.

Congress should extend/stagger the deadlines contained in the CAA and the Clean Water Act. As discussed above, EPA has chronically missed statutory deadlines since Congress wrote the major environmental laws in the 1970s. The modern-day impact of nondiscretionary deadlines established in major environmental statutes written decades ago is critically important, because it is the fuel that drives the sue and settle approach to policymaking. Accordingly, Congress must either extend or stagger the numerous action deadlines it wrote into statutes in the 1970s so as to give EPA a reasonable chance to comply. Congress should also provide EPA with an affirmative defense to deadline suits, under which a plaintiff must show the agency acted in bad faith in missing a deadline.

Congress Should Redefine the term "mandate" in the Unfunded Mandates Reform Act. The Unfunded Mandates Reform Act ("UMRA")[65] requires federal agencies to assess the likely effects of new federal mandates of $100 million or more per year on state and local governments where federal funding will not be provided to implement the mandate. In essence, UMRA is intended to prevent federal agencies from shifting the costs of federal programs to the states. The definition of a "mandate" should be redefined as "any federal requirement that obligates a state or a subdivision of a state to expend state or local resources to comply."

Federal agencies should be required to perform an analysis of probable unfunded mandate impacts. Employing the new definition of mandate above, agencies need to calculate the costs of implementing federal rules that will be borne by state and local government bodies. Principles of transparency embedded in other administrative analytical requirements, such as Executive Order 12,866, should be extended to the requirements of the UMRA analysis. Further, if a new regulation will impose a new unfunded mandate, then agencies should consult with states before drafting a notice of proposed rulemaking. This consultation should be clearly documented and placed in the rulemaking record.

States should have a right to obtain judicial review of agency failures to conduct UMRA cost analyses. The states should have the ability to challenge the federal government in court when it imposes new unfunded mandates and does not conduct a cost analysis—calculating and disclosing the burdens its new requirements are anticipated to impose on state and local governments.

[65] Pub. L. 104-4, 109 Stat. 48 (1995).

Appendix A: Federal Register Notices of Proposed Clean Air Act Settlement Agreements and Consent Decrees since January 2013 (excluding enforcement-related settlements)

Case Name	Federal Register Publication	Settlement Topic
Sierra Club v. McCarthy, No. 1:16-cf-01895-KBJ (D. D.C.)	82 Fed. Reg. 7,820 (January 23, 2017)	Deadline for EPA to act on petition challenging proposed Title V operating permit issued by the Utah Dept. of Air Quality to PacifiCorp Energy authorizing the operation of the coal-fired Hunter Plant in Castle Dale, Utah.
Sierra Club v. EPA, No. 16-1158 (D.C. Cir.)	82 Fed. Reg. 6,532 (January 19, 2017)	Review of final EPA action titled "Revisions to Ambient Monitoring Quality Assurance and Other Requirements." The EPA action dealt with public inspections of annual monitoring plans. EPA agreed to issue guidance documents to state and local agencies advising them on public notice and inspection practices for annual monitoring plans.
Center for Biological Diversity, et al. v. McCarthy, No. 3:16-cv-03796-VC (N.D. Cal.)	82 Fed. Reg.4,866 (January 17, 2017)	Deadline for EPA to act to complete periodic review of air quality criteria and National Ambient Air Quality Standards (NAAQS) for sulfur dioxide (SO2) and oxides of nitrogen (SOx). EPA agreed to set a time for its proposed decision on the NOx review no later than July 14, 2017, a final decision on the NOx review by April 6, 2018, a final SOx criteria document by December 14, 2017, a proposed decision on the SOx review by May 25, 2018, and a final decision on the SOx review by January 28, 2019.
Sierra Club v. McCarthy, No. 1:16-cv-01831-EGS (D. D.C.)	82 Fed. Reg. 1,732 (January 6, 2017)	Deadline for EPA to act on petition challenging proposed Title V operating permit issued by the Pennsylvania Dept. of Environmental Protection to the Scrubgrass Generating Co. LP power plant in Venango County. EPA agreed to take specific action by a specified date.
Citizens for Clean Air, et al. v. McCarthy, et al., No. 2:16-cv-01594-RAJ (W.D. Wa.)	82 Fed. Reg. 116 (January 3, 2017)	Deadline for EPA action on determination of attainment status of Fairbanks North Star Borough in Alaska under 2006 24-hour PM2.5 NAAQS. EPA agreed to take specific action by April 28, 2017.
Basin Electric Power Co-op, et al. v. EPA, No. 14-9533 (10th Cir.); ***Wyoming v. EPA,*** No. 14-9529 (10th Cir.); ***Powder River Resource Council v. EPA,*** No. 14-9530 (10th Cir.); ***PacifiCorp v. EPA,*** No. 14-9534 (10th Cir.)	81 Fed. Reg. 96,450 (December 30, 2016)	Review of final EPA action on Regional Haze Plan for Wyoming. Basin Electric challenged application of NOx Best Available Refit Technology (BART) requirements to Laramie River Units 1-3. Under the terms of the settlement Basin Electric agreed to submit a source-specific State Implementation Plan (SIP) to EPA for SO2, to comply with specified average SO2 emission rates at each unit. The State of Wyoming agreed to review the SIP submittal expeditiously, and EPA agreed to make a decision on removing the Federal Implementation Plan it had imposed
American Chemistry Council v. EPA, No. 15-1146 (D.C. Cir.)	81 Fed. Reg. 91,931 (December 19, 2016)	EPA action on reconsideration of requirements for pressure relief devices under March 2015 final hazardous air pollutant rule for Off-Site Waste Recovery Operations. EPA agreed to take specific final action by January 18, 2018.

Federal Register Notices of Proposed Clean Air Act Settlement Agreements and Consent Decrees since January 2013, cont.

Case Name	Federal Register Publication	Settlement Topic
State of New York, et al. v. McCarthy, et al. No. 1:16-cv-07827 (S.D. N.Y.)	81 Fed. Reg. 91,169 (December 16, 2016)	Deadline for EPA to act on two petitions requesting that EPA expand the Ozone Transport Region to include numerous upwind states. EPA agreed to take action on one petition by January 18, 2017 and on the other petition by October 27, 2017.
Center for Biological Diversity, et al. v. McCarthy, et al., No. 4:16-cv-04092-PJH (N.D. Cal.)	81 Fed. Reg. 89,094 (December 9, 2016)	Deadline for EPA to act to address an alleged failure to find that specified states did not submit required implementing SIPs under the 1997 and 2008 Ozone NAAQS. EPA agreed to take specific action by specified dates.
Donald van der Vaart, et al. v. McCarthy, No. 4-16-cv-01946-SBA (E.D. N.C.)	81 Fed. Reg. 83,235 (November 21, 2016)	Deadline for EPA to act on petition seeking to include North Carolina to the Ozone Transport Region. EPA agreed to take specific action on the petition by October 27, 2017. Plaintiff is Secretary of the North Carolina Dept. of Environmental Quality.
Citizens for Clean Air, et al. v. McCarthy, et al., No. 2:16-cv-00857-JCC (W.D. WA.)	81 Fed. Reg. 76,582 (November 3, 2016)	Deadline for EPA to act on Fairbanks North Slope Borough Moderate Area Attainment Plan for the 2006 24 hour PM2.5 NAAQS SIP. EPA agreed to take action on the SIP submittal by January 19, 2017.
Air Alliance Houston et. al. v. EPA, No. 1-16-cv-01998 (D.C. Cir)	81 Fed. Reg. 73,387 (October 25, 2016)	Deadline for EPA to act to revise emission factors for volatile organic compounds from flares at natural gas production facilities at least once every three years. EPA agreed to take specific actions relating to emissions factors by June 3, 2017.
Center for Biological Diversity, et al. v. EPA, No. 4:16-cv-01946-SBA (N.D. Cal.)	81 Fed. Reg. 72,804 (October 21, 2016)	Deadline for EPA to act on petition challenging proposed Authority to Construct/Certificate of Authority issued by the San Joaquin Valley Air Pollution Control District for the Alon USA Refinery in Bakersfield, California.
Air Alliance Houston et. al. v. EPA, No. 15-1210 (D.C. Cir)	81 Fed. Reg. 70,677 (October 13, 2016)	Deadline for EPA to act to revise emission factors for volatile organic compounds from flares, tanks, and wastewater collectors. EPA agreed to take specific actions relating to emissions factors by December 16, 2016.
Concerned Citizens of Seneca County, Inc. v. McCarthy, No. 6:16-cv-06196 (W.D.N.Y.)	81 Fed. Reg. 54,802 (August 17, 2016)	Deadline for EPA to act on petition challenging proposed Title V operating permit issued by the New York State Dept. of Environmental Conservation to the Seneca County Landfill Gas-to-Energy Facility.
Sierra Club v. Gina McCarthy, No. 3:15-cv-04328-JD (N.D. Cal.)	81 Fed. Reg. 54,800 (August 17, 2016)	Deadline for EPA to act on Wyoming's SIP submittal relating to the 2008 ozone NAAQS.
Sierra Club v. EPA, No. 15-cv-01555 (D.D.C.)	81 Fed. Reg. 44,301 (July 7, 2016)	Deadline for EPA to act to promulgate a FIP for Louisiana to address regional haze.
Appleton Coated, LLC v. McCarthy, No. 1:16-cv-272 (E.D. Wis.)	81 Fed. Reg. 44,018 (July 6, 2016)	Deadline for EPA to act on petition challenging proposed Title V operating permit issued by the Wisconsin Department of Natural Resources to Appleton Coated, LLC.

Federal Register Notices of Proposed Clean Air Act Settlement Agreements and Consent Decrees since January 2013, cont.

Case Name	Federal Register Publication	Settlement Topic
Sierra Club v. Gina McCarthy, No. 3:15-cv-04328-JD (N.D. Cal.)	81 Fed. Reg. 42,351 (June 29, 2016)	Deadline for EPA to act on 2008 ozone NAAQS SIP submittals by Louisiana, Montana, New Jersey, New York, South Dakota, Wisconsin, and Wyoming, and to promulgate a FIP for California and Kentucky relating to the2008 ozone NAAQS SIP.
Sierra Club v. McCarthy, No. 1:16-cv-235 (D.D.C.)	81 Fed. Reg. 39,922 (June 20, 2016)	Deadline for EPA to act on petition challenging proposed Title V operating permit issued by the Tennessee Dept. of Env't and Conservation to TVA's Bull Run Fossil Plant.
Partnership for Policy Integrity v. McCarthy, No. 5:16-cv-00038-CAR (M.D. G.A.)	81 Fed. Reg. 37,588 (June 10, 2016)	Deadline for EPA to act on petition challenging proposed Title V operating permit issued by the Georgia Dept. of Natural Resources to Piedmont Green Power, LLC for a biomass boiler.
Midwest Environmental Defense Center v. McCarthy, No. 1:15-cv-1511 (E.D. Wis.)	81 Fed. Reg. 29,260 (May 11, 2016)	Deadline for EPA to act on petition challenging proposed Title V operating permit issued by the Wisconsin Department of Natural Resources to Appleton Coated, LLC.
Louisiana Environmental Action Network v. McCarthy, No. 3:15-cv-00858-JJB-RLB (M.D. La.)	81 Fed. Reg. 24,810 (April 27, 2016)	Deadline for EPA to act on petition filed by LEAN and Sierra Club challenging proposed Title V operating permit for Yuhuang Chemical Inc. issued by the Louisiana Dept. of Environmental Quality.
State of Nevada, et al. v. McCarthy, No. 3:15-cv-00396-HDM-WGC (D. Nev.)	81 Fed. Reg. 22,079 (April 14, 2016)	Deadline for EPA to act on Nevada's SIP submittal relating to the interstate transport requirements under the 2008 ozone NAAQS.
Donald van der Vaart, et al. v. EPA, No. 5:15-cv-593-FL (E.D.N.C.)	81 Fed. Reg. 19,600 (April 5, 2016)	Deadline for EPA to act on North Carolina's submitted PM2.5 PSD SIP. Plaintiff is Secretary of the North Carolina Department of Environmental Quality.
Center for Biological Diversity, et al. v. EPA, No. 4:15-cv-4663-SBA (N.D. Cal.)	81 Fed. Reg. 19,175 (April 4, 2016)	Deadline for EPA to determine whether California submitted a complete SIP for 2006 PM2.5 nonattainment new source review (NNSR) program for El Dorado and Yolo-Solano Air Districts; whether Arizona, California, Idaho, Oregon and Utah submitted adequate 2006 PM2.5 NNSR SIPs, and whether EPA must impose a FIP.
PPHE v. McCarthy, No. 1:15-cv-00412-ACK-BMK (D. Haw.)	81 Fed. Reg. 9,849 (February 26, 2016)	Deadline for EPA to act on petition challenging proposed Title V operating permit for Hu Hunua Bioenergy Facility issued by the Hawaii Dept. of Health.
Sierra Club, et al. v. EPA, No. 2:15-cv-3798-ODW (ASx) (C.D. Cal.)	80 Fed. Reg. 79,338 (December 21, 2015)	Deadline for EPA to act on 2006 PM2.5 Air Quality Management Plan submitted by California for the South Coast Air Quality Management District. This is the second notice of the same proposed consent decree published on October 21, 2015.

Federal Register Notices of Proposed Clean Air Act Settlement Agreements and Consent Decrees since January 2013, cont.

Case Name	Federal Register Publication	Settlement Topic
In re Deseret Power Cooperative Bonanza Power Plant, CAA Appeal Nos. 15-1, 15-2	80 Fed. Reg. 63,993 (October 22, 2015)	Deadline for EPA to act on Sierra Club and WildEarth Guardian challenges to Part 71 federal operating permit issued by EPA Region 8 to Deseret Power Cooperative for operation of the Bonanza Plant in Utah. Under the agreement, Deseret will apply for a New Source Review permit which EPA will draft and seek public comment upon.
Sierra Club, et al. v. EPA, No. 2:15-cv-3798-ODW (ASx) (C.D. Cal.)	80 Fed. Reg. 63,782 (October 21, 2015)	Deadline for EPA to act on 2006 PM2.5 Air Quality Management Plan submitted by California for the South Coast Air Quality Management District.
Environmental Integrity Project, et al. v. McCarthy, No. 1:15-CV-745 (ABJ) (D.D.C.)	80 Fed. Reg. 63,779 (October 21, 2015)	Deadline for EPA to act on petition objecting to proposed title V operating permit issued by Texas Comm'n on Environmental Quality to Southwestern Electric Power Company's H.W. Pirkey Power Plant.
WildEarth Guardians, et al. v. EPA, No. 1:15-cv-00630 (D. Colo.)	80 Fed. Reg. 57,178 (Sept. 22, 2015)	Deadline for EPA to act pursuant to partial disapproval of Utah's regional haze SIP and deadline to promulgate a FIP for Utah.
Sinclair Wyoming Refining Co. et al. v. EPA, No. 14-9594 (10th Cir.) and ***Sinclair Wyoming Refining Co. et al. v. EPA***, No. 14-1209 (D.C. Cir.)	80 Fed. Reg. 55,113 (September 14, 2015)	EPA action on decision concerning small oil refiners' request for extension of small refiner temporary exemption from 2014 obligations under Renewable Fuel Standards Program.
Sierra Club v. EPA, No. 10-cv-1541 (CKK) (D.D.C.)	80 Fed. Reg. 47,922 (August 10, 2015)	Deadline for EPA to act on 1997 PM2.5 and ozone NAAQS requirements for Texas, including acting on submitted SIPs and imposing FIPs as necessary.
Center for Biological Diversity, et al. v. EPA, No. 3:14-cv-0138-WHO (N.D. Cal.)	80 Fed. Reg. 46,985 (August 6, 2015)	Deadline for EPA to act on 2008 lead nonattainment SIP submittals by Florida, Minnesota, Texas, Indiana, Ohio, and North Carolina, as well as non-submittals by Iowa and Puerto Rico.
Sierra Club, et al. v. EPA, No. 13-1639 (D.D.C.)	80 Fed. Reg. 38,444 (July 6, 2015)	Deadline for EPA to act on revised MACT standards for Publicly-owned treatment works (POTWs).
Center for Biological Diversity v. McCarthy, No. 15-cv-00268 TFH (D.D.C.)	80 Fed. Reg. 36,335 (June 24, 2015)	Deadline for EPA to promulgate a FIP to address 2006 OM2.5 NAAQS requirements for Puerto Rico, Iowa, and Washington.
Environmental Integrity Project v. McCarthy, No. 1:14-cv-2106 (RC) (D.D.C.)	80 Fed. Reg. 35,951 (June 23, 2015)	Deadline for EPA to act on petition objecting to proposed title V operating permit issued by the Texas Comm'n on Environmental Quality to Shell Chemical/Shell Oil for operations at two facilities.

Federal Register Notices of Proposed Clean Air Act Settlement Agreements and Consent Decrees since January 2013, cont.

Case Name	Federal Register Publication	Settlement Topic
National Parks Conservation Association, et al. v. EPA, No. 12-3043 (D. Minn.)	80 Fed. Reg. 31,031 (June 1, 2015)	Deadline for EPA to act on finding by Department of Interior that Xcel Energy's Sherburne plant contributes to visibility impairment in Minnesota and Minnesota Class I areas.
Sierra Club v. McCarthy, No. 4:14-cv-02149-CRC (D.D.C.)	80 Fed. Reg. 27,303 (May 13, 2015)	Deadline for EPA to act on petition objecting to proposed title V operating permit issued by New Hampshire Dept. of Environmental Quality to Public Service Company of New Hampshire's Shiller Station power plant.
American Fuel & Petrochemical Manufacturers, et al. v. EPA, No. 1:15-cv-394 (D.D.C.)	80 Fed. Reg. 21,718 (April 20, 2015)	Deadline for EPA to act regarding renewable fuel obligations for 2014 and 2015.
Bill Green v. McCarthy, No. 4:14-cv-05093-TOR (E.D. Wash.)	80 Fed. Reg. 19,079 (April 9, 2015)	Deadline for EPA to act on petition objecting to proposed title V operating permit issued by Washington State Department of Ecology to the Hanford Site in Benton County, Washington.
Sierra Club v. McCarthy, No. 4:14-cv-00643-JLH (E.D. Ark.)	80 Fed. Reg. 14,999 (March 20, 2015)	Deadline for EPA to act pursuant to partial disapproval of Arkansas regional haze SIP and promulgate FIP for Arkansas.
Sierra Club v. McCarthy, No. 3:12-cv-6472-CRB (N.D. Cal.)	80 Fed. Reg. 7,586 (February 11, 2015)	Deadline for EPA to act on 2006 PM2.5 infrastructure SIPs and/or "good neighbor" transport FIPs affecting California, Illinois, Michigan, Nebraska, South Dakota, Wisconsin, Colorado, Wyoming, Oregon, Idaho, and the District of Columbia.
Finger Lakes Zero Waste Coalition, Inc. v. McCarthy, No. 6:14-cv-06542 (W.D.N.Y.)	80 Fed. Reg. 6,707 (February 6, 2015)	Deadline for EPA to act on petition objecting to proposed title V operating permit issued by New York State Dept. of Environmental Conservation to Seneca Energy's landfill gas-to-energy facility.
Sierra Club v. McCarthy, No. 4:14-cv-3198-JSW (N.D. Cal.)	80 Fed. Reg. 6,513 (February 5, 2015)	Deadline for EPA to act on absence of Tennessee SIP submittal for 2008 ozone NAAQS requirements, and to take action on 2008 ozone NAAQS SIP submittals from Alabama, Arizona, Colorado, Connecticut, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Texas, West Virginia, Utah .

Federal Register Notices of Proposed Clean Air Act Settlement Agreements and Consent Decrees since January 2013, cont.

Case Name	Federal Register Publication	Settlement Topic
Cliff Natural Resources Inc., et al, v. EPA, No. 13-1758 (and consolidated case Nos. 13-1761, 13-2126, 13-2129, 13-2130) and ***Cliffs Natural Resources Inc., et al., v. EPA***, No. 13-3573 (and consolidated cases No. 13-3575, 14-1710, and 14-1712) (8th Cir.)	80 Fed. Reg. 5,111 (January 30, 2015)	Deadline for EPA to propose revisions to rulemaking establishing Regional Haze FIPs for Michigan and Minnesota relating to taconite processing facilities.
Oxy Vinyls, LP; The Vinyl Institute, Inc. ("Vinyl Institute"); PolyOne Corp. (now, Mexichem Specialty Resins, Inc.); SaintGobain Corp. and CertainTeed Corp. Case Nos. 12-1260, 12-165, 12-1266, and 12-1267 (D.C. Cir.)	79 Fed. Reg. 77,004 (December 23, 2014)	Deadline for EPA to act on petition for review of Polyvinyl Chloride and Copolymer Production MACT filed by Oxy Vinyl, The Vinyl Institute, Saint Gobain Corp, PolyOne Corp, and CertainTeed Corp.
Environmental Integrity Project v. McCarthy, No. 1:14-cv-01196 (D.D.C.)	79 Fed. Reg. 67,431 (November 13, 2014)	Deadline for EPA to act on Sierra Club's and EIP's petitions objecting to proposed title V operating permits for three Luminant Generating Co. power plants issued by Texas Comm'n on Environmental Quality.
Sierra Club v. McCarthy, No. 1:14-cv-00883-ESH (D.D.C.)	79 Fed. Reg. 66,368 (November 7, 2014)	Deadline for EPA to determine whether the Dallas/Ft. Worth area is in attainment with the 1997 8-hour ozone NAAQS, as well as RACT requirements for VOCs and NOX and reasonable further progress.
Wyoming v. McCarthy, No. 2:14-cv-00042-NDF (D. Wyo.)	79 Fed. Reg. 61,864 (October 15, 2014)	Deadline for EPA to act on Wyoming's nonattainment new source review (NNSR) SIP submission.
WildEarth Guardians v. McCarthy, No. 1:13-dv-02748-RBJ (D. Colo.)	79 Fed. Reg. 55,477 (September 16, 2014)	Deadline for EPA to make findings that Alaska, Colorado, Hawaii, Idaho, New Mexico, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming failed to submit NOX SIPs to EPA.
Sierra Club v. McCarthy, No. 1:14-cv-00222 (D.D.C.)	79 Fed. Reg. 53,193 (September 8, 2014)	Deadline for EPA to promulgate a FIP for Montana's PSD program for NOX.
WildEarth Guardians v. EPA, No. 13-9520 (10th Cir.) and ***National Parks Conservation Association v. EPA***, No. 13-9525 (10th Cir.)	79 Fed. Reg. 47,636 (August 14, 2014)	Challenge to EPA's approval of Colorado's regional haze SIP; requires EPA to require Colorado to submit a revised SIP by a deadline.

Federal Register Notices of Proposed Clean Air Act Settlement Agreements and Consent Decrees since January 2013, cont.

Case Name	Federal Register Publication	Settlement Topic
Sierra Club v. McCarthy, No. 3:14-cv-00964-JD (N.D. Cal.)	79 Fed. Reg. 46,439 (August 8, 2014)	Deadline for EPA to act on PSD program requirement for PM2.5 under SIPs.
Center for Biological Diversity v. McCarthy, No. 4:13-cv-5142-SBA (N.D. Cal.)	79 Fed. Reg. 44,452 (July 31, 2014)	Deadline for EPA to act on nonattainment SIPs pursuant to the 2006 PM2.5 NAAQS.
National Parks Conservation Association v. McCarthy, No. 12-3043 (RHK/JSM) (D. Minn.)	79 Fed. Reg. 40,098 (July 11, 2014)	Deadline for EPA to act on finding by Department of Interior that Xcel Energy's Sherburne plant contributes to visibility impairment in Minnesota and Minnesota Class I areas.
Sierra Club et al. v. McCarthy, No. 3:13-cv-3953-SI (N.D. Cal.)	79 Fed. Reg. 31,325 (June 2, 2014)	Deadline for EPA to act to promulgate and publish remaining area designations under the 2010 revised SO2 NAAQS.
Sierra Club v. McCarthy, No. 2:13-cv-06115-JCJ (E.D. Pa.)	79 Fed. Reg. 29,188 (May 21, 2014)	Deadline for EPA to act on Sierra Club's petitions objecting to proposed title V operating permits for seven coal-fired power plants in Pennsylvania.
Environmental Integrity Project v. McCarthy, No. 1:13-cv-01783 (KBJ) (D.D.C.)	79 Fed. Reg. 27,605 (May 14, 2014)	Deadline for EPA to object to a proposed title V permit for Mettiki Coal's coal processing plant in Oakland, Maryland issued by the Maryland Department of the Environment.
WildEarth Guardians v. McCarthy, No. 1:13-cv-03457-JLK (D. Colo.)	79 Fed. Reg. 27,304 (May 13, 2014)	Deadline for EPA to act on a title V operating permit application for the Deseret Bonanza coal-fired power plant in Uintah County, Utah.
State of New York, et al. v. McCarthy, No. 13-1553 and consolidated case No. 13-1555 (D.D.C.)	79 Fed. Reg. 26,752 (May 9, 2013)	Deadline for EPA to act to review and potentially revise the New Source Performance Standards for new residential woodstoves.
Air Alliance Houston, et al. v. McCarthy, No. 1:13-cv-00621-KBJ (D.D.C.)	79 Fed. Reg. 10,519 (February 25, 2014)	Deadline for EPA to review and potentially revise emission factors for VOC, CO, and NOX from flares, liquid storage tanks and wastewater treatment systems.
Sierra Club v. McCarthy, No. 1:13-cv-00385 (BHA) (D.D.C.)	79 Fed. Reg. 9,204 (February 18, 2014)	Deadline for EPA to act on Georgia's 2010 SIP submittal, and to act on Sierra Club's petitions objecting to proposed title V permits for Georgia Power's Scherer, Hammond, Wansly, Kraft and McIntosh Steam-Electric Generating Plants.
WildEarth Guardians v. McCarthy, No. 1:12-cv-03307 (D. Colo.)	78 Fed. Reg. 60,280 (October 1, 2013)	Deadline for EPA to act on revised SIPs submitted by the States of Colorado, North Dakota, South Dakota, and Utah.

Federal Register Notices of Proposed Clean Air Act Settlement Agreements and Consent Decrees since January 2013, cont.

Case Name	Federal Register Publication	Settlement Topic
American Forest and Paper Association Inc. and American Wood Council v. EPA, No. 12-1452 (D.C. Cir.)	78 Fed. Reg. 59,684 (September 27, 2013)	EPA's Mandatory Greenhouse Gas Reporting Rule and amendments favorable to industry.
Bahr, et al. v. McCarthy, No. 2:13-cv-00872 SMM (D. Ariz.)	78 Fed. Reg. 54,143 (August 28, 2013)	Deadline for EPA to act on a Federal Implementation Plan for Arizona relating to PM10.
Air Alliance Houston, et al. v. McCarthy, No. 12-1607 (RMC) (D.D.C.)	78 Fed. Reg. 51,186 (August 20, 2013)	Deadline for EPA to act on MACT standards for petroleum refineries.
Sierra Club v. Jackson, No. 1:12-cv-01237-ESH (D.D.C.)	78 Fed. Reg. 48,161 (August 7, 2013)	Deadline for EPA to act on 1997 PM2.5 NAAQS SIP submittals by New Jersey and Michigan.
Communities for a Better Environment, et al. v. EPA, No. 12-71340 (9th Cir.)	78 Fed. Reg. 43,200 (July 19, 2013)	Deadline for EPA to act on South Coast Air Quality Management District (California) 1-hour and 8-hour ozone SIP.
Sierra Club v. Perciasepe, No. 1:12-cv-01917 (D.D.C.)	78 Fed. Reg. 40,140 (July 3, 2013)	Deadline for EPA to act on Wyoming's SIP revision relating to the 1997 PM2.5 NAAQS and Connecticut's SIP revision relating to the 1997 Ozone NAAQS.
Sierra Club v. Perciasepe, No. 3:12-cv-4078-JST (N.D. Cal.)	78 Fed. Reg. 30,919 (May 23, 2013)	Deadline for EPA to act on Clark County, Nevada SIP revision dealing with startup, shutdown, and malfunction requirements.
Sierra Club v. Jackson, No. 12-cv-00347 (D.D.C.)	78 Fed. Reg. 26,028 (May 3, 2013)	Deadline for EPA to act on SIP submittals from Colorado, Kansas, Missouri, Montana, New Jersey, New York, North Dakota, and Utah relating to 2006 PM2.5 NAAQS standard.
Clean Air Council v. Jackson, No. 1:12-cv-00707 (D.D.C.).	78 Fed. Reg. 23,562 (April 19, 2013)	Deadline for EPA to promulgate a Federal Implementation Plan for Pennsylvania for 1997 lead NAAQS.
Center for Biological Diversity v. Jackson, No. C-12-04968-JWT (N.D. Cal.)	78 Fed. Reg. 23,560 (April 19, 2013)	Deadline for EPA to act on 2008 lead NAAQS SIPs for Colorado, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, Oklahoma, Oregon, Pennsylvania, South Dakota, Vermont, and Washington.
Louisiana Environmental Action Network and Sierra Club v. Jackson, No. 12-1096 (D.D.C.) ("LEAN v. Jackson")	78 Fed Reg. 18,979 (March 28, 2013)	Deadline for EPA to act on proposed Title V permit for Nucor Steel issued by the Louisiana Dept. of Environmental Quality.

Federal Register Notices of Proposed Clean Air Act Settlement Agreements and Consent Decrees since January 2013, cont.

Case Name	Federal Register Publication	Settlement Topic
Preserve Pepe'ekeo Health and Environment v. EPA, No. CV 12 00520 ACK-RLP (D. Haw.)	78 Fed. Reg. 16,667 (March 18, 2013)	Deadline for EPA to act on proposed Title V permit for Hu Hunua Bioenergy Facility issued by the Hawaii Dept. of Health.
Sierra Club v. Jackson, No. 108-cv-00414 RWR (D.D.C.)	78 Fed. Reg. 2,260 (January 10, 2013)	Deadline for EPA to act on revised MACT standards for the brick manufacturing industry.

Appendix B: List of Notices of Intent to Sue EPA

Date	NOI Submitter	Statute & Issue
1/19/2017	Environmental Law & Policy Center	**Clean Water Act -** For failure to perform nondiscretionary duty to act on the State of Ohio's October 20, 2016, submission of a Clean Water Act impaired waters list under 33 U.S.C. § 1313(d) within thirty days.
1/13/2017	Bill Green	**Clean Air Act -** For failure to respond to petition requesting that the Administrator object to the Title V operating permit for the U.S. Department of Energy Hanford Site.
1/13/2017	Gulf Restoration Network, Little Tchefuncte River Association, Sierra Club Delta Chapter, Louisiana Audubon Council, and Louisiana Environmental Action Network	**Endangered Species Act -** Regarding June 3, 2016 EPA Approval of Louisiana's Dissolved Oxygen Criteria Revisions for the Eastern Lower Mississippi Alluvial Plain Ecoregion. Sixty-Day Notice of Intent to Sue: Violations of the Endangered Species Act Related to the U.S. Environmental Protection Agency's Failure to Consult.
12/29/2016	Douglas Lindamood	**Clean Air Act -** For failure to respond to petition requesting that the Administrator object to the Title V operating permit for the U.S. Department of Energy Hanford Site.
12/22/2016	Sierra Club and Environmental Integrity Project	**Clean Air Act -** Failure to grant or deny a petition to object to a proposed Title V Operating Permit for Wheelabrator Frackville Energy, Inc. power plant in Schuylkill County, Pennsylvania.
12/20/2016	Alliance for the Great Lakes, Lake Erie Charter Boat Association, Lake Erie Foundation, Michigan League of Conservation Voters, Michigan United Conservation Clubs, National Wildlife Federation, and Ohio Environmental Council	**Clean Water Act -** Mandatory duty challenge to Region 5 demanding that they act on Ohio's 2016 303(d) list.
12/7/2016	New York Department of State, New York Department of Environmental Conservation	Marine Protection, Research, and Sanctuaries Act (MPRSA) - NOI regarding EPA designation of Eastern Long Island Sounds dredged material disposal site.
11/23/2016	Environmental Integrity Project, Sierra Club, and Air Alliance Houston	**Clean Air Act -** For Failure to Timely Grant or Deny a Petition to Object to Part 70 Operating Permit No. 01553 Issued to the ExxonMobil Corporation for the Baytown Olefins Plant in Harris County, Texas.
11/4/2016	Center for Biological Diversity and Center for Environmental Health	**Clean Air Act -** For failure to perform a mandatory duty with regard to PM2.5 to protect the North Coast Air Quality Management District in California.
11/4/2016	Valero Energy Corporation	**Clean Air Act -** For failure to perform non-discretionary duties which relate to defining the obligated party for the RFS program.
11/3/2016	Climate Change Law Foundation, Association of Irritated Residents, Center for Biological Diversity, and Sierra Club	**Clean Air Act -** Failed to grant or deny a petition to object to a proposed Authority to Construct/Certificate of Conformity ("Permit") for a Steam Plant in the McKittrick Oil Field in California.

Date	NOI Submitter	Statute & Issue
10/28/2016	Northwest Environmental Advocates	**Clean Water Act -** Mandatory duty lawsuit against Oregon to approve or disapprove the state's 2012 303(d) list.
10/14/2016	The Humane Society of the United States, Association of Irritated Residents, Environmental Integrity Project, Friends of the Earth, and Sierra Club	**Clean Air Act -** For Unreasonable Delay in Responding to a Petition for the Regulation of CAFOs under the Clean Air Act.
10/14/2016	Environmental Integrity Project, Sierra Club, Air Alliance Houston, and Environment Texas	**Clean Air Act -** For Unreasonable Delay and Failure to Perform a Non-Discretionary Duty to Revise and Re-Issue or Deny Three Title V Permits Issued by the Texas Commission on Environmental Quality (Shell Deer Park Chemical Plant, Shell Deer Park Refinery, and SWEPCO's I-1. W. Pirkey Power Plant).
10/13/2016	Sierra Club	**Clean Air Act -** Concerning Clean Air Act deadlines related to Commercial and Industrial Solid Waste Incinerators and other categories of Solid Waste Incinerators.
10/12/2016	Sierra Club	**Clean Air Act -** For failure to grant or deny a petition seeking an objection by EPA to the Title V Operating Permit renewal for the Tennessee Valley Authority's Gallatin Fossil Plant.
10/6/2016	New England Gen-Connect, LLC	**Clean Air Act -** For failure to respond to petition regarding "Control of Emissions from New, Small Nonroad Spark-Ignition Engines and Equipment" to take action to remedy violations of the Act by certain generator conversion kit companies.
9/29/2016	Center for Biological Diversity and Northwest Environmental Advocates	**Clean Water Act / Endangered Species Act -** Notice of Violations of the Endangered Species Act Regarding Approval of Water Quality Standards in New Hampshire, Vermont, Maine, and Connecticut.
9/23/2016	Northwest Environmental Advocates	**Endangered Species Act -** Notice of intent to allege violations Endangered Species Act consultation provisions for administration of nonpoint source grant funds.
9/22/2016	George Barto, Beth Barto, and citizens of Borough of Blairsville PA	**Clean Water Act -** Failure to perform nondiscretionary duty.
9/21/2016	Perry Lee Oil & Gas Company	**Safe Drinking Water Act** - Texas business-owner is asking EPA to weigh in on his legal dispute with several oil companies and the Texas Railroad Commission.
9/14/2016	Center for Biological Diversity, the Center for Environmental Health, and the Clean Air Council	**Clean Air Act -** For failure to take final action and failure to make findings of failure to submit for 2008 ozone NAAQS nonattainment areas state implementation plans.
8/25/2016	Sierra Club	**Clean Air Act -** Failure to grant or deny a petition seeking an objection by EPA to the Title V Operating Permit proposed by the Western North Carolina Regional Air Quality Agency for Duke Energy Progress, Inc.'s Asheville Steam Electric Plant in Buncombe County, North Carolina.

Date	NOI Submitter	Statute & Issue
8/25/2016	Sierra Club	**Clean Air Act -** Failure to grant or deny a petition seeking an objection by EPA to the Title V Operating Permit proposed by the North Carolina Department of Environmental Quality, Division of Air Quality for Duke Energy Progress, LLC's Roxboro Steam Electric Plant in Caswell County, North Carolina.
8/22/2016	Columbia Riverkeeper, Idaho Rivers United, Snake River Waterkeeper, Pacific Coast Federation of Fishermen's Associations, and the Institute for Fisheries Resources	**Clean Water Act -** Alleging non-discretionary duty to establish TMDL for temperature on Lower Columbia River.
8/16/2016	Center for Biological Diversity and Center for Environmental Health	**Clean Air Act -** For failure to perform a mandatory duty with regard to PM2.5 to protect the state of Wisconsin.
8/3/2016	Citizens for Clean Air and Sierra Club	**Clean Air Act -** For failure to determine whether the Fairbanks North Star Borough non-attainment area has attained the 24-hour PM2.5 NAAQS and to publish notice of that finding in the Federal Register, in addition to potentially reclassification of the area as a "serious" non-attainment area "no later than 6 months following the attainment date.
7/21/2016	Chesapeake Climate Action Network, Sierra Club and Environmental Integrity Project	**Clean Air Act -** For unreasonable delay in responding to petition requesting that EPA reconsider its final action on the startup and shutdown provisions from the Mercury and Air Toxics Standards.
7/21/2016	Municipality of San Juan	**Clean Water Act -** Notice of Intent to Sue for aerial spraying of pesticides in Puerto Rico to combat the Zika Virus.
7/18/2016	Center for Biological Diversity and the Center for Environmental Health	**Clean Air Act -** For failure to perform mandatory duties for PM2.5.
7/7/2016	Sierra Club	**Clean Air Act -** Failure to perform a non-discretionary duty to grant or deny petition seeking an objection to Proposed Title V Permit for the operation of Scrubgrass Generating Company L.P. facility located near Kennerdell, Pennsylvania.
7/6/2016	Sierra Club	**Clean Air Act -** Failure to perform a nondiscretionary duty to grant or deny petition seeking an objection to Proposed Title V Permit for the operation of PacifiCorp's Hunter Power Plant located in Castle Dale, Utah.
7/5/2016	Environmental Integrity Project, Air Alliance Houston, Environment Texas, Texas Campaign for the Environment, Downwinders at Risk…	**Clean Air Act -** For unreasonable delay in responding to Petition for EPA action to address startup, shutdown, and maintenance exemptions in revised permits for Texas coal-fired power plants.
7/1/2016	Center for Biological Diversity and the Center for Environmental Health	**Clean Air Act -** For failure to perform multiple mandatory duties with regard to PM2.5.
6/30/2016	State of New York	**Clean Air Act -** Failure to perform non-discretionary duty to promulgate Federal Implementation Plan for Kentucky's Good Neighbor provision requirements for the 2008 ozone NAAQS.

Date	NOI Submitter	Statute & Issue
6/9/2016	Chesapeake Climate Action Network, Sierra Club, Environmental Integrity Project and Physicians for Social Responsibility, Chesapeake, Inc.	**Clean Air Act -** For failure to timely grant or deny a petition to object to the Title V operating permit for the Morgantown Generating Station.
6/6/2016	Sierra Club	**Clean Air Act -** For failure to promulgate Federal Implementation Plan for Kentucky Good Neighbor provision.
5/17/2016	Center for Biological Diversity, the Center for Environmental Health, and the Clean Air Council	**Clean Air Act -** Deadline suit for failure to submit and failure to act on 2008 ozone attainment SIPs.
5/11/2016	Toni Offner and Cynthia Portera	**Clean Air Act -** Failure to grant or deny a petition to object to the Title V air permit issued to Bunge North America Inc. for construction activities at its grain elevator in Destrehan, Louisiana.
4/27/2016	Finger Lakes Zero Waste Coalition, Inc.	**Clean Air Act -** For failure to perform nondiscretionary duty under the CAA to respond to Petition filed on or about February 8, 2016, requesting that the Administrator object to the Title V operating permit for the Seneca Energy II, LLC, Ontario County Landfill Gas to Energy Facility.
4/27/2016	Center for Biological Diversity and the Center for Environmental Health	**Clean Air Act -** For failure to timely review, revise and promulgate the Air Quality Criteria for Sulfur Oxides and the NAAQS for Sulfur Dioxide and Nitrogen Oxides as may be appropriate.
4/27/2016	Sierra Club, Medical Advocates for Healthy Air, Physicians for Social Responsibility - Los Angeles, WildEarth Guardians, and Center for Biological Diversity	**Clean Air Act -** For failure to perform non-discretionary duties related to the implementation of the 1997 NAAQS PM2.5 in the Los Angeles-South Coast Air Basin, CA nonattainment area.
4/18/2016	States of New York, Connecticut, Massachusetts, New Hampshire, Rhode Island and Vermont	**Clean Air Act -** Failure to Act on their Petitions Under Clean Air Act Section 176A.
4/8/2016	Community In-Power and Development Association Inc., Hoosier Environmental Council, Ohio Valley Environmental Coalition…	**Clean Air Act -**For failure to issue standards or final residual risk determinations for various major sources of hazardous air pollutants categories. Also for failure to review and revise as necessary emission standards promulgated every 8 years.
4/7/2016	Potomac Riverkeeper Network	**Clean Water Act -** Allegation EPA failed to fulfill mandatory duty to approve or disapprove Virginia's 2014 303(d) list.
4/6/2016	Citizens for Clean Air and Sierra Club	**Clean Air Act -**Failure to issue a full or partial approval or a disapproval of the State of Alaska's state implementation plan addressing the Fairbanks North Star Borough 24-hour fine particulate matter non-attainment area.
4/4/2016	Sierra Club, West Virginia Highlands Conservancy, West Virginia Rivers Coalition	**Clean Water Act -** Allegation EPA failed to fulfill mandatory duty to approve or disapprove West Virginia's 2014 303(d) list.

Date	NOI Submitter	Statute & Issue
4/1/2016	Sierra Club, West Virginia Highlands Conservancy, and Ohio Valley Environmental Coalition	**Clean Water Act -** NOI from environmental groups alleging that EPA failed to perform a mandatory duty under 303(c) to review an alleged revision to West Virginia's water quality standards. " The NOI states that West Virginia permitting guidance effectively revises the biological integrity standard by exempting NPDES mining permits from the standard.
3/24/2016	Sierra Club	**Clean Air Act -**Amended NOI for the failure to promulgate a FIP within two years of partially disapproving Louisiana's June 13, 2008 Regional Haze SIP.
3/7/2016	Conservation Law Foundation	**Clean Water Act -** Notice of intent to sue EPA for failure to establish a Lake Champlain phosphorus TMDL within 30 days of disapproving VT's 2002 TMDL (January 24, 2011).
3/1/2016	Puyalluup Tribe of Indians	**Clean Water Act -** NOI regarding alleged mandatory duty to promulgate WQS in Washington State.
2/18/2016	Bill Green	**Clean Air Act -** Failure to issue a part 71 permit in response to EPA's order granting in part a petition to object to the Hanford permit and the state's failure to respond to that order.
2/16/2016	WildEarth Guardians	**Clean Air Act -** Failure to determine that the Denver Metropolitan/North Front Range area of Colorado failed to attain the 2008 ozone NAAQS by the attainment date of July 20, 2015.
2/12/2016	Center for Biological Diversity and Elizabeth Crowe	**Clean Air Act -** For failure to make "bump up" determinations for various marginal non-attainment areas for the 2008 ozone NAAQS.
2/10/2016	Iowa Citizens for Community Improvement, Clean Wisconsin, Center for Food Safety, The Humane Society of the United States…	**Clean Air Act -** For unreasonable delay in responding to our April 5, 2011 petition for the Regulation of Ammonia as a Criteria Pollutant Under Clean Air Act Sections 108 and 109.
1/28/2016	Plant Oil Powered Diesel Fuel Systems, Inc.	**Clean Air Act -** For failure to properly regulate fuel, particularly renewable diesel.
1/21/2016	Seneca County, Inc.	**Clean Air Act -** For failure to timely grant or deny Petition to Object to the proposed Title V Operating Permit issued to Seneca Energy, II LLC for operation of the Landfill Gas to Energy Facility located in Seneca Falls, Seneca County, New York.
1/21/2016	North Carolina Department of Environmental Quality	**Clean Air Act -** Failure to timely respond to 2013 petition regarding the Ozone Transport.
1/18/2016	Appleton Coated, LLC and Wisconsin Paper Council, Inc.	**Clean Air Act -** Failure to grant or deny a petition regarding the Title V Operating Permit to Appleton Coated. LLC. for a plant in Wisconsin.
12/24/2015	Blue Ridge Environmental Defense League, Clean Wisconsin and Midwest Environmental Defense Center	**Clean Air Act -** Failure to promulgate standards for several categories of major sources of hazardous air pollutants.

Date	NOI Submitter	Statute & Issue
12/22/2015	John Penn Whitescarver	**Clean Water Act -** Alleging violation of mandatory duty approving an alleged defective NPDES permit for active construction stormwater issued by State of Florida.
12/21/2015	Center for Biological Diversity, Sierra Club, Association of Irritacect Residents and Climate Change Law Foundation	**Clean Air Act -** Failure to grant or deny the petition requesting that EPA object to the Permit proposed by the San Joaquin Valley Air Pollution Control District for the Alon USA - Bakersfield, California Refinery Crude Oil Flexibility Project, Facility.
12/21/2015	Sanitary Board of the City of Charleston, West Virginia	**Clean Water Act -** Alleging mandatory duty for EPA to approve or disapprove state-submitted WQS.
12/21/2015	Waterkeepers Washington	**Clean Water Act -** NOI to sue EPA for failure to perform mandatory duty to promulgate human health water quality criteria for State of Washington within 90 days of proposal.
12/10/2015	Sierra Club	**Clean Air Act -** Failure to submit non-attainment area SIP submittals for the NAAQS for S02 for 14 states.
12/4/2015	Sierra Club and Environmental Integrity Project	**Clean Air Act -** Failure to grant or deny a petition regarding the Title V Operating Permit for the Tennessee Valley Authority's Bull Run Fossil Plant located in Clinton, Tennessee.
11/20/2015	New Era Group, Inc.	**Clean Air Act -** For failure to enforce the Greenhouse Gas Reporting rules for suppliers of HFCs.
11/13/2015	Air Alliance Houston, Texas Environmental Justice Advocacy Services, and two other groups.	**Clean Air Act -** For failure to review and revise emission factors for oil and gas flares.
11/6/2015	Missouri Coalition for the Environment Foundation	**Clean Water Act -** Notice of Intent to Sue filed by Missouri Coalition for the Environment Foundation alleging nondiscretionary duty to promulgate WQS for Missouri.
11/4/2016	Sierra Club	**Clean Air Act -** Failure to take final action on 2008 ozone NAAQS infrastructure state implementation plan submittals for New Jersey.
11/2/2015	NRDC, Defenders of Wildlife, and The Bay Institute	**Clean Water Act -** Alleged failure to carry out non-discretionary federal review of California water quality standards in violation of Clean Water Act section 303(c).
10/13/2015	Southern Utah Wilderness Alliance	**Clean Water Act -** Notice alleging EPA failure to approve or disapprove Utah's CWA 303(d) list of impaired waters.
10/8/2015	Center for Biological Diversity, Center for Environmental Health, and Neighbors for Clean Air	**Clean Air Act -** Notice of intent to sue for failure to promulgate a Federal Implementation Plan for Montana.
10/5/2015	Sierra Club	**Clean Air Act -** For failure to take final action on 2008 ozone NAAQS infrastructure state implementation plan submittals with regard to Wyoming.
9/21/2015	Nucor Steel Louisiana LLC and Consolidated Environmental Management, Inc., a fully-owned subsidiary of Nucor Corporation	**Clean Air Act -** Failure to take action after objection to Nucor's Title V permit.

Date	NOI Submitter	Statute & Issue
8/31/2015	Partnership for Policy Integrity	**Clean Air Act -** Failure of EPA Administrator to Take Timely Final Action Regarding Petition to Object to Permit for the Piedmont Green Power. LLC Facility in the City of Barnesville, Lamar County, Georgia.
8/31/2015	Wild Fish Conservancy	**Clean Water Act / Endangered Species Act -** Notice of Intent to Sue U.S. EPA and National Marine Fisheries Service for Violations of the Endangered Species Act Associated with Consultation on Washington State's Revised Sediment Management Standards for Marine Finfish Facilities.
8/17/2015	Sierra Club and Louisiana Environmental Action Network	**Clean Air Act -** For failure to grant or deny a petition requesting that the Administrator object to the Title V permit issued to Yuhuang Chemical Inc. for the construction and operation of a new methanol manufacturing plant in St. James, Louisiana.
8/17/2015	Midwest Environmental Defense Center	**Clean Air Act -** For failure to grant or deny a petition regarding the Title V Operating Permit issued by the Wisconsin Department or Natural Resources to Appleton Coated. LLC. for a plant in Wisconsin.
8/13/2015	Value Recovery Inc.	**Clean Air Act -** For failure to name a stationary major source category that includes the hazardous air pollutant, Methyl Bromide.
8/3/2015	Center for Biological Diversity, Center for Environmental Health, and Neighbors for Clean Air	**Clean Air Act -** For failure to take final action and failure to make findings of failure to submit for 2006 PM2.5 NAAQS nonattainment areas state implementation plans.
7/13/2015	Yvonne D. Lewis and Sidney T. Lewis	**Clean Air Act -** Pro se NOI regarding failure to do alleged mandatory duties related to lead HAP emissions from leaded avgas and Ohio nonattainment areas.
7/8/2015	State of North Carolina	**Clean Air Act -** Failure to Approve or Disapprove North Carolina's PM 2.5 State Implementation Submittal, dated September 5, 2013, pursuant to Clean Air Act Section 110(k).
6/17/2015	State of Maine	**Clean Water Act -** 60-day NOI from State of Maine to sue EPA over failure to approve WQS in Indian country within the State where EPA had previously approved such WQS in State waters.
6/11/2015	Preserve Pepe'keo Health and Environment	**Clean Air Act -** Failure to take timely action regarding petition to object to the Hu Honua Bioenergy, LLC ("Hu Honua") Title V operating permit.
6/1/2015	Sierra Club	**Clean Air Act -** For failure to take action on 2008 Ozone iSIPs and related FIP commitments.
5/28/2015	State of Nevada Dept. of Conservation and Natural Resources	**Clean Air Act -** Failure to Act on Nevada's 2008 Ozone NAAQS State Implementation Plan Submission as Required by 42 U.S.C. Sec. 7410(k)(2).
5/28/2015	State of Louisiana and Louisiana Department of Environmental Quality	**Clean Air Act -** For failure to Designate Areas of Attainment or Non-Attainment for the Sulfur Dioxide NAAQS (Mike Thrift).

Date	NOI Submitter	Statute & Issue
3/24/2015	Sierra Club	**Clean Air Act -** For failure to promulgate a FIP within two years of our partial disapproval on Louisiana's Regional Haze SIP.
3/20/2015	Sierra Club and Physicians for Social Responsibility- Los Angeles	**Clean Air Act -** For its failure to perform non-discretionary duties related to the implementation of the 2006 NAAQS for PM2.5 in the Los Angeles-South Coast Air Basin, CA nonattainment area.
3/20/2015	Wisconsin Public Service Corporation	**Clean Air Act -** For failure to grant or deny petitions to object to the proposed Title V permits for WPSC's De Pere Energy, LLC plant and for WPSC's Weston plant permit.
3/18/2015	Plant Oil Powered Diesel Fuel Systems, Inc.	**Clean Air Act -** For failure to regulate nitrous oxides emissions from biofuels, additives comprised of biofuels, and the biofuel-derived blend stocks of petroleum-based fuels run in compression ignition (diesel) engines of all kinds.
3/10/2015	Environmental Integrity Project and Sierra Club	**Clean Air Act -** For failure to respond to petition to object to the Title V permit issued to Southwestern Electric Power Company for operation of the H.W. Pirkey Power Plant in Harrison County, Texas.
2/20/2015	Hawaiian Electric Company, Inc.	**Clean Air Act -** Failure to Act on Petition for Reconsideration of the National Emission Standards for Hazardous Air Pollutants From Coal-Fired and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9304 (Feb. 16, 2012) ("MATS Rule").
2/11/2015	Northwest Environmental Advocates	**Clean Water Act -** Mandatory Duties Under Section 303(c)(4) of the Clean Water Act, to Revise Oregon's Water Quality Criteria for Toxic Pollutants.
2/10/2015	Conservation Law Foundation	**Clean Water Act -** Failure to perform non-discretion duty to require NPDES permits for certain stormwater discharges to certain waters in RI.
2/10/2015	Conservation Law Foundation, Charles River Watershed Association	**Clean Water Act -** Failure to perform nondiscretionary duty to notify stormwater dischargers of permit requirement and to respond to residual designation petition within 90 days.
2/5/2015	WildEarth Guardians	**Clean Air Act -** For EPA's failure to promulgate to FIP within two years of disapproving the State of Utah's Regional Haze SIP.
2/4/2015	Earthjustice (Nine environmental organizations)	**Clean Air Act -** Regarding overdue health risk and technology review (RTR) rules.
1/29/2015	HEAL Utah, National Parks Conservation Association, and Sierra Club	**Clean Air Act -** For EPA's failure to promulgate Regional Haze FIP for Utah.
1/26/2015	WildEarth Guardians	**Clean Air Act -** For EPA's failure to promulgate to FIP within two years of disapproving the State of Utah's Regional Haze SIP.
1/16/2015	Sandra Reevis, Blackfeet Tribe	Safe Drinking Water Act - Notice of intent to sue EPA R8 over Town of Browning water supply on Blackfeet Reservation.

Date	NOI Submitter	Statute & Issue
1/15/2015	WildEarth Guardians	**Clean Air Act -** For failure to take action on a number of title V permit applications pending in Region 8.
12/30/2014	Upper Missouri Waterkeeper	**Clean Water Act -** NOI to sue for failure to perform mandatory duty to approve or disapprove Montana's new and revised WQS.
12/22/2014	Halogenated Solvents Industry Alliance, Inc.	**Clean Air Act -** For failure to list n-Propyl Bromide as a hazardous air pollutant.
12/15/2014	American Petroleum Institute	**Clean Air Act -** For failure to issue the 2014 & 2015 Renewable Fuel Standard Regulations and failure to meet the 90-day deadline with respect to API's waiver petition.
12/12/2014	Idaho Conservation League	**Clean Water Act -** Notice of intent to sue EPA for approval of Idaho Antidegradation rule.
12/2/2014	Peter Bormuth	Safe Drinking Water Act - Non-discretionary duty suit for permitting Class II UIC well in violation of the SDWA and implementing regulations.
12/1/2014	American Fuel & Petrochemical Manufacturers	**Clean Air Act -** For failure to issue the 2015 Renewable Fuel Standard Regulations.
12/1/2014	American Petroleum Institute	**Clean Air Act -** For failure to issue the 2015 Renewable Fuel Standard Regulations.
12/1/2014	Center for Biological Diversity	**Clean Air Act -** For failure to take final action on nonattainment SIP submittals for various states addressing the 2008 lead NAAQS.
11/22/2014	San Juan Citizens Alliance	**Clean Water Act -** NOI alleges EPA has unreasonably delayed in reissuing an NPDES permit for the Four Corners Power Plant.
11/21/2014	American Fuel & Petrochemical Manufacturers	**Clean Air Act -** For failure to issue the 2014 Renewable Fuel Standard Regulations.
10/17/2014	Sierra Club, Waterkeeper Alliance, Center for Biological Diversity	**Endangered Species Act -** 60 Day Notice of Intent to sue under ESA for EPA failure to comply with ESA on 316(b).
10/8/2014	Sierra Club and WildEarth Guardians	**Clean Air Act -** For failure to find that Alabama, Florida, Mississippi, and North Carolina have failed to submit SIPs to meet various requirements under Section 110(a) of the CAA with regards to the 2008 revised NAAQS for ozone.
10/8/2014	Sierra Club	**Clean Air Act -** For failure to take final action on 2008 ozone NAAQS infrastructure state implementation plan submittals for Kansas and North Dakota.
10/6/2014	Mark W. Schaefer	**Clean Water Act -** Failure to regulate illegal building of berms and monitor building of pipes to storm sewer system and maintain compliance of storm sewer permit.
10/2/2014	Sierra Club	**Clean Air Act -** Failure to grant or deny petition to object to the proposed Title V permit for the Schiller Station power plant in Portsmouth, New Hampshire.

Date	NOI Submitter	Statute & Issue
9/17/2014	Nucor Steel Louisiana LLC and Consolidated Environmental Management, Inc., a fully-owned subsidiary of Nucor Corporation	**Clean Air Act -** For failure to take mandatory action under the CAA for violations of the Administrative Procedure Act and for relief under the Declaratory Judgment Act.
9/2/2014	WildEarth Guardians	**Clean Air Act -** For unreasonable delay in responding to petition to find that Colorado is failing to administer its Title V permitting program.
8/27/2014	Sierra Club and WildEarth Guardians	**Clean Air Act -** For failure to make findings of failure to submit 'Good Neighbor' provisions for the 2008 ozone NAAQS.
8/22/2014	Public Employees for Environmental Responsibility (PEER)	**Toxic Substances Control Act -** PEER issued NOI against EPA for failure to enforce TSCA and Santa Monica-Malibu Unified School District for violating TSCA (for having PCBs in the school).
8/20/2014	Shenandoah Riverkeeper and Potomac Riverkeeper, Inc.	**Clean Water Act -** Alleged mandatory duty to approve or disapprove Virginia's 2012 303(d) list.
8/4/2014	Sierra Club, Medical Advocates for Healthy Air, Physicians for Social Responsibility - Los Angeles, WildEarth Guardians, and Center for Biological Diversity	**Clean Air Act -** For its failure to perform non-discretionary duties related to the implementation of the 1997 NAAQS for PM2.5 in the San Joaquin Valley, CA and Los Angeles-South Coast Air Basin, CA nonattainment areas.
7/28/2014	Environmental Integrity Project, the Sierra Club, and Air Alliance Huston	**Clean Air Act -** For failure to grant or deny their petition to object to a title V permit issued to Shell Chemical LP for operation of the Deer Park Chemical Plant in Harris County, Texas.
7/28/2014	Center for Biological Diversity	**Clean Air Act -** For failure to take final action on North Carolina's 2008 Lead and Ozone NAAQS.
7/28/2014	Environmental Integrity Project, Sierra Club, and Air Alliance Houston	**Clean Air Act -** Failure to timely grant or deny a petition to object to the part 70 operating permit issued to Shell Oil Company for operation of the Deer Park Refinery in Harris County, Texas.
7/15/2014	Bill Green	**Clean Air Act -** For failure to respond to two Title V petitions submitted by Bill Green in 2013 and 2014 on renewals of and revisions to the Hanford Title V permit.
6/20/2014	Center for Biological Diversity, Center for Environmental Health, and Clean Air Council	**Clean Air Act -** Alleging EPA's failure to perform mandatory duties under the 2008 Lead NAAQS.
6/4/2014	Concerned Citizens Around Murphy	**Clean Air Act -** Allege failure to respond to LDEQ's Response to EPA's Order regarding the Valero Title V petition.
5/27/2014	Ronald J. Ferguson	**Clean Water Act -** Failure to maintain compliance with storm water permit.
5/20/2014	Finger Lakes Zero Waste Coalition, Inc.	**Clean Air Act -** Alleging EPA's failure to timely respond to a title V petition regarding Seneca Energy II, Ontario County Landfill Gas to Energy Facility, NY.
5/14/2014	Environmental Integrity Project and Sierra Club	**Clean Air Act -** Alleging EPA's failure to timely respond to a title V petition regarding Luminant's Monticello Plant, Texas.

Date	NOI Submitter	Statute & Issue
5/12/2014	New Era Group, Inc.	**Clean Air Act -** Alleged failure 'to collect reliable data and to perform a reliable assessment of the existing inventory of and the need for' HCFC-22.
5/2/2014	Californians Against Waste	**Clean Air Act -** Failure to Perform Nondiscretionary Duties Under Section 112(d)(6) and (f) Relating to Municipal Solid Waste Landfills.
4/28/2014	Sierra Club	**Clean Air Act -** Failing to promulgate a Federal Implementation Plan (FIP) within two years of partially disapproving Arkansas' revised Regional Haze (RH) and Interstate Transport State Implementation Plans (SIPs).
4/23/2014	Sierra Club	**Clean Air Act -** Failure to take final action on 2008 ozone NAAQS infrastructure state implementation plan submittals and failure to make finding of failure to submit.
4/22/2014	State of Wyoming	**Clean Air Act -** Failure to Act on Wyoming's 2008 Lead NAAQS State Plan Submission.
4/7/2014	Sierra Club, Appalachian Voices, Kentuckians for the Commonwealth, Kentucky Waterways Alliance, Kentucky Resources Council, Center for Biological Diversity, Defenders of Wildlife	**Clean Water Act / Endangered Species Act -** Notice of ESA violations in connection with EPA approval of KY WQS for Se and nutrients and eutrophication.
3/18/2014	Monroe Energy, LLC.	**Clean Air Act -** Failure to respond to a Petition for Reconsideration and a Petition for Partial Waiver of EPA's Regulation of Fuels and Fuel Additives 2013 Renewable Fuel Standards, published at 78 Fed. Reg. 49794 (Aug. 15, 2013).
2/19/2014	Nucor Steel-Arkansas, Nucor-Yamato Steel Company	**Clean Air Act -** Failure to grant or deny Nucor's petition for an objection to Title V Operating Permit issued to Big River Steel by the Arkansas Department of Environmental Quality for a steel manufacturing facility in Osceola, Arkansas.
2/14/2014	Jack L. Firsdon, Larry D. Askins and Vickie A. Askins	**Clean Water Act -** ODA authority to issue permits under the NPDES Permit Program for PTIs and PTOs for CAFOs.
2/10/2014	Sierra Club	**Clean Air Act -** Failure to take final action on 2010 sulfur dioxide NAAQS infrastructure state implementation plan submittal and failure to make finding of failures to submit.
1/27/2014	Sierra Club	**Clean Air Act -** Failure to take action on petition for redesignation of areas that violate 2008 NAAQS for Ozone.
1/27/2014	Murray Energy	**Clean Air Act -** Failure to carry out a duty under CAA 321 - entitled Employment Effects - to conduct continuing evaluations of potential loss or shifts of employment.
1/9/2014	Center for Biological Diversity	**Clean Air Act -** Failure to promulgate a FIP for Infrastructure SIP elements for Alaska, Iowa, Puerto Rico and Washington for the 2006 PM2.5 NAAQS.

Date	NOI Submitter	Statute & Issue
12/23/2013	Wild Equity Institute	**Clean Air Act -** Alleging EPA's failure to respond to a title V petition for Gateway Generating Station, Antioch, CA.
12/16/2013	Auto Industry Forum	**Clean Air Act -** Failure to promulgate standards under 112(d) for five major source categories.
12/3/2013	State of Wyoming	**Clean Air Act -** Failure to act on Wyoming's nonattainment NSR SIP submission.
11/26/2013	Center for Biological Diversity	**Clean Air Act -** Failure to make a finding of failure and take final action for 2006 PM2.5 NAAQS nonattainment areas.
11/1/2013	Idaho Power Company	**Clean Water Act -** Notice of Mandatory Duty to Review Site Specific Criteria in Idaho.
11/1/2013	Northwest Environmental Advocates	**Clean Water Act / Endangered Species Act -** Alleges further duties under the CWA and ESA respecting Washington Water Quality Standards.
11/1/2013	Northwest Environmental Advocates	**Clean Water Act -** Alleges further duties under the CWA relating to Idaho Water Quality Standards.
11/1/2013	Idaho Power Company	**Clean Water Act -** Mandatory Duty to Review Site Specific Criteria in Idaho.
10/28/2013	Sierra Club	**Clean Air Act -** For failure to make a finding of failure to submit for state implementation plan amendments to add particulate matter less than 2.5 microns in diameter (PM2.5) increments.
10/22/2013	WildEarth Guardians	**Clean Air Act -** Alleging EPA's failure to issue or deny a title V permit for Deseret Bonanza Power Plant in Utah.
10/21/2103	Sierra Club	**Clean Air Act -** For failure to promulgate a Federal Implementation Plan for Montana's SIP-approved PSD program to properly regulate nitrogen oxides as an ozone precursor.
10/21/2103	Sierra Club	**Clean Air Act -** Failure to meet statutory deadlines to set biomass-based diesel and renewable fuel requirements for 2014 standards.
9/4/2013	Center for Biological Diversity	**Clean Air Act -** For failure to make a finding of failure to submit and take final action for 2006 PM2.5 NAAQS nonattainment areas.
8/23/2013	California Communities Against Toxics and Sierra Club	**Clean Air Act -** Failure to conduct residual risk and technology reviews for 46 source categories pursuant to CAA section 112(d)(6) and (f)(2).
8/22/2013	Pine Creek Valley Water Association, Raymond Proffitt Foundation, Delaware Riverkeeper Network, Delaware Riverkeeper	**Clean Air Act -** Failure to review Pennsylvania's Act 41 that bars use of parts of Pennsylvania's approved antidegradation policy. The parties, along with Delaware Riverkeeper, sent a supplemental NOI dated December 3, 2013, stating that EPA has not approved or disapproved the change in water quality standards and…
8/15/2013	BCCA Appeal Group	**Clean Air Act -** Failure to promulgate designations of areas for the 1-hour NAAQS for sulfur dioxide.

Date	NOI Submitter	Statute & Issue
8/14/2013	South Carolina Coastal Conservation League	**Clean Water Act -** For violations in connection with approval of Clydesdale Mitigation Bank.
8/12/2013	Environmental Integrity Project and Benjamin Feldman	**Clean Air Act -** Failure to Grant or Deny Plaintiffs' Petition to Object to the Proposed Title V Operating Permit for Mettiki Coal preparation/processing plant.
8/8/2013	State of North Carolina	**Clean Air Act -** Failure to Designate Areas for the 2010 S02 National Ambient Air Quality Standard.
8/8/2013	Pacific Coast Federation of Fishermen's Associations and the Institute for Fisheries Resources	**Clean Water Act -** Alleges that EPA is in violation of a non-discretionary duty, under 33 U.S.C. 1313(c)(4), to propose and promulgate certain water quality standards for the State of Washington.
8/6/2013	WildEarth Guardians	**Clean Air Act -** Failure to find that Colorado, Idaho, Kansas, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming have failed to submit SIPs to meet various requirements under the CAA with regards to the 2010 revised NAAQS for nitrogen dioxide.
8/2/2013	Attorneys General of New York, Connecticut, Maryland, Massachusetts, Oregon, Rhode Island, Vermont, and the Puget Sound Clean Air Agency	**Clean Air Act -** Failure to timely review and revise the NSPS for Residential Wood Heaters under the CAA.
8/2/2013	American Lung Association, Clean Air Council, Environmental Defense Fund, and Environment and Human Health, Inc.	**Clean Air Act -** Failure to timely review and revise the NSPS for Residential Wood Heaters under the CAA.
7/29/2013	Wild Equity Institute, Communities for Better Environment, and Center for Biological Diversity	**Clean Water Act -** For illegally issuing federal CAA permits to the Gateway Generating Station without consulting with the Fish and Wildlife Service.
7/29/2013	State of Maine	**Clean Water Act -** Failure to perform nondiscretionary duties under the Clean Water Act.
7/29/2013	State of Maine	**Clean Water Act -** 60-day NOI to sue EPA over failure to timely approve/disapprove Maine's WQS in Indian country within the State.
7/23/2013	Center for Biological Diversity	**Clean Water Act -** Threatening an APA challenge to EPA's approval of Washington and Oregon's 2010 303(d) list where the state did not list waters as impaired due to ocean acidification.
7/23/2013	Columbia Riverkeeper, Puget Soundkeeper Alliance, Spokane Riverkeeper, and North Sound Baykeeper	**Clean Water Act -** Alleges that EPA is in violation of a non-discretionary duty, under 33 U.S.C. 1313(c)(4), to propose and promulgate certain water quality standards for the State of Washington.
7/22/2013	Commissioners of the County of Berks, Pennsylvania	**Clean Air Act -** Failing to make a finding of failure to develop a SIP addressing the North Reading 2008 Lead NAAQS Nonattainment Area and the Lyons 2008 Lead NAAQS Nonattainment Area.
7/9/2013	States of North Dakota, South Dakota, and Texas	**Clean Air Act -** Failure to designate areas for SO2 NAAQS.

Date	NOI Submitter	Statute & Issue
7/1/2013	Sierra Club and NRDC	**Clean Air Act -** Supplemental notice for failure to designate areas for the 2010 S02 NAAQS.
6/20/2013	NRDC, Clean Ocean Action, Hackensack Riverkeeper, Heal the Bay, NY/NJ Baykeeper, Riverkeeper, and Waterkeeper Alliance	**Clean Water Act -** Notice of Intent to Sue for failure to promulgate National Recreational Water Quality Criteria in compliance with the Clean Water Act.
6/19/2013	Jacquelyn B. N'Jai	**Toxic Substances Control Act -** Appears to be a notice of intent to sue EPA and a named employee alleging that EPA failed to take action against a contractor who allegedly violated lead-based paint regulations.
6/12/2013	State of Oregon	**Clean Air Act -** Failure to determine whether standards of performance are appropriate for methane emissions from oil and gas operations and, if so, to issue methane standards and emissions guidelines.
6/10/2013	Clean Air Council	**Clean Air Act -** Failure to make a finding that Pennsylvania is failing to implement its SIP; for failure to determine that PA is not adequately administering and enforcing its CAA Title V permitting program; and failure to sanction PA for these actions.
6/10/2013	Turtle Island Restoration Network	**Endangered Species Act -** Notice of Intent to Sue under the ESA related to salmonid BiOps 1 and 2 (BiOps challenged in the NCAP v EPA lawsuit). Related to NOI NSC 2013-1.
6/4/2013	Sierra Club and NRDC	**Clean Air Act -** Failure to make SO2 NAAQS designations.
5/29/2103	Sierra Club	**Clean Air Act -** Failure to grant or deny petitions to object to the proposed Title V permits for seven Pennsylvania power plants.
5/23/2013	Sierra Club	**Clean Air Act -** Failure to issue a finding of failure to submit a SIP addressing the Baltimore 1997 ozone NAAQS serious nonattainment area.
5/13/2013	Northwest Environmental Advocates, Idaho Conservation League	**Clean Water Act -** Alleges duties under the CWA and ESA related to Idaho Water Quality Standards.
5/13/2013	West Virginia Coal Association	**Clean Water Act -** Alleges failure to approve revisions to West Virginia's NPDES program.
4/30/2013	Idaho Conservation League	**Clean Water Act -** Mandatory Duty to Promulgate Human Health Toxics Criteria in Idaho.
4/29/2013	Conservation Law Foundation	**Clean Air Act -** Failure to timely promulgate new source standards of performance and regulations providing emission guidelines for certain greenhouse gas emissions from fossil fuel-fired electric utility generating units (power plants).
4/25/2013	Richard Sloat	**Clean Water Act -** Notice of intent for failure to require NPDES permit for Buck Mine discharge site.

Date	NOI Submitter	Statute & Issue
4/22/2013	States of New York, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia and the City of New York	**Clean Water Act -** Failure to promulgate final standards of performance for greenhouse gas emissions from new electric utility generating units (power plants) and to issue emission guidelines for existing power plants.
4/15/2013	Environmental Defense Fund, Sierra Club and NRDC	**Clean Air Act -** Failure to issue final NSPS regulating emissions of GHGs from new EGUs and failure to issue proposed and final emission guidelines for emissions of GHGs from existing EGUs.
4/4/2013	Center for Biological Diversity	**Clean Air Act -** Failure to promulgate a FIP within two years after finding that the State of Arizona failed to submit a SIP to attain NAAQS for PM10 in Maricopa County.
3/18/2013	Sierra Club	**Clean Air Act -** For failure to grant or deny a petition requesting EPA to object to the issuance of the revised proposed Title V Operating Permit for Georgia Power's coal-fired Kraft Steam-Electric Generating Plant in Port Wentworth, Georgia.
3/18/2013	Sierra Club	**Clean Air Act -** For failure to grant or deny a petition requesting EPA to object to the issuance of the revised proposed Title V Operating Permit for Georgia Power's coal-fired Wansley Steam-Electric Generating Plant in Carrollton, Georgia.
3/18/2013	Sierra Club	**Clean Air Act -** For failure to grant or deny a petition requesting EPA to object to the issuance of the revised proposed Title V Operating Permit for Georgia Power's coal-fired Mcintosh Steam-Electric Generating Plant in Rincon, Georgia.
3/13/2013	American Lung Association, NRDC, and Sierra Club	**Clean Air Act -** For failure to perform non-discretionary duties related to the review of the national ambient air quality standards for ozone.
3/11/2013	Florida Wildlife Federation	**Clean Water Act -** Alleged mandatory duties under 303(d) regarding Florida's 303(d) list/antidegradation.
3/11/2013	Alabama Rivers Alliance	**Clean Water Act -** Failure to respond to petition to commence withdrawal proceedings regarding Alabama's NPDES program.
2/28/2013	Northwest Environmental Advocates	**Clean Water Act / Endangered Species Act -** Alleged mandatory duties under CWA and ESA regarding Washington WQS.
2/26/2013	Our Children's Earth Foundation and Ecological Rights Foundation	**Clean Water Act / Endangered Species Act -** Alleged duties under CWA and ESA regarding California Toxics Rule.
2/21/2013	Sandra L. Bahr and David Matusow	**Clean Air Act -** Failed to take final action with regard to the replacement 5% PM-10 plan or promulgate a FIP and impose highway funding sanctions.
2/6/2013	Sierra Club, West Virginia Highlands Conservancy, Ohio Valley Environmental Coalition	**Clean Water Act -** NOI alleges failure to perform a mandatory duty to approve revisions to state NPDES program.

Date	NOI Submitter	Statute & Issue
1/30/2013	Sierra Club, West Virginia Highlands Conservancy, Ohio Valley Environmental Coalition	**Clean Water Act -** Alleged mandatory duty to approve or disapprove WV's 303(d) list.
1/30/2013	BCCA Appeal Group	**Clean Air Act -** Failure to act on Texas SIP submittals relating to air quality permitting.
1/23/2013	WildEarth Guardians	**Clean Air Act -** Failure to take action on several Clean Air Act State Implementation Plan ("SIP") submissions from the States of Colorado, South Dakota, and Utah.
1/14/2013	WildEarth Guardians	**Clean Air Act -** Failure to Make a Finding that Utah and Idaho Failed to Submit State Implementation Plans to Attain the PM25 National Ambient Air Quality Standards as Required by Part D, Subpart 4 of the Clean Air Act.

Appendix C: Federal Implementation Plans Imposed by EPA (2010–2016)

Regional Haze Federal Implementation Plans (FIPs) (17 states)(EPA, rather than the state, determines the appropriate emissions control requirements to reduce haze)

Year	Federal Register Notice	Affected States
2016	81 Fed. Reg. 66,333 (Sept. 27, 2016)	**Arkansas**
2016	81 Fed. Reg. 43,894 (July 5, 2016)	**Utah**
2016	81 Fed. Reg. 295 (Jan. 5, 2016)	**Texas, Oklahoma**
2014	79 Fed. Reg. 33,438 (June 11, 2014)	**Washington**
2014	79 Fed. Reg. 5,032 (Jan. 30, 2014)	**Wyoming**
2013	78 Fed. Reg. 8,705 (Feb. 6, 2013	**Minnesota (taconite ore processing plants)**
2013	78 Fed. Reg. 8,705 (Feb. 6, 2013	**Michigan (taconite ore processing plants)**
2012	77 Fed. Reg. 72,511 (Dec. 5, 2012)	**Arizona**
2012	77 Fed. Reg. 71,533 (Dec. 3, 2012)	**Michigan (St. Marys Cement Co. and Escanaba Paper Co.)**
2012	77 Fed. Reg. 61,476 (Oct. 9, 2012)	**Hawaii**
2012	77 Fed. Reg. 57,864 (Sept. 18, 2012)	**Montana**
2012	77 Fed. Reg. 51,915 (Aug. 28, 2012)	**New York**
2012	77 Fed. Reg. 50,936 (Aug. 23, 2012)	**Nevada**
2012	77 Fed. Reg. 40,150 (July 6, 2012)	**Nebraska**
2012	77 Fed. Reg. 20,894 (April 6, 2012)	**North Dakota**
2011	76 Fed. Reg. 81,728 (Dec. 28, 2011)	**Oklahoma**
2011	76 Fed. Reg. 52,388 (Aug. 22, 2011)	**New Mexico**

Transport of Fine Particulate Matter (PM2.5) / Ozone FIPs (28 states)(EPA, rather than the state, takes control of planning and approvals for PM2.5 emission sources)

Year	Federal Register Notice	Affected States
2011	76 Fed. Reg. 48,208 (Aug. 8, 2011)	**Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, West Virginia, and Wisconsin**
2011	76 Fed. Reg. 48,006 (Aug. 8, 2011)	**California (North Coast Unified Air Quality Management District)**

Federal Implementation Plans Imposed by EPA (2010–2016), cont.

Greenhouse Gas (GHG) Prevention of Significant Deterioration (PSD) Program FIPs (9 states)(EPA, rather than the state, issues GHG construction permits to sources)

Year	Federal Register Notice	Affected States
2011	76 Fed. Reg. 2,581 (Jan. 14, 2011)	**Kentucky (Jefferson County)**
2010	75 Fed. Reg. 82,365 (Dec. 30, 2011)	**Texas**
2010	75 Fed. Reg. 82,240 (Dec. 30, 2011)	**Arizona, Arkansas, Florida, Idaho, Kansas, Oregon, and Wyoming**

Oil and Gas Minor New Source Review (NSR) Program FIP (EPA issues construction permits to oil and gas sources, rather than Tribes or States)

Year	Federal Register Notice	Affected Areas
2016	81 Fed. Reg. 35,944 (June. 3, 2016)	**Indian Country**

U.S. CHAMBER OF COMMERCE
Environment, Technology & Regulatory Affairs

NORTH DAKOTA DEPARTMENT OF AGRICULTURE

July 21, 2022
For immediate release

Goehring opposed to EPA banning agriculture pesticide uses

BISMARCK, N.D. – Agriculture Commissioner Doug Goehring strongly opposes the Environmental Protection Agency's (EPA) current pattern of severely restricting or banning applications of safely-used critical agricultural chemicals.

"The EPA is now proposing to severely restrict the use of atrazine," Goehring said. "Atrazine is a highly effective weed killer that has been proven safe in over 7000 studies and has been used safely on North Dakota farms and ranches for over 60 years."

"It readily appears the EPA is ignoring its own science at times and does not fully appreciate the actual effects of their actions," Goehring further explained. "Continually taking more and more crucial tools out of the agricultural producer's toolbox, when there are no cost-effective and viable alternatives available, will greatly harm North Dakota's agricultural economy and threaten our food supply."

"Certain environmental activist groups routinely sue the EPA because the EPA frequently fails to perform its statutory duties and does not meet its mandatory deadlines. Instead of fighting these lawsuits, the EPA commonly rolls over and settles with these groups – consenting to do whatever the groups demand," Goehring said. "In 2017, the EPA rightfully prohibited its use of these 'sue and settle' and 'friendly lawsuit' tactics. However, earlier this year under the Biden administration, the EPA formally rescinded that ban, permitting these lawsuits to once again drive its regulatory rule making."

Goehring gave the recent example that "when several environmental groups sued the EPA regarding its 2020 science-based decision reauthorizing atrazine use for the next 15 years, the EPA simply surrendered. Despite no change in the science, the EPA just gave up – telling the court it would completely redo its previous atrazine registration process."

Goehring intends to submit official comments to the EPA strongly opposing the EPA's newly proposed severe atrazine restrictions.

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MEDIA: For more information, please contact Michelle Mielke at (701) 328-2233 or mmielke@nd.gov.

North Dakota Grain Growers Association Testimony in Support of SCR 4017 House Energy and Natural Resources Committee March 16, 2023

Chairman Porter, members of the House Energy and Natural Resources Committee, for the record my name is Ed Kessel; I own and operate a family farm in the Belfield, North Dakota area. I am also President of the North Dakota Grain Growers Association (NDGGA). I appear here today in both capacities in support of HCR 4017.

HCR 4017 speaks to EPA's regulatory over-reach and the negative impacts that over-reach has on North Dakota agriculture. EPA's regulatory efforts regarding the Endangered Species Act and WOTUS continue to impose federal control over issues best left to state and local control. Shackling North Dakota agriculture with federal over-reach negatively impacts the way farmer's feed the world, fetters state and local control and ultimately negatively impacts the North Dakota economy and the state's budget.

HCR 4017 also speaks to the "wink and nod" EPA strategy whereby the agency and agricultural detractors get together to agree to "sue and settle" lawsuits which leads to detrimental consequences for both the agriculture and energy industries in this nation.

In 2023 NDGGA will conduct its 29th NDGGA E-Tour which brings EPA personnel from EPA Washington D.C. and EPA Region 8 to observe first-hand North Dakota's environmental stewardship. NDGGA has found that by doing that it fosters a better understanding and relationship between North Dakota and EPA. HCR 4017 sends another clear message that North Dakota doesn't need regulatory over-reach to achieve the desired environmental goals that protects our citizens.

Therefore the North Dakota Grain Growers Association would respectfully request that the House Energy and Natural Resources Committee give HB 4017 a Do Pass recommendation and request that the full House concur.

February 6, 2023

Ms. Melanie Biscoe
Pesticide Reevaluation Division
Office of Pesticide Programs
Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460-0001
Submitted via regulations.gov

RE: **EPA-HQ-OPP-2022-0908**
ESA WORKPLAN UPDATE: Nontarget Species Mitigation for Registration Review and Other FIFRA Actions

Dear Ms. Biscoe:

The North Dakota Grain Growers Association (NDGGA) has been serving the state's wheat and barley producers through representation, education, and proactive advocacy for more than 50 years. North Dakota is the nation's top producing state of spring wheat and ranks number two in overall wheat production. The state ranks 3rd in production of barley. Our growers rely on crop protection tools and support efforts to make their introduction more efficient and timelier, meets new challenges, and protects species and the environment. These goals are not mutually exclusive. While we strongly support efforts to ensure a more certain, stable, and effective Endangered Species Act and Registration Review process, we have significant issues with EPA's latest Endangered Species Act Workplan Update and offer the following comments:

- **We are concerned about EPA proposal's that** *"You must obtain a Bulletin no earlier than six months before using this product."* This would place our growers in an untenable position since it does not address the sometime late breaking needs for pesticide applications. We believe this would be both impractical and unworkable for wheat and barley producers in North Dakota, and we would suspect elsewhere, particularly in neighboring states. What is a grower to do in an emergency pest outbreak with his or her crop?

- **Further, growers and other stakeholders should have a role with EPA** in providing feedback into the registration and consultation process. We would envision growers' role to provide best practices, by focusing on protecting vulnerable species, providing regulatory certainty, and supporting agriculture and associated pest control. We believe, for instance, that county-level bans are ineffective and overly broad and ultimately ineffective in encouraging growers to engage proactively on avoiding exposure to nontarget species. Further early mitigation measures also should allow for grower input.

- **While NDGGA agrees with EPA that surface water runoff should be avoided,** where possible; some provisions, however, are not practical – for instance, prohibiting application within 48 hours following "when a storm event likely to produce runoff from the treated area." This is not workable given the frequently uncertain and changing forecasts, let alone, weather patterns in North Dakota. EPA also provides little in the way of instruction regarding what items may or may not be more effective in certain regions.

- **On registration review, we are concerned about EPA's approach to mitigation**…where "pesticides have similar exposure pathways, uses, and ecological risk profiles." If the agency plans to use that approach mitigations adopted for an entire group could result in unnecessarily burdensome measure for certain chemistries. Such a conservative approach can hinder the development of more appropriate and product-specific mitigations.

- **Moreover, grouping chemicals together may not result in viable outcomes,** and EPA instead should focus on attempts to develop groups of ESA-listed *species* that may respond in similar ways to chemical exposure, so that they can be addressed at the outset and narrow the range of listed species for which individual consultation is required.

- **NDGGA appreciates the additional information EPA** has provided regarding its approach to developing an herbicide strategy—including developing multiple suites of mitigation measures and applying criteria to determine when mitigation is needed based on physical-chemical-fate properties and potential effects. EPA should not wait until summer 2023, however, to take suggestions from stakeholders; rather, EPA should be open to receiving feedback leading up to the proposal, so that the proposal can be better-informed from the start.

- **Overall, NDGGA supports EPA's efforts to working more closely with the "Services"** (U.S. Fish & Wildlife Service and the National Marine Fisheries Service) to achieve more "no effect" determinations for species. We also support industry efforts that establish a more efficient process for certain species and pesticide reviews, leading to shorter reviews where repeated analyzes are not needed.

- **Regarding EPA's "pick list" for growers'** ecological mitigation efforts, the agency does not provide detail on how it will engage in a risk/benefit analysis for these measures. EPA also describes general attributes of pick list measures but does not provide data regarding efficacy or necessity.

- **While NDGGA supports a pick-list approach** to provide upfront mitigations for the ESA process while maintaining a certain level of flexibility for growers, some of the practices suggested on the pick list may not be viable in certain parts of the country or with certain agronomic practices. For example, the Update explains that "[t]he cover crop must be planted and remain on the field up to the field preparation for planting the crop." This requirement does not consider various agronomic practices adopted by many American farmers like those in North Dakota, which is in the center of the nation's Prairie Pothole region and has unique growing conditions.

- **We believe EPA must document the benefits from these mitigations** with respect to the species and habitat protection goal(s). Mitigation evaluation should be based on reasonable and realistic assumptions, conducted using refined methods, and thus provide the means to focus on the most effective forms of mitigation. The focus should also be on operationalizing these practices and including what is already being accomplished by growers.

- **Prioritize development of programmatic consultations.** All parties to the pesticide registration process, from registrants to regulators to end-users, could be well-served by developing programmatic consultations on a pesticide-class basis (herbicides, insecticides, etc.) that include practices which might avoid jeopardy for all species. Individual products, however, and especially newer chemistries may behave differently, and be more likely to have a narrower spectrum of activity than some older chemistries or otherwise present a different potential risk profile. Therefore, while considering programmatic consultations, EPA assessments that group pesticides together, individual registration assessments may need to evaluate and account for these distinctions.

- **Finally, NDGGA believes the proposed EPA label language:** "*It is a Federal offense to use any pesticide in a manner that results in an unauthorized "take" (e.g., kill or otherwise harm) of an endangered species and certain threatened species, under the Endangered Species Act section 9."* is regulatory overreach and unrealistic to enforce. What happens when a producer follows the label and unknown to them a "threatened or endangered species" is found on their premises? To subject that famer to a "federal offence" in that instance would be terribly unfair. Furthermore, who will enforce this EPA label language, and given the number of pesticides applied throughout U.S. agriculture in any one year, how can the agency possibly monitor harm to a threatened or endangered species?

NDGGA thanks EPA for the opportunity to provide comments. If you or the agency has any questions, please feel free to contact NDGGA Executive Director Dan Wogsland at danw@ndgga.com or 701.282.9361.

Sincerely,

Edward Kessel
President
North Dakota Grain Growers Association

March 15, 2023

Ms. Melanie Biscoe
Pesticide Reevaluation Division
Office of Pesticide Programs
Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460-0001
Submitted via regulations.gov

RE: EPA-HQ-OPP-2022-0908
ESA WORKPLAN UPDATE: Nontarget Species Mitigation for Registration Review and Other FIFRA Actions

Dear Ms. Biscoe:

My name is Sarah Lovas. I'm an agronomist from North Dakota and have helped advise farmers on their agronomic input use, including pesticides. I also serve as a current Board member with the North Dakota Grain Growers Association and am the 2022 North Dakota Certified Crop Advisor or the Year. Pesticides are not the only tool farmers use to manage agronomic pests, but they are an important component in a system to help manage agronomic pests. Every pesticide recommendation I make has been made trying to reduce pesticide use. Judicious use of pesticides along with other non-pesticide management strategies are always considered. Judicious use of pesticides not only helps environmental management but also reduces cost to the farmer. I am writing today with concerns over EPA's latest Endangered Species Act Workplan Update. I offer these comments:

1) **I am concerned about EPA proposal's that** *"You must obtain a Bulletin no earlier than six months before using this product."* I have helped farmers plan their pesticide use as early as 3 months prior to the growing season based on previous crop scouting data from previous years. This means that pesticide plans are made in March when, often, North Dakota still has snow on the ground, and these plans won't be used until June. However, it is critical to be able to amend the initial plan based on the pests that are present during the actual growing season. In-season crop scouting allows us to make sure we are using the correct active ingredient at the correct rate. These decisions can't be made correctly 6 months ahead of time.
2) **Further, growers and other stakeholders should have a role with EPA** in providing feedback into the registration and consultation process. I believe that EPA would develop better working pesticide regulations if they collaborated and understand those who make pesticide recommendations and those who apply those pesticides. Both the agronomists and agronomists are professionals who understand the field application of the pesticide regulations implemented.

3) **Provisions such as prohibiting application within 48 hours following "when a storm event likely to produce runoff from the treated area" is simply not practical.** North Dakota's weather patterns are unpredictable and trying to forecast these types of rains are not possible with the certainty we need to make our pesticide recommendations and applications.

4) **Finally, I believe the proposed EPA label language:** "*It is a Federal offense to use any pesticide in a manner that results in an unauthorized "take" (e.g., kill or otherwise harm) of an endangered species and certain threatened species, under the Endangered Species Act section 9."* is regulatory overreach and unrealistic to enforce. What happens when a producer follows the label and unknown to them a "threatened or endangered species" is found on their premises? To subject that famer to a "federal offence" in that instance would be terribly unfair. Furthermore, who will enforce this EPA label language, and given the number of pesticides applied throughout U.S. agriculture in any one year, how can the agency possibly monitor harm to a threatened or endangered species?