Statement of
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House Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

House Resolution 1493
Sunshine for Regulatory Decrees and Settlements Act

The views expressed in this testimony are those of the author alone and do not necessarily represent those of the State of Georgia.

Chairman Bachus, Vice-Chairman Farenhthold, Ranking Member Cohen, and Members of the Subcommittee, thank you for inviting me to testify today.

As Attorney General for the State of Georgia, a particular focus of mine has been fighting federal administrative and regulatory overreach. With increasing and dismaying frequency, constitutional principles of federalism and separation of powers have been set aside in favor of administrative end-routes to a preferred policy outcome. One of the most troubling manifestations of this phenomenon is the practice known as "Sue and Settle."

Sue and Settle occurs when an agency, intentionally or otherwise, abdicates its statutory discretion – and eliminates the participation rights of States and other affected parties – by engaging in rulemaking via settlement. In these cases, the agency agrees to settlement talks with outside groups that ultimately commandeer the rulemaking process, creating legally binding, court-approved settlements through closed-door negotiations that dictate the agency's policy priorities and funding choices. Indeed, EPA has shared publicly that complying with consent decree deadlines is the top agency priority, a position shared only with meeting statutory deadlines. These settlements or consent decrees have real-world effects on numerous parties who had no role in, and often no knowledge of, the negotiations that led to the agreements' consummation. Congressional directives on transparency and administrative process play no role in Sue and Settle. That is plainly outside the bounds of the law set out in the Administrative Procedure Act, 5 U.S.C. § 500 *et seq*., and the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, and interrupts important federal principles of separation of powers, federalism, and the rule of law.

As James Madison explained in Federalist No. 47,

> 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.

Sue and Settle accretes the legislative, executive, and judicial powers in a single regulatory agency, and – perhaps even more troublingly – can in many instances cede that conglomeration of authority to an outside interest group. Outlined below are a few of the chief concerns from a legal and constitutional perspective.

Separation of Powers. Congress has set out in the Administrative Procedure Act, the Clean Air Act, and elsewhere clear steps that federal agencies must follow during the rulemaking process. Sue and Settle violates the terms of these procedures even as described in the most general terms. In the Clean Air Act, for example, Congress directs the EPA to begin by publishing a notice of the proposed rulemaking in the Federal Register. 42 U.S.C. § 307(d). That notice must contain a statement of the rule's "basis and purpose," including a summary of the factual data on which the proposed rule is based, the methodology used in obtaining and analyzing the data, and any significant legal interpretations or policy issues behind the proposed rule. Congress also requires in that statute the opportunity for public comment and hearing. None of these congressional directives is obeyed in the context of Sue and Settle. Instead, outside advocacy groups notify agencies of their intent to sue and then conduct months of closed-door negotiations. In certain cases, the resultant consent decree is filed the same day as the complaint. *See, e.g.*, *Defenders of Wildlife v. Jackson*, No. 10-01915 (D.D.C.) (complaint and consent decree filed Nov. 8, 2010); *Environmental Geo-Technologies, LLC v. EPA*, No. 10-12641 (E.D. Mich.) (complaint and settlement agreement filed July 2, 2010). Such processes perform an end-run around the rulemaking processes directed by Congress, and in doing so may also use a back door to achieve policy outcomes that have failed legislatively.

Moreover, although Sue and Settle agreements are rendered legally binding when courts enter them, they have not been subjected to the same adversarial testing as normally occurs in an agency challenge; the court is largely stripped of its decisional role because the parties to the case agree, while other affected parties are absent and impotent. One federal appeals court recently agreed, holding that it was an abuse of discretion for a federal court to enter "a consent decree that permanently and substantially amends an agency rule that would have otherwise been subject to statutory rulemaking procedures." *Conservation Northwest v. Sherman*, No. 11-35729, 2013 U.S. App. LEXIS 8396 at *14-*15 (9th Cir. Apr. 25, 2013). In many instances those parties do not even know of the negotiations that lead to a settlement. In others, they are actually

denied the opportunity to intervene. *See Defenders of Wildlife v. Jackson*, No. 10-1915, 2012 U.S. Dist. LEXIS 35750 (D.D.C. March 18, 2012). The D.C. Circuit upheld that decision, finding that the petitioners could not demonstrate injury and therefore did not have standing to intervene. *Defenders of Wildlife v. Perciasepe*, No. 12-5122, 2013 U.S. App. LEXIS 8123 (D.C. Cir. April 23, 2013).

In short, Sue and Settle permits an agency – along with an interested advocacy group – to develop its own rulemaking processes, often in contravention of those set out by Congress, and can bar other affected parties from any role in either the negotiation or the ultimate court approval of the settlement. Such unification of authority is contrary to the separation of powers principles so fundamental to our constitutional structure.

Federalism. Sue and Settle also introduces significant federalism concerns. States are often heavily affected by, yet almost never privy to, Sue and Settle negotiations. Yet the structure of our government and laws provides for shared responsibility in a range of regulatory areas. Sue and Settle practices permit the federal government and interested advocacy groups to withdraw constitutional and legal authority from States in order to achieve a desired policy outcome. Regardless of my State's or my personal agreement or disagreement with a particular policy judgment, I have great concerns about expunging States from federal regulatory processes in which we have historically and statutorily played an important and authoritative role.

The Clean Air Act, for example, is predicated on a model of "cooperative federalism," in which States and the federal government divide regulatory responsibilities. The federal government develops standards within the law for emissions limits and other regulatory goals, while States are responsible for implementing those standards through State Implementation Plans, or SIPs. Sue and Settle presents extraordinary complications for this outline of cooperative federalism, including but not limited to the fact that States are forced to develop SIPs based on settlement timelines rather than at a pace that allows them to review and analyze the appropriate information to make the right decision for how to meet environmental goals within their borders.

Not surprisingly, States have been subjected to the same limitations on intervention as private parties. In *WildEarth Guardians v. Jackson*, for example, EPA opposed intervention by

North Dakota even though the case involved how and when EPA should act on North Dakota's proposed Regional Haze SIP. *See WildEarth Guardians v. Jackson*, No. 4:09-cv-02453 (N.D. Cal.) (filed June 2, 2009; consent decree entered Feb. 23, 2010). North Dakota charged that EPA had exceeded its authority in promulgating a regional haze FIP under the auspices of an interstate transport consent decree. The district court did not permit North Dakota to intervene, deeming North Dakota's allegations that EPA relied on the consent decree in promulgating its regulation were a "sham" or "frivolity" – despite the fact that the EPA itself said that it was simultaneously exercising its authority on regional haze and interstate transport requirements. *WildEarth Guardians v. Jackson*, No. 4:09-cv-02453 (N.D. Cal. Dec. 27, 2011).

The Regional Haze issue is thus another arena in which States are losing their traditional role in the cooperative federalism structure of the Clean Air Act due to Sue and Settle consent decrees. EPA's regional haze program seeks to address impairments to visibility at national parks and other federal lands, but is an aesthetic requirement rather than a health-related mandate. The statute, 42 U.S.C. § 7491(b)(2), requires affected States to put forth SIPs that will "make reasonable progress toward meeting the national goal" on regional haze. But for the first time, and as a result of Sue and Settle consent decrees, the EPA is allowed to propose combined Regional Haze SIPs and FIPs (Federal Implementation Plans) – something EPA has not previously done in administering the Clean Air Act. These new FIPs have proved costly and improper. In five separate consent decrees negotiated without State participation, EPA agreed to commit itself to deadlines for evaluating the States' plans, and subsequently determined that each of those plans was procedurally deficient in some respect. *Nat'l Parks Cons. Ass'n v. Jackson*, No. 1:11-cv-01548 (D.D.C. Aug 18, 2011); *Sierra Club v. Jackson*, No. 1-10-cv-02112 (D.D.C. Aug. 18, 2011); *WildEarth Guardians v. Jackson*, No. 1:11-cv-00743 (D. Col. June 16, 2011); *WildEarth Guardians v. Jackson*, No. 4:09-cv-02453 (N.D. Cal. Feb. 23, 2010); *WildEarth Guardians v. Jackson*, No. 1:10-cv-01218 (D. Col. Oct. 28, 2010). Because the consent decree deadlines did not allow time for states to resubmit plans, the EPA imposed its own FIP controls. This type of action is in derogation of congressional intent, and deprives States of the appropriate level of control as stewards of their resources and environments.

The Regional Haze issue is only one example of EPA's decision to let outside interest groups control its regulatory agenda to the exclusion of its previous federalist partners. States

and their Attorneys General are increasingly concerned that we are losing our roles as federal partners in the regulatory arena, and are losing our opportunity to develop environmental plans that respect the individual circumstances of our States while also making important progress on environmental goals. Consequently, 13 States have filed a FOIA request seeking the release of documents showing EPA communications with advocacy groups relating to the scope of the EPA administrator's non-discretionary authority to take actions under environmental statutes; the course of action to be taken with respect to any SIP plan; the course of action to be taken with respect to a State's administration of federal environmental laws; and the course of action to be taken with respect to any "administrative or judicial order, decree or waiver entered or proposed to be entered . . . concerning a State." FOIA Request No. HQ-FOI-01841-12 (Sept. 12, 2012). The States also requested a fee waiver because this disclosure meets the standard criteria for a request that is within the public interest as outlined in 40 C.F.R. § 2.107(l).[1] As of the date of this testimony, more than eight months have passed and neither request has been granted.

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The above testimony does not begin to catalogue the legal and constitutional dangers of Sue and Settle practices. Congress, however, has the ability to curb these practices and restore the intended structure and process of federal rulemaking. House Resolution 1493 would take important and critical steps to ensuring transparency and equal access to the administrative process for all affected parties, including States. Thank you again for the opportunity to submit testimony on this important matter.

[1] Waiver or reduction of fees. (1) Records responsive to a request will be furnished without charge or at a charge reduced below that established under paragraph (c) of this section when a FOI Office determines, based on all available information, that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.