DEADLINE CITIZEN SUITS: AN IDEA WHOSE TIME HAS EXPIRED

William Yeatman[1]

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I. INTRODUCTION

The Clean Air Act[2] has a serious timing problem. Relative to other regulatory statutes, the act is replete with deadlines. Indeed, the act contains far too many time limits, such that the Environmental Protection

1. William Yeatman is a senior fellow at the Competitive Enterprise Institute, a free-market think tank based in Washington, D.C.

2. "Clean Air Act" refers to the 1970, (Pub. L. No. 91-604, 84 Stat. 1676 (1970).), 1977, (Pub. L. No. 95-95, 91 Stat. 685 (1977).), and 1990 (Pub. L. No. 101-549, 104 Stat. 2468 (1990).) Amendments that modified and extended federal authority provided by the Clean Air Act of 1963 (Pub. L. No. 88-206, 77 Stat. 392 (1963),) and the 1967 Air Quality Act (Pub. L. No. 90-148, 81 Stat. 485 (1967)). Because the modern structure of the act was established in the 1970 amendment, that is the starting point for analysis in this paper.

Agency (EPA) is evidently overwhelmed. From 1993 to 2013, EPA promulgated 98 percent (196 out of 200) of its non-discretionary responsibilities pursuant to three core Clean Air programs past statutory deadlines, by an average of 2,072 days late.[3] The simple matter of the fact is that EPA has far more date-certain duties than it has the resources to achieve.

EPA's untimeliness, by itself, isn't necessarily problematic; it is, after all, Congress's fault for assigning responsibilities without appropriating commensurate funds.[4] *Ceteris paribus*, the agency can be expected to use its discretion to best allocate its limited resources. However, the Clean Air Act empowers private parties to sue the agency in order to compel the performance of overdue regulatory actions;[5] and this dynamic—an agency that has too many deadlines and a public right to sue over any missed deadlines—has proven very problematic. Virtually all deadline lawsuits are filed by national environmental organizations that have increasingly politicized agendas far removed from the public interest.[6] Consequently, it is now the case that special interests effectively are setting the regulatory priorities of the EPA. States, which are supposed to be EPA's partners in cleaning the nation's air under the cooperative federalism regulatory regime established by the Clean Air Act,[7] are being left out of this agency priority setting.[8]

Both the act's anomalously high number of date-certain duties and its provision empowering citizens to sue over missed deadlines are a byproduct of the intellectual environment into which the law was enacted. In 1970, when Congress passed the Clean Air Act, regulatory capture theory was the ascendant school of thought regarding the administrative state. At the time, it was conventional wisdom, in academia and among the public at large, that regulated entities (i.e., industry) had come to dominate regulatory agencies. The two solutions to agency capture, according to this school of thought, were to: (1) enhance Congressional control over agencies through statutory devices like more detailed instructions with deadlines for action; and (2) grant greater rights to the public to participate in the regulatory process, through means like citizen suits over missed deadlines. Of course, there was overlap between these two remedies. A missed deadline by EPA could engender a citizen suit to compel action.

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3. *See infra* notes 52-53.

4. *See infra* notes 63-65 and accompanying text.

5. *See infra* Part II, Section B.

6. *See infra* notes 76-78 and accompanying text.

7. *See Infra* note 29; *See also* Train v. Natural Resources Defense Council, 421 U.S. 60, 63-67 (1975) (Under the cooperative federalism structure established by the Clean Air Act, EPA sets nationwide standards, which are then implemented by the states, in the belief that local officials know best the regional conditions that most efficiently reduce air pollution).

8. *See infra* Part IV, Section B.

The intellectual pedigree of this binary system of accountability is discussed in part II.

In part III, this paper presents the empirical evidence of how this system is working in practice. As indicated above, EPA's performance achieving date-certain responsibilities is, in a word, "woeful." In fact, the agency's poor record is due to basic arithmetic—the Congress imposed too many time limits, yet granted too few resources to achieve them. Missed deadlines, in turn, have engendered scores of Clean Air Act citizen suits to spur action, nearly all of which are filed by national environmental groups.

Part IV analyzes the impacts on the regulatory process of the evidence presented. Congress included copious deadlines in the Clean Air Act in order to wrest control of agencies "captured" by business special interests. However, by imposing too many deadlines, Congress has, in effect, ceded control over EPA to environmental special interests, who are acting through citizen suits to establish the agency's priorities. Similarly, Congress intended for citizen suits to mitigate regulatory capture by facilitating greater public participation in the regulatory process. Yet these suits, as currently practiced, exclude states from having a voice in the process.

Finally, part V of this paper discusses judicial and legislative means by which courts and Congress might mitigate the deleterious impacts of an agency overwhelmed with statutory deadlines. When adjudicating a citizen suit alleging EPA's nonperformance of a date-certain duty, the court's standard for considering the agency's proposed schedule for compliance is one of "impossibility." If EPA's proposed timeline is longer than what is feasible, then the court will reject it. The court has adopted this high threshold so as to give meaning to the unambiguously expressed intent of Congress, as manifest in a statutory deadline. If, however, the court were to take into account the broader context, and incorporate into its reasoning the reality that EPA could not possibly meet all its Clean Air Act deadlines at once, then it would create the interpretive space, wholly in line with its precedent, to afford EPA the discretion to set its own priorities. Alternatively, Congress could cull date-certain deadlines from the Clean Air Act, or establish a new process by which EPA established its own deadlines with or without input from lawmakers.

II. Deadlines & Citizen Suits: A Binary System of Accountability

A. *Clean Air Act Deadlines: Controlling Captured Agencies with Precise Direction*

Although deadlines generally are "rare,"[9] their frequency varies significantly depending on the agency and the law. The EPA, for example, is obligated to meet a disproportionate number of time limits. According to an interagency survey, EPA accounted for almost a third of all agencies date-certain duties from 1987 to 2003.[10] As noted by a former official at the Office of Management and Budget, "[w]hile most agencies have some statutes into which deadlines for regulatory action have been written, the statutes of the EPA are replete with them."[11]

Statutory deadlines vary considerably not just across agencies, but also within them. From 1983 to 2003, EPA Office of Air and Regulation, whose primary responsibility is to administer the Clean Air Act,[12] accounted for 63 percent of the agency's deadlines.[13] Of the twenty-five "major"[14] regulations EPA has promulgated since January 2009, seventeen (68 percent) were issued by the Office of Air and Radiation and subject to

9. Jacob E. Gersen & Anne Joseph O' Connell, *Deadlines in Administrative Law*, 156 U. Pa. L. Rev. 923, 941 (2008). "More than 90% of all unique regulatory actions are not associated with a deadline." Gersen & O'Connell present data on the frequency, nature, and type of deadlines used to structure agency decisions from 1978-2003.

10. *Id*. at 981. Federal administrative agencies faced 4884 total deadlines from 1978-2003, of which 1342 (27 percent) applied to EPA.

11. Alden F. Abbott, *The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 Admin. L. Rev. 171, 173 (1987).

12. EPA, *About the Office of Air and Radiation (OAR)*, http://www2.epa.gov/aboutepa/about-office-air-and-radiation-oar (last visited Oct. 17, 2013). "OAR is responsible for administering the Clean Air Act, the Atomic Energy Act, the Waste Isolation Pilot Plant Land Withdrawal Act, and other applicable environmental laws." EPA's responsibilities pursuant to the Clean Air Act dwarfs those incurred by the other statutes.

13. Jacob E. Gersen & Anne Joseph O' Connell, *Deadlines in Administrative Law*, http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1156&context=law_and_economics. Compare with *supra* note 9. Gersen and O'Connell published a preliminary draft of the above paper as a University of Chicago John M. Olin Law & Economics Working Paper (No. 380). The two papers used overlapping data sets. The paper cited at *supra* note 9 surveyed deadlines from 1978-2003, whereas the preliminary draft surveyed deadlines from 1983-2003. The final paper showed intra-agency data (in addition to inter-agency data), while the preliminary paper only showed inter-agency data.

14. 5 U.S.C.A. § 804(2) (West 2013). The Congressional Review Act defines a major rule as one that has "resulted in or is likely to result in [1] an annual effect on the economy of $100,000,000 or more; [2] a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or [3] significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets".

a statutory time limit.[15] This evidence indicates that environmental statutes contain more congressionally directed timetables for action than do other regulatory statutes, and, furthermore, that the Clean Air Act possesses the most deadlines of all.

In order to understand the prevalence of administrative deadlines in environmental statutes generally, and the Clean Air Act in particular, it is necessary to first appreciate the intellectual climate in which these laws were passed. Modern environmental regulation came into being during the early and mid 1970s,[16] a period of great public and scholarly skepticism regarding the efficacy of regulation. At the time, it was widely believed that administrative agencies were dominated by special interests—primarily the regulated entities (i.e., industry)—a phenomenon pejoratively known as "regulatory capture."[17]

Capture theory was a reaction to New Deal-era regulatory statutes that conferred broad power on administrative agencies to regulate in the "public interest."[18] By the late 1960s, it was commonly held that administrative agencies had been delegated too much discretion, leading to their domination, or capture, by special interests.[19] In its most cynical form, capture theorists alleged venality in the form of a "revolving door" between regulators and the industries they regulate.[20] More convention-

15. U.S. Government Accountability Office, http://www.gao.gov/legal/congressact/fedrule.html?fedRuleSearch=&report=&agency=Independent+Agencies+and+Govt+Corporations&subagency=Environmental+Protection+Agency&type=Major&priority=All&begin_date=01%2F01%2F2009&end_date=10%2F14%2F2013&begin_eff_date=mm%2Fdd%2Fyyyy&end_eff_date=12%2F31%2F2014&begin_gao_date=&end_gao_date=12%2F20%2F2013&searched=1&Submit=Search (last visited Oct. 14,2013). Data collected from Government Accountability Office's Federal Rules Database. The search was narrowed to "major" regulations by EPA from January 1, 2009 to October 14, 2013.

16. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7401 (1970); Clean Water Act, 33 U.S.C. § 1251 (1972); Safe Drinking Water Act, 42 U.S.C. § 300f (1974); Toxic Substances Control Act, 15 U.S.C. § 2601 (1976).

17. Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 108-109 (2002); Joel A. Mintz, *Has Industry Captured the EPA?: Appraising Marver Bernstein's Captive Agency Theory After Fifty Years*, 17 FORDHAM ENVTL. L. REV. 1, 5-14 (2005); Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1050-1053 (1997); Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits under Federal Environmental Laws*, 34 BUFF L. REV. 833, 843-844 (1985).

18. *See, e.g.*, Federal Communications Act of 1934, 47 U.S.C. § 201(a) (granting Federal Communication Commission regulatory and ratemaking power in the "public interest"); *see also*, Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1048-1049 (1997).

19. Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 459 (1999); Zinn, *supra* note 17, at 116-117.

20. For a review of the history of academic literature on the existence of a "revolving door," *see* William T. Gormley, Jr., A Test of the Revolving Door Hypothesis at the FCC, 23 AM. J. POL. SCI. 665, 666 (1979); Zinn, *supra* note 17, at 109-110.

ally, they argued that unfettered agency discretion over time engenders a "subtle relationship in which the mores, attitudes, and thinking of those regulated come to prevail in the approach and thinking" of regulators, leading to lax, ineffective oversight.[21]

It is widely acknowledged that capture theory significantly influenced Congress' passage of major environmental statutes during the 1970s.[22] Mindful of agencies captured by special interests, Congress sought to retake control of the administrative state through legislative means. Compared to previous agency-authorizing statutes, environmental laws in the 1970s were longer and contained more precise directions and date-certain deadlines. These are all policy prescriptions advocated by capture theorists.[23]

The 1970 Clean Air Act was the first modern environmental statute, and the capture theory's sway over the drafting of the bill was particularly acute.[24] This explains why the legislation features so many deadlines, which were then a novel device, and the subject of much deliberation. As noted by the U.S. District Court for the Southern District of New York, "[t]he strict deadlines for EPA action. . .were not the inadvertent product of uninformed congressional action, but were the deliberate result of a studied effort by a joint congressional conference."[25]

Subsequent amendments to the Clean Air Act further narrowed EPA's discretion by imposing even more deadlines.[26] Today, EPA's date-

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21. Marver Bernstein, *Regulating Business By Independent Commission,* 31 IND. L.J. 83 (Princeton: Princeton University Press, 1955), as cited in Paul Sabatier, Social Movements and Regulatory Agencies: Toward a More Adequate—and Less Pessimistic—Theory of "Clientele Capture," 6 Pol'y Sci. 301, 303 (1975).

22. Zinn, *supra* note 17, at 112 ("The prevailing view is that [the] body of research [on capture] had a major influence on the design of American bureaucracy. Congress learned its lesson.") (footnote and citation omitted); Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 843 (1985) ("[The Clean Air Act and the Clean Water Act] were first enacted at a time when 'capture' theories dominated scholarly and popular thought about regulation.") (citation omitted).

23. Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 827 (1988); Seidenfeld, *supra* note 18, at 433-444; Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1052 (1997).

24. R. Shep Melnick, *Pollution Deadlines and the Coalition for Failure*, 75 PUB. INT. 123, 124 (1984); *see also* Bruce A. Ackerman & William T. Hassler, *Clean Coal/Dirty Air,* 22 YALE UNIV. PRESS 265, 265-266 (1981).

25. New York v. Gorsuch, 554 F. Supp. 1060, 1063 (D.N.Y 1983) (citation omitted).

26. *See* 42 U.S.C.A. § 7409(d)(1) (West 2013) and 42 U.S.C.A. § 7411(b)(1)(B) (West 2013), respectively. The 1977 Clean Air Amendments added a responsibility for EPA to periodically review National Ambient Air Quality Standards (every five years) and New Source Performance Standards (every 8 years). In 1990, frustrated with EPA's slow pace regulating hazardous air pollutants, Congress completely revamped the act's air toxics program (42 U.S.C.A § 7412) (West 2013). Not only did Congress list the hazardous air

certain responsibilities pursuant to the act are numerous and interlocked. Consider, for example, the National Ambient Air Quality Standards (NAAQS),[27] the foundational regulatory scheme of the Clean Air Act of 1970.[28] There are nationwide NAAQS standards for six pollutants.[29] EPA must review and, if necessary, revise these standards every five years.[30] A revised NAAQS, in turn, triggers a responsibility by all 50 states[31] to submit, within three years, an implementation plan to achieve the revised NAAQS.[32] After a state submits a NAAQS implementation plan, EPA has six months by which to make a "completeness finding."[33] Upon such a finding, the act requires EPA to approve or disapprove a plan within twelve months.[34] Thus, six deadlines every five years can engender 300 more.

In sum, the Clean Air Act of 1970 was influenced by widespread public and academic suspicion that unlimited grants of discretion to administrative agencies had led to their capture by industry, thereby undermining regulatory effectiveness. Thus, informed members of Congress sought to proscribe EPA's freedom of action with more thorough directives. Statutory deadlines were a primary method by which EPA did so; another was longer statutes with more detailed guidance. This history explains why the Clean Air Act contains a significantly higher number of dead-certain requirements, relative to other agency-authorizing laws.

B. *Clean Air Act Citizen Suits: Controlling Captured Agencies by Widening Participation*

Regulatory capture, the ascendant school of thought on the administrative state in the 1970s, warned that the number one cause of agency

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pollutants that EPA had to regulate, but lawmakers also imposed 229 deadlines by which sources of hazardous air pollutants were to be regulated. *See* U.S. Government Accountability Office, *Clean Air Act: EPA Has Completed Most of the Actions Required by the 1990 Amendments, but Many Were Completed Late* (May 2005), http://www.gao.gov/assets/250/246543.pdf.

27. 42 U.S.C.A. §§ 7408-7410 (West 2013).

28. Richard E. Ayres & Mary Rose Kornreich, THE CLEAN AIR ACT HANDBOOK 13 (Robert J. Martineau, Jr. & David P. Novello eds., ABA Publishing, 2d ed. 2004). "The regulatory scheme established by the Clean Air Act of 1970 (CAA) was based primarily on the concept of nationwide air quality goals [National Ambient Air Quality Standards] and individual state plans to meet those goals."

29. 40 C.F.R. §§ 50.4-50.11 (2013). The six "criteria" pollutants are Carbon Monoxide, Lead, Nitrogen Dioxide, Ozone, Particle Pollution, and Sulfur Dioxide.

30. *Supra* note 27, § 7409(d)(1).

31. *See* Train v. Natural Resources Defense Council, 421 U.S. 60, 63-67 (1975). Under the cooperative federalism structure established by the Clean Air Act, EPA sets nationwide standards, which are then implemented by the states, in the belief that local officials know best the regional conditions that most efficiently reduce air pollution.

32. 42 U.S.C.A. § 7410(a)(1).

33. *Id.* at § 7410(k)(1)(B).

34. *Id.* at § 7410(k)(2)-(3).

domination by special interests was excessive freedom of action accorded administrative agencies by New Deal regulatory legislation. After overly broad statutory grants of administrative discretion, "the second most important condition precedent for capture is an imbalance in the participation of competing interests groups in the agency's domain."[35] Whereas industry "had the resources to hire the lawyers, experts and lobbyists to make their voices heard[,]" other voices in the process, "lacking resources, remained mute."[36] The solution to this resource imbalance, according to capture theorists, was to grant the public greater participatory rights in the regulatory process. To this end, Congress included in the Clean Air Act a novel "citizen suit" provision,[37] which conferred upon private citizens the right to sue EPA if the agency failed to meet any of the Clean Air Act's copious deadlines for regulatory action.[38]

The concept of empowering private parties to sue the government over its failure to protect the environment originated with a group of legal activists who believed that the judiciary was best suited to "democratize the administrative process."[39] One such scholar, University of Michigan law professor Joseph Sax, put this idea into practice in 1968, by drafting a model law for the Michigan legislature that empowered any person to sue the state or a private party whose actions threatened the environment.[40] Sax's bill, in turn, directly influenced Maine Senator Edmund Muskie, the chief sponsor of the 1970 Clean Air Act. As chairman of the jurisdictional Senate Committee, Sen. Muskie introduced a citizen suit provision into the committee draft that was based on Prof. Sax's model bill.[41]

Sen. Muskie's citizen suit provision survived objections on the floor of the Senate and then in Conference.[42] It authorized two types of citizen suits in the Clean Air Act. In the first type, "any person may commence a civil action. . .against any person. . .who is alleged to have violated. . .or to

35. Zinn, *supra* note 17, at 117.

36. Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits under Federal Environmental Laws*, 34 BUFF L. REV. 833, 843 (1985).

37. 42 U.S.C.A. § 7604.

38. Boyer, *supra* note 36, at 844 ("The citizen suit, which gives the public a right to be heard in enforcement decisions and provides for expense reimbursement, is a logical outgrowth of this public participation movement.").

39. Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970*, 53 VAND. L. REV. 1389, 1416 (2000).

40. *Id.* at 1448-1449; *see generally* Joseph L. Sax & Joseph F. Dimento, Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act, 4 ECOLOGY L.Q. 1 (1974).

41. Schiller, *supra* note 39, at 1416.

42. Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws Part 1*, 13 ENVTL. L. REP. 10309, 10310-10311 (1983) (explaining the textual history of the citizen suit provisions of the Clean Air Act); see also, Robert L. Glicksman, *The Value of Agency-Forcing Suits To Enforce Nondiscretionary Duties*, 10 WIDENER L. REV. 353, 354-355 (2004).

be in violation of an emission standard or limitation[.]"[43] This is known as an "enforcing citizen suit."[44] The other type authorizes "any person [to] commence a civil action. . .against the Administrator where there is alleged a failure of the Administrator to perform any act or duty. . .which is not discretionary[.]"[45] This is known as an "agency-forcing" suit.[46] This paper addresses the latter type of citizen suit[47] as it relates to deadlines. Missing a date-certain duty is a clear-cut failure by the EPA to perform a non-discretionary duty,[48] and is, therefore, subject to an agency-forcing suit.

The debate over the Clean Air Act of 1970 evidences the influence of capture theory on members of Congress, who stressed the participatory aim of the agency-forcing lawsuits.[49] After reviewing the legislative history, the United States Court of Appeals, District of Columbia Circuit concluded that, "the citizen suits provision reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced."[50]

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43. 42 U.S.C.A. § 7604(a)(1).

44. Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 TEMP. ENVTL. L. & TECH. J. 55, 55 (1989); Robert L. Glicksman, *The Value of Agency-Forcing Suits To Enforce Nondiscretionary Duties*, 10 WIDENER L. REV. 353, 353 (2004); Boyer, *supra* note 36, at 848.

45. 42 U.S.C.A. § 7604(a)(2).

46. Robert L. Glicksman, *The Value of Agency-Forcing Suits To Enforce Nondiscretionary Duties*, 10 WIDENER L. REV. 353, 353 (2004).

47. *Id.* (Between the two types of citizen suits, the preponderance of the academic literature focuses on enforcement suits).

48. Glicksman, *supra* note 46, at 356-357; Sierra Club v. Thomas, 828 F. 2d 783, 791 (C.A.D.C. 1987) (establishing that a statutory deadline confers a "clear cut" non-discretionary duty on the agency).

49. *See, e.g.*, ENVTL.POLICY DIV. OF THE CONG. RESEARCH SERV. OF THE LIBRARY OF CONG. FOR THE COMM. ON PUBLIC WORKS, 93D Cong., A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970 262 (Comm. Print 1974), Virginia Sen. William Spong, "We have carefully preserved the right of the public to participate in the pollution abatement process. In one significant respect, we have broadened that right. We have written into the bill a section authorizing citizens to bring suits on their own behalf to assure enforcement of standards, emission requirements or implementation plans;" *id.* at 349, Sen. Hugh Scott during Senate debate, "The bill establishes a novel concept of public participation in the environmental enforcement process. The citizens suits authorized in the legislation will guarantee that public officials are making good on our national commitment to provide meaningful environmental protection," http://abacus.bates.edu/muskie-archives/ajcr/1970/CAA%20Debate%201.shtml; *id.* at 351, Sen. Muskie submitted for the record a memorandum stating that, "The concept of compelling bureaucratic agencies to carry out their duties is integral to democratic society. . .", http://abacus.bates.edu/muskie-archives/ajcr/1970/CAA%20Debate%201.shtml.

50. Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 700 (D.C. Cir. 1975); see also, Friends of the Earth v. Carey, 535 F.2d 165, 172 (2d Cir. 1976) ("Thus the Act seeks to encourage citizen participation rather than to treat it as a curiosity or a theoretical remedy.").

The citizen suit provision was unchanged by the 1977 Clean Air Act Amendments, but broadened slightly in the 1990 Clean Air Act amendments,[51] in order to clarify a jurisdictional confusion.[52] This change does not concern the purpose of this paper.

To recap, deadlines weren't the only legislative innovation born of capture theory and introduced in the Clean Air Act of 1970. Lawmakers included in the statute a novel provision, the citizen suit, which empowered private parties to sue the EPA if the agency failed to perform its non-discretionary duties, among them being date-certain duties. By expanding the participatory rights of pro-regulatory parties, citizen suits were intended to redress the advantage in resources previously enjoyed by regulated entities.

III. EVIDENCE

A. *EPA's Compliance with Clean Air Act Deadlines: Woeful*

EPA's current performance meeting Clean Air Act is, in a word, "woeful."[53] A recent survey on the timeliness of agency actions found that, from 1993 to 2013, EPA promulgated 98 percent (196 out of 200) of its non-discretionary responsibilities pursuant to three core Clean Air programs past statutory deadlines, by an average of 2,072 days late.[54] As of July 2013, 65 percent of EPA's statutorily defined responsibilities for these programs—212 of 322—are past-due, making the average outstanding deadline 2,147 days late.[55]

EPA today, is markedly slower in achieving its date-certain duties than in the recent past. A 2005 Government Accountability Office review

51. 42 U.S.C.A. § 7604(a) (specifying that a private citizen's authority to file suit against the administrator for non-performance of a non-discretionary duty included agency actions "unreasonably delayed").

52. Sierra Club v. Thomas, 828 F.2d 783, 794 (D.C. Cir. 1987) (Before the 1990 Clean Air Act amendments, the Clean Air Act's "unusual, bifurcated jurisdictional scheme" was the course of much confusion that factored prominently in legal challenges). For more, including a discussion of how the 1990 Clean Air Act amendments addressed this confusion, *see* Daniel P. Selmi, *Jurisdiction to Review Agency Inaction under Federal Environmental Law*, 72 IND. L. J. 65, 75-76 (1996).

53. William Yeatman, *EPA's Woeful Deadline Performance Raises Questions about Agency Competence, Climate Change Regulations, "Sue and Settle,"* Competitive Enterprise Institute Web Memo No. 23 (July 10, 2013), http://cei.org/sites/default/files/William%20Yeatman%20-%20EPA's%20Woeful%20Deadline%20Performance%20Raises%20Questions%20About%20Agency%20Competence.

54. *Id.* at 1 (The three Clean Air Act programs were: (1) EPA's responsibility to review National Ambient Air Quality Standards every five years (42 U.S.C. § 7409(d)(1)); (2) EPA's responsibility to promulgate and review National Emissions Standards for Hazardous Air Pollutants every eight years (42 U.S.C. §7412(d)()-(6) and 42 U.S.C. §7412(f)(2)); and (3) EPA's responsibility to review New Source Performance Standards every eight years (42 U.S.C. §7411(b)(1)(B)).

55. *Id.* at 1.

of EPA's performance meeting deadlines resultant from one of the same Clean Air Act programs analyzed above found that the agency promulgated 93 percent (195 out of 208) past due, by an average of 25 months late.[56] By contrast, EPA's Clean Air Act regulations currently are an average of 69 months overdue.[57]

There is also substantial evidence that EPA's performance is similarly woeful in the crucial processing of state implementation plans (SIP), which is the key compliance documents through which states exercise their "primary responsibility" for regulating air pollution under the cooperative federalism regulatory scheme established by the act.[58] EPA must either approve or disapprove a submitted SIP within 12 months,[59] but the agency has been chronically truant in meeting its SIP review responsibilities.

In March 2013, the Environmental Council of the States, a national non-profit, non-partisan association of state and environmental agency leaders,[60] identified as its "number one issue" the timeliness of SIP approval by EPA.[61] This sentiment, moreover, was expressed by multiple state regulators at bipartisan hearings held in 2012 by the House Energy and Commerce Committee on "State, Local, and Federal Cooperation under the Clean Air Act."[62]

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56. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, CLEAN AIR ACT: EPA HAS COMPLETED MOST OF THE ACTIONS REQUIRED BY THE 1990 AMENDMENTS, BUT MANY WERE COMPLETED LATE (May 2005), http://www.gao.gov/assets/250/246543.pdf.

57. Yeatman, *supra* note 53, at 1 (2,147 days late divided by 31 days in a month equals 69.25 months).

58. Fla. Power & Light Co. v. Costle, 650 F.2d 579, 586-587 (5th Cir. 1981).

59. 42 U.S.C.A. § 7408.

60. Description taken from The Environmental Council of the States, http://www.ecos.org/ (last visited Oct. 19, 2013).

61. Jenny Hopkinson, *EPA Vows To Help States Solve "Number One" Issue of SIP Process Reform* (March 20, 2013), http://insideepa.com/Environmental-Policy-Alert/Environmental-Policy-Alert-03/20/2013/epa-vows-to-help-states-solve-number-one-issue-of-sip-process-reform/menu-id-1095.html (last visited Feb. 2. 2014).

62. The Forums were held on July 31, August 2, and November 29 of 2012 regarding the timeliness of EPA's SIP review; *see e.g.*, Theresa Marks, *Arkansas Department of Environmental Quality, Responses to Questions Posed for the Clean Air Act Forum* (July 31, 2012), http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CAAforum/20120731/Marks.pdf; *see also*, Brian Accardo, *Florida Department of Environmental Protection, Responses to Participant Questions 3* (July 31, 2012), http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CAAforum/20120731/Accardo.pdf; *see also*, Thomas S. Burack, *New Hampshire Department of Environmental Services, Responses to Questions Posed for the Clean Air Act Forum*, p 2 (July 27 2012); *see also*, Martha Rudolph, Director of Environmental Programs, State of Colorado, *Colorado Department of Public Health & Environment Responses to Clean Air Act Forum Questions 2* (July 27, 2012), http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CAAforum/20120731/Burack.pdf; Martha Rudolph, Colorado Department of Public Health and Environment, *Responses to Clean Air Act Forum (Part III) Questions* 2 (Nov. 23, 2012); http://energycommerce.house.gov/sites/republicans

EPA has failed, and continues to fail, meeting its Clean Air Act deadlines for a simple reason: The agency has far more responsibilities than it can handle. As explained by a former official at the Office of Management and Budget,

> The nature of the legislative process helps explain why Congress enacts large numbers of impossible-to-meet deadlines. The process of drafting authorizing legislation is relatively insensitive to resource constraints and to difficult trade-offs and priority conflicts among programs. When creating a new regulatory program to address a problem, Congress tends to set absolute goals, and to tie these goals to absolute deadlines. The appropriations process, on the other hand, cannot avoid making difficult trade-offs and priority decisions. . .Much of the delay problem and failure to meet deadlines can be attributed to this tension between an ambitious authorizing statute and a more realistic appropriation.[63]

This perspective is borne out by events. For example, in the 1990 Clean Air Act Amendments, Congress added 338 date-certain requirements.[64] Despite these added responsibilities, "EPA. . .received 13 percent less funding in fiscal 2012, adjusted for inflation, than it did in fiscal 1990."[65]

The evidence is unequivocal: EPA is overwhelmed with deadlines. Regardless whether the President is a Republican or a Democrat, the simple fact of the matter is that the agency has far more responsibilities than it has resources. This unfortunate reality, itself a function of Congressional myopia, in turn invites agency-forcing citizen suits, a subject that is discussed in the next subsection.

B. *Agency-Forcing Citizen Suits over Missed Deadline*

Statutory deadlines in the Clean Air Act are "the unambiguously expressed intent of Congress."[66] As such, there is normally no question of

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.energycommerce.house.gov/files/analysis/CAAforum/20121129/Rudolph.pdf, p 2; *see also*, Robert J. Martineau, Jr., *Tennessee Department of Environment and Conservation, Written Remarks of Robert J. Martineau, Jr., Commissioner* 6-7 (November 29, 2012) http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CAAforum/20121129/Martineau.pdf.

63. Abbott, *supra* note 11, at 182.

64. U.S. Government Accountability Office, *supra* note 26, at 3- 4.

65. Jean Chemnick, *Air Office—A Reg-Writing Powerhouse—Strains As Mandates Grow And Funding Shrinks*, ENERGY & ENVIRONMENT PUBLISHING, LLC (April 2, 2013), http://www.eenews.net/stories/1059978755.

66. Delaney v. EPA, 898 F.2d 687, 691 (9th Cir. 1990) (citations omitted). *See also,* Glicksman, *supra* note 46, at 356 ("[M]andatory deadlines are the easy cases, so that courts readily require EPA and other affected agencies to issue regulations or reports or take other actions for which statutory deadlines have passed.") (citations and footnotes omitted).

liability when a citizen suit alleges the agency missed a date-certain deadline,[67] and the only matter before the court is how to fashion an appropriate equitable remedy.[68] Irrespective of the remedy adopted by the court (i.e., the compliance schedule), the EPA is bound to "in good faith employ[ ] the utmost diligence in discharging [its] statutory responsibilities."[69] It follows that, at the very least, an agency-forcing citizen suit over a missed deadline will require EPA to shift its limited resources to the regulation at issue.[70]

The open-and-shut nature of citizen suits renders both parties to citizen suits amenable to a negotiated outcome. And while there is a dearth of analysis regarding Clean Air Act citizen suits over EPA's nonperformance of a statutory deadline,[71] there is a wealth of information on Clean Air Act settlements.[72] Thus, by using such settlements as a proxy, it is possible to create a data set of agency-forcing citizen suits from 1997 to present,[73] from which we might gain insights.[74]

For starters, environmental organizations, rather than "citizens," were a party to virtually all (74 out of 75) agency-forcing citizen suits that led to

67. Before the 1990 Clean Air Act Amendments, EPA would defend allegations of nonperformance of a date-certain duty with jurisdictional arguments. *See* Daniel P. Selmi, *Jurisdiction to Review Agency Inaction under Federal Environmental Law*, 72 IND. L. J. 65, 75-76 (1996); also, in the 1980s, the Agency unsuccessfully tried to argue that it incurs no nondiscretionary responsibilities after a deadline passes. *See Delaney, supra* note 66, at 687; when the agency does not settle with plaintiffs, it is common practice for EPA to waive liability, and instead contest the plaintiff's proposed schedule as unreasonable. *See*, Sierra Club v. Johnson, 444 F. Supp. 2d 46, 52 (D.D.C. 2006); *see*, American Lung Association v. Browner, 884 F. Supp. 345, 346 (D. Ariz. 1994),

68. *Infra* Part V, Section A.

69. Natural Resources Defense Council, Inc. v. Train, 510 F. 2d. 692, 713 (D.C. Cir. 1974).

70. *See, e.g.*, Sierra Club v. California, 658 F. Supp. 165, 174 (N.D. Cal. 1987) (In rebutting an argument by EPA that completing regulations at issue (pursuant to 42 U.S.C. § 7476) in the time sought by the plaintiffs "would unduly jeopardize the implementation of other essential programs," the court noted that "shifting resources in response to. . .court orders is commonplace for EPA.").

71. Glicksman, *supra* note 46, at 353. Virtually all of the literature on citizen suits focuses on their enforcement aspect, rather than agency-forcing aspects.

72. 42 U.S.C.A. §7413(g) (West 2013) requires notice in the Federal Register of all proposed settlement agreements or consent decrees reached pursuant to the Clean Air Act.

73. The electronic Federal Register is searchable starting at 1/1/1994, http://www.federalregister.gov.

74. Of course, the data set is necessarily limited, due to the fact that it only incorporates settlements where the agency and the plaintiff reached common ground. If the parties could not agree in settlement negotiations, and a compliance schedule was instead dictated by court order, then such an agency forcing suit would fall outside the scope of this analysis. In the text, these limitations are acknowledged when germane. This having been said, it is the author's experience that the preponderance of these cases are settled.

settlement from 1997 to 2013.[75] Sierra Club was the most active group, by a wide margin.[76] This finding comports with the academic literature; as noted by one scholar, "The predominant force in private environmental law enforcement has always been, and will always be, highly organized, professional advocacy and litigation groups."[77]

There is also evidence of citizen suit plaintiffs discriminating among jurisdictions. Whereas, the Clean Air Act requires judicial review of all agency actions with a nation-wide scope to take place in the United States Court of Appeals for the District of Columbia,[78] the act places no such limitation for agency-forcing citizen suits with interstate consequences, which may be filed in any federal district court.[79] In this context, it is interesting that, of all settlements pursuant to agency-forcing citizen suits from 1997 to 2013 affecting more than three states, 26 percent (12 of 46) were filed in the U.S. District Court, Northern California District, based in the Bay Area.[80]

When categorized by four-year Presidential terms since 1997 (i.e., President William Clinton's second term, President George Bush's 1st and 2nd terms, and President Barrack Obama's 1st term), there is evident a spike during President Obama's first term in settlements pursuant to Clean Air Act agency forcing suits over missed deadlines.[81] It is unclear whether this uptick is the result of a greater willingness to settle by the current administration,[82] or whether there's been an increase in agency-forcing citizen suits, or some combination of the two.

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75. *See* Appendix 1, which lists all settlements pursuant to agency-forcing citizen suits over missed Clean Air Act deadlines announced in the Federal Register.

76. *Id.* (Sierra Club was party to 55% [39 out of 79] of Clean Air Act agency-forcing citizens suits that were settled over the period of analysis).

77. Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 369-370 (1990).

78. 42 U.S.C. § 7607(b)(1) "A petition for review of action of the Administrator in promulgating. . .[regulations with a national scope]. . .may be filed only in the United States Court of Appeals for the District of Columbia."

79. 42 U.S.C. § 7604(a) "The district courts of the United States shall have jurisdiction to compel. . .agency action unreasonably delayed."

80. *See* Appendix 1.

81. *Id.* (The totals are: Clinton II: 14; Bush I: 14; Bush II: 8; Obama I: 47).

82. *Infra* Part IV, Section B. The "revolving door" between national environmental organizations and the EPA is discussed. Perhaps the institutional links between EPA and environmental groups, over time, has engendered a culture conducive to the settlement by EPA of citizen suits brought by these organizations.

IV. Discussion: Deadlines and Citizen Suits Are Not Working as Intended

A. *Congress Intended for Clean Air Act Deadlines To Better Control EPA; However, Deadlines Have Led to a Loss of Control*

Since 1993, EPA has missed 98 percent of its date-certain responsibilities pursuant to three core Clean Air Act programs, by an average of more than five years.[83] If the agency's non-performance of date-certain duties were less extreme, then the binary system of accountability, whereby private parties file agency-forcing citizen suits to enforce missed deadlines, perhaps could be said to work as Congress intended. Obviously, lawmakers foresaw that the agency would miss some deadlines; otherwise, they wouldn't have authorized agency-forcing citizen suits. Congress, however, went too far.[84] It added time limits to too many responsibilities,[85] such that EPA is evidently overwhelmed. As a result, the initiative for regulatory action lies largely with environmental organizations, acting through agency-forcing suits.

This last point raises the unsettling prospect that Clean Air Act deadlines, when coupled with agency-forcing suits, actually work at a cross purposes to the Congress's intent. As I explain above, statutory time limits for regulatory action were a legislative fix to the perceived problem of administrative agencies having been "captured" by special interests.[86] And yet, because EPA is chronically late in completing its responsibilities, the agency is subject to citizen suits by environmental organizations,[87] which, in practice, means that environmental interest groups, rather than EPA or Congress, are establishing EPA's regulatory priorities.[88] Thus, Congress' two "solutions" to agency capture by industry (statutory deadlines and agency-forcing citizen suits) have engendered something very much akin to agency capture by environmental special interests.

This parallel is further evidenced by the existence of a "revolving door" between conservation groups and EPA. Consider, for example, former EPA Region 6 administrator Alfredo "Al" Armendariz, who served in

83. Yeatman, *supra* note 53.

84. This study does not address how many deadlines is "too many," which of course has implications for the operation of agency forcing citizen suits as Congress intended. This is irrelevant in light of the facts on the ground—namely, that EPA is out of compliance with virtually all of its date-certain responsibilities.

85. *Supra* Part III, Section A.

86. *Supra* Part II, Section A.

87. *Supra* Part III, Section B.

88. This negative aspect of citizen suits has been addressed in the academic literature. However, it has never been analyzed in the context of empirical evidence demonstrating EPA's woeful performance meeting date-certain deadlines. *See* Sidney A. Shapiro & Robert L. Glicksman, *supra* note 23, at 835; Jacob E. Gersen & Anne Joseph O'Connell, *supra* note 9, at 973; Matthew D. Zinn, *supra* note 17, at 137.

the administration of President Obama.[89] Before he was appointed regional administrator in November 2009,[90] Armendariz was a "technical advisor" with the Denver, Colorado-based WildEarth Guardians.[91] As EPA Region 6 administrator, Armendariz executed the regulatory priorities resulting from a controversial agency-forcing citizen suit filed in a California court by WildEarth Guardians,[92] pursuant to which Region 6 ultimately imposed pollution controls on six coal-fired power plants in Oklahoma[93] and New Mexico,[94] over the objection of state officials. After

89. Dave Bary, *EPA Announces Regional Administrator for Region 6 – Regional Agency Headquarters in Dallas*, EPA, Nov. 5, 2009, http://yosemite.epa.gov/opa/admpress.nsf/e8f4ff7f7970934e8525735900400c2e/e5a2e935be9bc4bb852576650071b61f!OpenDocument. As one of ten regional jurisdictions, EPA Region 6 oversees regulatory compliance in Texas, Oklahoma, New Mexico, Arkansas, and Louisiana.

90. *Id.*

91. Alfredo "Al" Armendariz identified this affiliation in his c.v., found at http://lyle.smu.edu/~aja/Armendariz.pdf

92. WildEarth Guardians v. Jackson, 870 F. Supp. 2d 847 (N.D. Cal. 2012). In June 2009, WildEarth Guardians filed an agency-forcing citizen suit alleging that EPA had failed to process the "good neighbor" provision (compliance with 42 U.S.C. § 7410(a)(2)(D)) of SIP submissions for California, Colorado, Idaho, New Mexico, North Dakota, Oklahoma, and Oregon that were triggered by the 1997 ozone and particulate matter National Ambient Air Quality Standards revision. EPA and the plaintiffs pursued settlement negotiations and a consent decree was approved by the court on February 20, 2010.

Controversy stemmed from EPA's contention that the visibility component of the Clean Air Act's "good neighbor" provision (42 U.S.C. § 7410(a)(2)(D)(1)(ii)) created a responsibility for a state to have a completed Regional Haze plan (under 42 U.S.C. § 7491). The effect of the agency's contention was to bind the deadline by which EPA had to approve Regional Haze SIPs with the deadline by which EPA had to approve "good neighbor" provision SIPs, pursuant to the consent decree reached in WildEarth Guardians v. Jackson. The latter timetable was shorter, and, on this basis, EPA claimed it did not have the time to allow some states to revise their plans, or even to evaluate their original submissions. *See* William Yeatman, EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs, U.S. Chamber of Commerce 6 (2012), http://www.uschamber.com/sites/default/files/reports/1207_ETRA_HazeReport_lr.pdf); *See also*, Scott Pruitt, Oklahoma Attorney General,Testimony before the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform of the House Committee on Oversight and Government Reform, Mandate Madness: When Sue and Settle Just Isn't Enough (June 28, 2012), *available at* http://oversight.house.gov/wp-content/uploads/2013/02/2012-06-28-Ser.-No.-112-185-SC-Tech-Hrg.-on-Mandate-Madness.pdf.June 28 2012.

93. 76 Fed. Reg. 81728 (December 28, 2011) (codified at 40 C.F.R. § 52.1923), This rule disapproved the state's submitted Regional Haze and Interstate Transport SIPs and in their stead imposed a federal implementation plan requiring sulfur dioxide scrubbers at six coal-fired power plants in Oklahoma. The consent decree is noted at 81,7328-81732, "We also are required by the terms of a consent decree with WildEarth Guardians, lodged with the U.S. District Court for the Northern District of California, to ensure that Oklahoma's [Clean Air Act] requirements for [42 U.S.C. § 7410(a)(2)(D)] are finalized by December 13, 2011."

resigning in the spring of 2012,[95] Armendariz quickly found employment with the Sierra Club's "Beyond Coal" campaign.[96]

Armendariz's revolving door experience is not uncommon among political appointees at the agency. Current EPA Region 9 administrator Jared Blumenfeld, for example, previously worked at the Sierra Club.[97] And ex-EPA Region 8 administrator James Martin, who resigned in early 2013,[98] had worked for a decade as an attorney at Environmental Defense prior to being appointed to the agency.[99] EPA Acting Assistant Administrator for Water, Nancy Stoner, is a veteran of the Clinton administration EPA, and in between her public service, she served as the Co-Director of the Natural Resources Defense Council's Water Program.[100] These are only the most prominent examples.[101]

A revolving door isn't the only striking similarity between modern environmental organizations and the special interests that were feared to have captured regulatory agencies forty years ago. In 1970, when Congress deliberated on the citizen suit provision of the Clean Air Act, there was a presumption of altruism given to private parties who would sue EPA to compel an agency action.[102] During Senate debate, for example, Sen.

94. Approval and Promulgation of Implementation Plans; New Mexico, 76 Fed. Reg. 52,388 (Aug. 22, 2011) (codified at 40 C.F.R. 52.1628)), This rule disapproved the state's submitted Regional Haze and Interstate Transport SIPs and in their stead imposed a federal implementation plan requiring selective catalytic reduction at the San Juan Generating Station coal-fired power plant. The consent decree is noted at 52390, "[B]ecause of the missed deadline for the visibility transport, we are under a court-supervised consent decree deadline with WildEarth Guardians[.]"

95. Dina Cappiello, *EPA Official Armendariz Resigns over "Crucify" Comment*, USA TODAY, (April 30, 2012), http://usatoday30.usatoday.com/money/industries/environment/story/2012-04-30/al-armendariz-resigns-amid-criticism-over-crucify/54648132/1.

96. Sierra Club Welcomes Dr. Al Armendariz to Beyond Coal Campaign, GUIDRY NEWS.COM (June 30, 2012), http://www.guidrynews.com/story.aspx?id=1000044375.

97. *Jared Blumenfeld, Administrator for EPA's Pacific Southwest Region (Region 9)*, EPA, http://www2.epa.gov/aboutepa/jared-blumenfeld-administrator-epas-pacific-southwest-region-region-9 (last visited Oct. 21, 2013).

98. William Yeatman, *How CEI and II Toppled EPA Region 8 Administrator James Martin*, INDEPENDENCE INSTITUTE, (March 14, 2013), http://energy.i2i.org/2013/03/14/how-cei-and-ii-toppled-epa-region-8-administrator-james-martin/.

99. *Id.*

100. *Nancy Stoner, Acting Assistant Administrator for Water*, EPA, http://www2.epa.gov/aboutepa/nancy-stoner-acting-assistant-administrator-water (last visited Oct. 21, 2013).

101. Consider, for example, Michael Tejada, who currently heads EPA's Environmental Justice Office. Before joining EPA, he worked for Air Alliance Houston, on whose behalf he filed a lawsuit against EPA, alleging the agency had failed to regulate hazardous air pollution from refineries. Six months later, in March 2013, Tejada was appointed to head EPA's Environmental Justice office. Last August, EPA and the plaintiffs settled the suit, thereby binding the agency to a deadline for action. *See* Jeremy P. Jacobs, *EPA Agrees To Review Risk, Technology Standards for Refineries*, E&E PUBLISHING, LLC (Aug. 19, 2013).

102. Robert Meltz, *The Future of Citizen Suits After Steel Co. and Laidlaw*, CRS REPORT FOR CONGRESS, http://congressionalresearch.com/RS20012/document.php.

Gary Hart averred that, "[The citizen suit provision] . . . provides no incentives to suit other than to protect the health and welfare of those suing and others similarly situated."[103] Jeffrey Sax, the progenitor of the citizen suit provision,[104] believed that environmental litigants were acting in defense of the "public trust."[105] Moreover, there was a pervasive understanding that pro-regulatory groups were shoe-string operations.[106] While these assumptions regarding private parties engaged in citizen suits may have had merit in the 1970s, they certainly do not today.

Indeed, virtually all agency forcing citizen suits are filed by national environmental organizations[107] that would be unrecognizable to lawmakers forty years ago. In 1975, the United States Court of Appeals for the District of Columbia Circuit noted that "[g]roups such as [Natural Resources Defense Council (NRDC)] have never been secure financially[.]"[108] In 2012, by contrast, NRDC had revenues in excess of $103 million.[109] At the outset of 2012, Sierra Club, which is responsible for a preponderance of agency-forcing citizen suits, had assets greater than $82 million.[110] More importantly, these organizations are deploying their considerable resources into the political arena.[111] National environmental organizations now routinely endorse political candidates,[112] engage in "get out the vote" initiatives,[113] and even produce political advertising.[114] Sierra

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103. ENVTL. POLICY DIV., *supra* note 49, at 355.

104. *Supra* notes 39-41 and accompanying text.

105. Schiller, *supra* note 39, at 1448.

106. *See* Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 843-844 (1985). This is the reason why Congress authorized the court to award legal fees to plaintiffs in Clean Air Act citizen suits.

107. *See supra* notes 78-80 and accompanying text.

108. Natural Resources Defense Council v. EPA, 512 F.2d 1351, 1358 (D.C. Cir. 1975).

109. Natural Resources Defense Council, *Consolidated Statement of Activities for the year ending June 30, 2012*, http://www.nrdc.org/about/finances2012.pdf (last visited Oct. 21, 2013).

110. The Sierra Club Foundation, *The Sierra Club Foundation: Annual Report 2012*, at 36, http://www.sierraclubfoundation.org/sites/sierraclubfoundation.org/files/TSCF_AR_2012_FINAL-web.pdf (last visited at Nov. 15, 2013).

111. *See, e.g.*, *Sierra Club's Voter Guide,* THE SIERRA CLUB, http://content.sierraclub.org/voterguide/endorsements (last visited Oct. 22, 2013).

112. *Id.*

113. NRDC Action Fund, *About the NRDC Action Fund,* NRDC, http://www.nrdcactionfund.org/about/ (last visited Oct. 22, 2013). NRDC started a 501c(4) advocacy group, NRDC Action Fund, to "work to educate and mobilize voters[.]", accessed; The Sierra Club, *Impact of the 2012 Elections*, http://content.sierraclub.org/politics-elections/impact-2012 (last visited Oct. 22, 2013). On Sierra Club's Politics & Elections webpage, the organization boasts of how, "Working closely with Obama for America, we recruited more than 12,000 members to join Environmentalists for Obama, to participate in 'Get Out the Vote' (GOTV) shifts on Election Day, and to plug into the Obama campaign's dashboard to make over 30,000 phone calls. . .It worked. On

Club has joined "progressive coalitions" to advance causes that have nothing to do with the environment.[115]

There are other indications that modern environmental organizations possess a narrower set of interests than the public at large. For example, a pervasive, preconceived sentiment among environmental lawyers that regulated firms are "amoral calculators" has been noted in the scholarly literature.[116] Surely, public interest is not best served by such a jaundiced view of American business. It is, moreover, uncontroversial to state that modern environmental groups are particularly suspicious of fossil fuels and especially of coal, due to the central importance of climate change to the environmental movement. Nonpartisan polling, however, indicates that the public has markedly different priorities.[117]

By taking avowedly political actions and exhibiting a sector-specific bias, these organizations necessarily forfeit any claim to be acting in the public interest at large. This is in no way to suggest impure motives by these groups in filing citizen suits. This author does not doubt the sincerity of these organizations' staff and members. Earnestness, however, is irrelevant. The indisputable fact is environmental organizations cannot be said to represent the public interest, as the Congress intended. Rather, they have become special interests, exhibiting many of the same behaviors—revolving doors and political muscle—that so worried capture theorists in the 1970s.[118]

This ironic outcome was not unforeseen by certain lawmakers. While debating the Conference Report of the 1990 Clean Air Act Amendments on the floor of the Senate, Idaho Sen. Steve Symms observed that,

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November 9, the Obama campaign acknowledged our contribution this cycle, stating the Club was 'an integral part of (the) win'").

114. William Yeatman, *Attack of the Scare Ads!*, Competitive Enterprise Institute (July 1, 2012), http://cei.org/op-eds-articles/attack-scare-ads.

115. Ned Resnikoff, *Progressive Coalition "Democracy Initiative" Aims to Rebuild Liberal Politics*, MSNBC (Jan. 10, 2013), http://www.msnbc.com/the-ed-show/progressive-coalition-democracy-initiative.

116. *See* Zinn, *supra* note 17, at 98.

117. A January 2013 Pew Research poll asked Americans to name their top priorities for the president and Congress in 2013. "Strengthening nation's economy" was the first priority (of eighteen); "dealing with global warming" was last. Pew Research Center, *Protecting the Environment Ranks in the Middle of Public's Priorities for 2013* (April 22 2013), http://www.pewresearch.org/daily-number/protecting-the-environment-ranks-in-the-middle-of-publics-priorities-for-2013/ (last visited Feb. 7, 2014).; An April 2013 poll by Rasmussen Reports says voting Americans believe that finding new energy is more important than fighting global warming by a two to one margin. Rasmussen Reports, *61% Say Finding New Energy More Important Than Fighting Global Warming*, RASMUSSEN REPORTS (April 2, 2013).

118. *Supra* notes 97-103, 112-115 and accompanying text; *see also*, *Texas Politics-Bureaucracy*, 11 (2013), http://texaspolitics.laits.utexas.edu/8_printable.html.

> This bill demands that the Environmental Protection Agency promulgate literally hundreds, if not thousands of rules and regulations for differing industries and individuals to live by. Many of these promulgations are under tight deadlines that EPA has often criticized as unworkable. Since the bill expressly provides for citizen suits against those who violate even the slightest provisions of the bill, and since the Agency itself is subject to suit if it misses even one deadline or falls short on even one regulation, the real driving force behind this bill will be the National Environmental lobbies with their army of attorn[eys]. This means that many of the priority calls, the decisions that determine who gets fines where, what industry gets regulated first, or how burdensome the regulation will be, is not in the hands of Government professionals, nor in the hands of elected representatives of the people, but at the discretion of the national environmental special interest groups.[119]

Viewed as such, it becomes apparent Congress's overindulgence in date-certain duties has engendered a paradoxical result. Deadlines are an attempt to prevent the capture of agencies by special interests. However, by imposing too many deadlines, lawmakers facilitated agency capture by special interests acting through agency-forcing citizen suits.

B. *Congress Intended Clean Air Act Citizen Suits To Expand Participation; Instead, They Are a Means by Which Participation is Suppressed*

The citizen suit provision of the Clean Air Act was meant to broaden participation in the regulatory process, and thereby remedy a resource imbalance in favor of regulated industries that was conducive to agency capture.[120] Regarding the purpose of citizen suits, the Second Circuit Court of Appeals found that, "[T]he Act seeks to encourage citizen participation rather than to treat it as a curiosity or a theoretical remedy."[121]

To be sure, citizen suits have facilitated greater participation by environmental organizations, which have employed this legal device to influence the regulatory system,[122] and also in the service of self-help.[123] However, there is mounting evidence that agency-forcing citizen suits, in

119. 101 Cong. Rec. 16,890 (1990) Library of Congress, U.S. General Accounting Office, Congressional Record, 101st Congress, The Clean Air Act Amendments-Conference Report, Senate, S 16890, (Senate – Oct. 27 1990), *available at* http://thomas.loc.gov/cgi-bin/query/F?r101:2:./temp/~r101gNjKFh:e101255:.

120. *See supra* Part II, Section B.

121. Friends of Earth v. Carey, 535 F.2d. 165, 172 (2d Cir. 1976).

122. *See supra* Part III, Section B.

123. Zinn, *supra* note 17, at 133 ("Citizen suits also help pro-regulatory groups to attract new membership or philanthropic contributions, which are critical funding sources for

contravention of their Congressional purpose, are actually inhibiting public participation on the whole. In fact, many states recently have started to object to agency-forcing citizen suits as an unacceptable affront to the Clean Air Act's system of cooperative federalism, whereby states and EPA are supposed to work in tandem to solve the nation's air quality problems.[124]

For example, thirteen Attorneys General in August 2012 filed a Freedom of Information Act request with EPA seeking agency correspondence with eighty environmental organizations regarding deadline citizen suits.[125] In an accompanying statement, the Attorneys General raised the same concerns articulated above,[126] that "Over the past three years, the EPA has allowed its regulatory agenda to be largely defined by litigation settlements it has entered into with environmental organizations."[127] In particular, the Attorneys General objected to the fact that "States responsible for implementing many of these regulations have little knowledge of or input in this process[.]"[128] By excluding participation by the States, the Attorneys General argued the EPA's settlement of agency-forcing suits undermined cooperative federalism.[129] In plain terms, they argued that states, rather than environmental special interests, rightfully should be collaborating with EPA on priority-setting.

In particular, State officials are concerned about their lack of involvement in agency-forcing citizen suits that pertain to EPA's processing of state implementation plans (SIPs), the essential document in which states

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nonprofit plaintiffs."); *see also*, Greve, *supra* note 77 (advances the controversial thesis that citizen suits were intended to be a subsidy for environmental groups.).

124. Train, *supra* note 31, at 63-67.

125. Larry Bell, *EPA's Secret and Costly 'Sue and Settle' Collusion With Environmental Organizations*, FORBES (Feb. 2, 2013), http://www.forbes.com/sites/larrybell/2013/02/17/epas-secret-and-costly-sue-and-settle-collusion-with-environmental-organizations/. (Oklahoma, Alabama, Arizona, Georgia, Kansas, Nebraska, North Dakota, Michigan, South Carolina, South Dakota, Texas, Utah, & Wyoming)

126. *See supra* Part IV, Section A.

127. Oklahoma et al., Case 5:13-cv-00726-M, Letter from E. Scott Pruitt, Oklahoma Attorney General, to U.S. EPA Freedom of Information Officer, 1, 24 (Feb. 6, 2013), *available at* http://law.ga.gov/sites/law.ga.gov/files/related_files/press_release/Filed%20FOIA%20Complaint%20and%20Exhibits.pdf.

128. *Id.*

129. *Id.* at 25, "Not only does EPA's action harm and jeopardize the States' role as partner with EPA, but it harms the interests of the citizens of the Requesting States. Our citizens rely on and expect the States to implement federal environmental law. Often, these implementation efforts require the States to design plans to meet the individual circumstances of the State, while protecting and advancing the environmental goals and requirements of federal environmental law. When EPA coordinates with non-governmental organizations regarding how federal environmental law should be applied and implemented in an individual State and excludes the State from that effort the State and its citizens are harmed."

codify how they'll meet nation-wide air quality and emissions standards.[130] As explained above, the Clean Air Act gives EPA eighteen months to approve or disapprove SIP revisions submitted by states, but the agency has been chronically late doing so.[131] The untimeliness of EPA's SIP processing, in turn, has invited agency-forcing lawsuits by environmental groups.[132]

Recently, the House Energy and Commerce Committee held a three part bipartisan forum on "State, Local, and Federal Cooperation in the Clean Air Act,"[133] during which state regulators repeatedly expressed their frustration about being omitted from settlement discussions pursuant to agency-forcing citizen suits over SIP deadlines. Consider the following testimonies:

- Henry Darwin, Director Arizona Department of Environmental Quality: "Often times, action on SIPs deemed unimportant is delayed, for as much as 20 years. This exposes EPA to litigation for failure to perform a non-discretionary duty, resulting in settlements that typically require the affected state to update and resubmit a SIP on a schedule agreed upon by EPA and the plaintiffs—with no input from the state. . .In recent years EPA's inaction, either in approving or disapproving SIPs, has created an environment where states' rights have been diminished."[134]
- Michael Krancer, Secretary Pennsylvania Department of Environmental Protection: "EPA repeatedly fails to timely approve SIPs. Failure to approve these SIPs in a timely fashion invites uncertainty into the regulatory process. For example, both Sierra Club and the WildEarth Guardians sued EPA over its failure to approve or deny state air pollu-

130. EPA, *State Implementation Plan Overview*, EPA, http://www.epa.gov/air/urbanair/sipstatus/overview.html (last visited Nov. 15, 2013).

131. *Supra* note 130; *infra* notes 132-138 and accompanying text.

132. *See, e.g.*, Wildearth Guardians v. Jackson, 870 F. Supp. 2d 847 (N.D. Cal. 2012). In a complaint filed January 11, 2011, plaintiffs WildEarth Guardians and Sierra Club alleged EPA's failure to take final action on 32 SIPs for the 2006 revised PM 2.5 NAAQS. In an amended complaint filed August 10, 2011, plaintiffs Sierra Club and WildEarth Guardians alleged EPA failed to take final action on 10 SIPs submitted in response to the 1997 ozone NAAQS revision.

133. *Supra* note 62.

134. Henry Darwin, Arizona Department of Environmental Quality, *Participant Response* 1,4 and 6, E&C (Aug. 2, 2012), http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CAAforum/20120802/Darwin.pdf.

tion control plans affecting more than 20 states to control PM-2.5."[135]

- Brian Accardo, Director, Division of Air Resource Management, Florida Department of Environmental Protection: "In some cases, EPA has elected not to take any of these actions, which unnecessarily subjects itself to lawsuits brought by special interest groups for its failure to timely act. These suits are settled behind closed doors without input from affected states. Indeed, affected states generally are provided no notice of these negotiations until a settlement is reached."[136]
- Robert Martineau, Jr., Commissioner Tennessee Department of Environment and Conservation: "[T]here is a level of uncertainty and delay in the SIP approval process that should be corrected. . .We have been particularly challenged when EPA, through litigation resolution, makes specific commitments on behalf of states without providing the states prior notice or the opportunity to intervene. . .EPA should not be permitted to commit states to deadlines in lawsuits."[137]

State officials allege a number of harms caused by their lack of a voice in negotiations resulting from agency-forcing citizen suits over missed SIP deadlines. The most common complaint is the EPA and environmental groups agree upon regulatory timetables that leave states no time for action.[138] States also object to how responsibilities engendered by agency-forcing lawsuits require a reshuffling of priorities.[139] Another concern is

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135. Michael Krancer, Pennsylvania Department of Environmental Protection 1, 6 (Nov. 29 2012), http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CAAforum/20121129/Krancer.pdf.

136. Brian Accardo, *Florida Department of Environmental Protection, Responses to Participant Questions 3* (July 31, 2012).

137. Robert J. Martineau, Jr., *Tennessee Department of Environment and Conservation, Written Remarks of Robert J. Martineau, Jr., Commissioner* (November 29, 2012).

138. *See, e.g.*, Darwin, *supra* note 134, at 1-2 ("In some cases, these settlements do not leave enough time for the resubmission of a SIP and instead commits EPA to developing its own Federal Implementation Plan, or FIP, to take the place of the SIP); Brian Accardo, *supra* note 136, at 3 ("Problems arise when these settlements require EPA to impose a FIP in a timeframe that does not allow affected states to remedy alleged deficiencies in pending SIP submittals." (citation omitted).

139. *See, e.g.*, Thomas Easterly, Commissioner, Indiana Department of Environmental Management, *Testimony before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law* (June 5, 2013), *available at* http://judiciary.house.gov/hearings/113th/06052013/Easterly%2006052013.pdf ("When Consent Decrees between EPA and plaintiffs require states to change their rules to incorporate new requirements—often without the input of states on either the substance or the timing of those changes—states must necessarily adjust

the extent to which responsibilities pursuant to settlements of agency forcing suits undermines the ability of states to craft air pollution regulatory regimes that take into account regional conditions.[140]

In the rare instance when states gain notice of an agency-forcing citizen suit, and have tried to participate, they have faced resistance, from both environmental organizations and the EPA. In November 1998, for example, Sierra Club and Missouri Coalition for the Environment filed a citizen suit in the federal district court for the District of Columbia, alleging that EPA had missed a deadline processing a Missouri SIP.[141] The state learned of the suit, and sought to intervene,[142] as did Illinois.[143] These states were the regulated entities and affected parties, yet the plaintiffs opposed (unsuccessfully) their right to intervene.[144]

More recently, on September 22, 2011, North Dakota Attorney General Wayne Stenehjem sought intervention in an agency-forcing citizen suit brought by Wildearth Guardians over the EPA's inaction regarding a number of SIP revisions (North Dakota's among them) resulting from a 2007 revision of the ozone National Ambient Air Quality Standards.[145] Rather than welcome the state's participation, in accordance with the tenets of cooperative federalism, EPA opposed (successfully) North Dakota's involvement.[146]

Even when states win intervention into agency-forcing citizen-suits, their input is shunned. Arizona, for example, successfully intervened in a citizen suit brought by a number of environmental groups regarding EPA's inaction on the state's Regional Haze SIP.[147] Yet its participatory success ended there. According to Henry Darwin, Director Arizona Department of Environmental Quality, "Even though the State was listed as a party to the lawsuit, Arizona was never consulted by either plaintiffs or its co-defendant, EPA, in finalizing or amending the settlement."[148] Local officials have voiced similar frustrations about being left out of settlement dis-

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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 the state would like to achieve.").

140. Letter from E. Scott Pruitt, *supra* note 127.

141. Cheryl Hammond, *1998 Clean Air Litigation May Reach End Cleaner Air*, SIERRA CLUB (Oct. – Dec. 2002). *https://missouri2.sierraclub.org/newsletter/1998-clean-air-litigation-may-reach-end-cleaner-air.*

142. Sierra Club v. Whitman, 285 F.3d 63, 65 (D.C. Cir. 2002).

143. *Id.*

144. *Id. at 68.*

145. WildEarth Guardians v. Jackson, 2011 U.S. Dist. LEXIS 87688, at *1 (D. Colo. Aug. 9, 2011).

146. *Id.* at *3.

147. National Parks Conservation Ass'n v. EPA, 2012 WL 6636398, at *7 (D.C. Cir. 2012).

148. Darwin, *supra* note 134, at 7.

cussions pursuant to agency-forcing citizen suits in other environmental statutes.[149]

These are legitimate concerns. States believe they are being cut out of the regulatory process. This is not to discount the merits of settlements, which are generally welcome in the service of judicial economy. The problem, rather, is with the execution of these settlements. Citizen suits were supposed to be a means by which participation in the regulatory process is expanded. And yet, agency-forcing citizen suits are achieving the opposite as currently resolved between environmental organizations and EPA, under the auspices of the courts. This exclusion is especially troubling in light of the Clean Air Act's system of cooperative federalism. Because states are responsible for implementing the act, they are EPA's partner in cleaning the nation's air. As such, these states justifiably expect to work with the agency on establishing regulatory priorities when faced with far more statutory deadlines than resources, which is precisely the predicament now encountered by the EPA. Instead, the agency is negotiating its priorities in settlement discussions with influential special interests, without any input from the states.

V. Solutions: Judicial and Congressional

A. *Judicial Fixes*

The Clean Air Act is replete with deadlines due to the influence on Congress exerted by capture theorists, who argued that date-certain duties would mitigate the special interest 'capture' of regulatory agencies. Historically, however, it has proven much easier for legislators to establish regulatory responsibilities for agencies than it has for them to appropriate sufficient funds to meet these responsibilities. As a result, EPA is now inundated with Clean Air Act deadlines. This unfortunate reality, in turn, has vitiated the purpose of agency-forcing citizen suits (over missed deadlines), which necessarily result in a reshuffling of the agency's limited resources, in order to effectuate the priorities of environmental special interests. Moreover, the open-and-shut nature of agency forcing citizen suits is conducive to settlements, which have resulted in participatory con-

149. C. Bernard Fowler, et al. v. EPA, 2009 WL 5114201, at *1 (D.C. Cir. 2009). Several environmental organizations and a concerned citizen filed an agency-forcing suit under the Clean Water Act (33 U.S.C. 1365) to compel EPA to perform its non-discretionary duty to issue comprehensive effluent limitations of discharges into the Chesapeake Bay. Several public waterworks associations (Maryland Association of Municipal Wastewater Agencies, Inc., the Virginia Association of Municipal Wastewater Agencies, Inc., the Virginia Municipal Stormwater Association, Inc., and the Storm Water Association of Maryland) successfully intervened. However, after being "told nothing about of substance outside of the broad scope of the topics they [EPA and the plaintiffs] may be considering as part of the settlement," the agencies moved to win a court order requiring their participation in the settlement discussions.

cerns by states feeling they've been left out. This section of the paper analyzes the history of the courts' review of deadline citizen suits, and recommends an interpretive framework comporting with this precedent that would allow for consideration of the fact that Clean Air Act contains too many time limits.

When, pursuant to an agency-forcing citizen suit over a missed Clean Air Act deadline, EPA and the plaintiffs cannot settle on a schedule for compliance, litigation has proceeded in a remarkably similar fashion. Liability is never at issue, for "[w]hen Congress has explicitly set an absolute deadline, congressional intent is clear."[150] There are no shades of grey: A date-certain duty was either executed, or it wasn't, and EPA readily concedes when it hasn't done so.[151] Rather than liability, "[t]he sole question presented therefore is on what terms relief is to be granted, i.e., within what time must EPA [act]. . ."[152] To this end, each party will submit a proposed schedule for compliance, and it is then up to the court to fashion a remedy. Because the court's equity powers are broad,[153] the exact relief granted varies,[154] but a constant throughout the case history is that the courts reject EPA's proposed schedules.

In *Natural Resources Defense Council v. Train*, the United States Court of Appeals, District of Columbia Circuit provided district courts with guidance for evaluating requests for delay.[155] While acknowledging that, "[t]he authority to set enforceable deadlines both of an ultimate and an intermediate nature is an appropriate procedure for exercise of the court's equity powers. . ."[156] the court nonetheless recognized that ordering the agency "to do an impossibility"[157] militated against the public interest. Where the agency is "in good faith [employing] the utmost diligence in

150. Delaney v. EPA, 898 F.2d 687, 691 (9th Cir. 1990).

151. *See, e.g.*, Sierra Club v. Johnson, 444 F. Supp. 2d 46, 52 (D.C. Cir. 2006) ("EPA does not contest its failure to discharge its duty under the statute."); Sierra Club v. Browner, 130 F. Supp. 2d 78 (D.C. Cir. 2001), *aff'd sub nom.* Whitman, *supra* note 142, at 68 (D.C. Cir. 2002) ("Readily conceding that it has not taken all of the nondiscretionary steps required by the CAA, EPA agrees that summary judgment is appropriate."); American Lung Association, v. Browner, 884 F. Supp. 345, 346 (D. Ariz. 1994) ("Defendant concedes it in violation of the statutory mandate to review and revise NAAQS, including PM, at 5-year intervals.").

152. Sierra Club v. Thomas, 658 F. Supp. 165, 170 (N.D. Cal. 1987).

153. *See, e.g.*, *American Lung Association*, 884 F. Supp. 345, 347 ("This Court has broad latitude to devise its equitable scheme for relief.") (citations omitted); *see also*, Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692 713 (D.C. Cir. 1975) ("A federal equity court may exercise its discretion to give or withhold its mandate in furtherance of the public interest. . .").

154. Gersen,, *supra* note 9, at 966 ("In sum, courts can enforce statutory mandates, even if those deadlines have passed, in a myriad of ways.").

155. *Train*, 510 F.2d at (704).

156. *Id.* at 705.

157. *Id.* at 713.

discharging [its] statutory responsibilities,"[158] the court suggested there are two rationales by which the agency might prove infeasibility, and thereby warrant a delay:

> First, it is possible that budgetary commitments and manpower demands required to complete the guidelines by [the existing deadline] are beyond the agency's capacity or would unduly jeopardize the implementation of other essential programs. Second, EPA may be unable to conduct sufficient evaluation of available control technology to determine which is the best practicable or may confront problems in determining the components of particular industrial discharges.[159]

In accordance with the court's guidance, EPA routinely defends its proposed schedule by claiming anything of shorter duration would be impossible to implement, because doing so would threaten other regulatory programs and/or preclude sufficient evaluation.[160] EPA, however, bears "a heavy burden to demonstrate the existence of an impossibility,"[161] and the agency has rarely overcome this onus with various iterations of these two defenses.[162]

In light of evidence that Congress has overwhelmed EPA with deadlines, the court's "impossibility" standard, by which it judges compliance schedules proposed by EPA in the course of litigating a citizen suit, would seem to miss the forest for the trees. Regardless whether or not it is infeasible for the EPA to achieve any one Clean Air Act deadline at issue in an agency-forcing citizen suit, it is certainly impossible for the agency to achieve all of its outstanding date-certain duties at once. In adjudicating Clean Air Act agency-forcing citizen suits, the court defers to the unambiguous intent of Congress, as manifest in the codified deadlines,[163] and has found that, "It is emphatically not within an agency's authority to set reg-

158. *Id.*

159. *Id.* at 712.

160. *See, e.g.*, Sierra Club v. Johnson, 444 F. Supp. 2d 46, 55 & 57 (D.C. Cir. 2006) ("Defendant's first argument. . .is that compelling EPA to promulgate regulations on that timeline would result in 'rules that fall short of meeting the substantive requirements of [the regulation whose non-performance was at issue'" and "[f]inally, EPA argues that 'other mandatory obligations' preclude its compliance with plaintiff's proposed schedule.").

161. Alabama Power Co. v. Costle, 636 F.2d 323, 359 (D.C. Cir. 1979).

162. *Johnson*, 444 F. Supp. 2d at 53-54) (The court gives a case history of decisions that rejected EPA's proposed timelines); The author is unaware of any instances whereby the court has accepted EPA's schedule allowing for delay past a Clean Air Act statutory deadline.

163. Sierra Club v. Browner, 130 F. Supp. 2d 78 (D.C. Cir. 2001), *aff'd sub nom.* ("Notwithstanding the extent of its authority to fashion appropriate equitable relief, the Court is unwilling to order a remedy that would so completely neutralize the mandatory nature of the statutory directive.").

ulatory priorities that clearly conflict with those established by Congress."[164] Yet this reasoning denies the stark reality that Congress, by establishing too many Clean Air Act priorities, in fact established none. By broadening its "impossibility" test, so as to account for the impossible situation bestowed on EPA by Congress's overreliance on deadlines, the court would better inform its exercise of its equity powers. Such a consideration would militate in favor of EPA's proposed schedule, and thereby aid in restoring to the agency's its legitimate and proper role in deciding how to allocate its limited resources. Under such a scheme of review, the EPA would be much less likely to settle. Thus states would be spared their present concerns regarding participation.

B. *Congressional Fixes*

The Clean Air Act suffers from a significant flaw: It contains far more deadlines than EPA has the resources to meet. The most direct means by which Congress could correct this defect is to simply cull deadlines from the act, in order to make EPA's responsibilities more reasonable. Any regulatory duty so altered (i.e., relieved of a date-certain time limit by which it must be performed) would still be non-discretionary, so private parties would retain the right to challenge the regulation's nonperformance. However, removing the date-certain deadline would significantly alter the degree of discretion the courts would accord EPA. As discussed in the previous section, when a date-certain deadline is the subject of an agency-forcing citizen suit that proceeds to litigation, the standard for reviewing EPA's proposed schedule is one of "impossibility." If it is possible for EPA to complete the contested regulatory action in a shorter duration, the court will reject the agency's proposal. By contrast, the time that EPA is required to perform a non-discretionary duty subject to a citizen suit is compelled by the much less stringent "rule of reason."[165] In determining whether the agency's delay is unreasonable, the court has established four considerations that must be balanced: (1) The length of time since the agency's duty to act arose; (2) the reasonableness of the delay in light of the statutory scheme; (3) the consequences of delay; and (4) how carrying out the contested duty would affect the agency's ability to carry out its other responsibilities under the statute.[166] Obviously, these factors are more sensitive to EPA's limited resources relative to its statutory responsibilities.

Alternatively, the Congress could establish a statutory process by which EPA periodically would establish its own non-binding priorities

164. Sierra Club v. Johnson, 444 F. Supp. 2d 46, 58 (2006).

165. Mashpee Wampanoag Tribal Council, Inc. v. Norton, 336 F.3d 1094, 1102 (D.C. Cir, 2003).

166. In re Int'l Chem. Workers Union, 958 F.2d 1144,1149 (D.C. Cir. 1992); *see also*, Telecommunications Research & Action Ctr. v. FCC, 750 F.2d 70, 79-80 (D.C. Cir. 1984) (The court lays out 6 considerations that are functionally equivalent.).

with enhanced Congressional oversight.[167] Although such deadlines would not carry the force of law, this scheme carries the decided advantage of subjecting EPA's performance meeting deadlines to greater political accountability, in addition to relieving the agency of an impossible burden. Also, these duties would remain non-discretionary, so agency forcing citizen suits would still serve as a guarantee against unreasonable delay.

VI. Conclusion

In the summer of 2013, the Senate Environment and Public Works Committee deliberated on legislation (S. 1009) that would reform the Toxic Substances Control Act (TSCA).[168] During debates, a particularly divisive topic was whether or not this amendment should include statutory deadlines.[169] TSCA contains a citizen suit provision,[170] and certain lawmakers were concerned that including date-certain deadlines in the bill would engender agency-forcing suits that inhibited public participation.[171] This paper serves to demonstrate that these concerns are well founded, in light of the Clean Air Act's example.

Indeed, these statutory devices—deadlines and agency-forcing suits—were introduced in the Clean Air Act of 1970. They were solutions to the perceived problem of agency capture and its corollary, nonparticipation by the public in the regulatory proceedings. Yet the Congress, for reasons inherent to the psychology of legislating, established too many deadlines. The paradoxical consequence of the Congress gorging on date-certain duties is that these two legislative mechanisms currently are achieving the opposite of what they were intended to do. Instead of warding off special interest capture, they've engendered capture by different special interests. And instead of eliciting participation, they've inhibited public input into EPA's setting of priorities. In order to alleviate these inimical impacts, this paper recommends certain judicial and legislative means.

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167. Abbott, *supra* note 11, at 200-201.

168. Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1976) (West 2013).

169. Jenny Hopkinson, *Fearing 'Sue-And-Settle,' Republicans Resist EPA Deadlines in TSCA Bill*, Inside EPA (July 29, 2013), http://insideepa.com/Risk-Policy-Report/Risk-Policy-Report-07/30/2013/fearing-sue-and-settle-republicans-resist-epa-deadlines-in-tsca-bill/menu-id-1098.html.

170. 15 U.S.C. §A. § 2619.

171. Hopkinson, *supra* note 169 ("Sen. David Vitter (R-LA), a co-sponsor of the bill, 'is very concerned with [agency forcing suits] and [their] implications for cutting off the public process. . .").

Plaintiffs	Court	Federal Register Announcement	Action (shaded if it affects more than 3 states)
National Parks Conservation Association	District Court D.C.	8/6/2012	Schedule for processing Florida Regional Haze State Implementation Plan
Grand Canyon Trust			
Powder River Basin Res. Council			
Plains Justice			
Our Children's Earth Found.			
San Juan Citizens Alliance			
Mont. Env'l Information Center			
Sierra Club			
Environmental Defense Fund			
Sierra Club	District Court D.C.	5/6/2010	Schedule for processing 1997 Ozone National Ambient Air Quality Standard State Implementation Plans for Maine, Rhode Island, Connecticut, New Hampshire, Alabama, Kentucky, Mississippi, South Carolina, Wisconsin, Indiana, Michigan, Ohio, Louisiana, Kansas, Nebraska, Missouri, Colorado, Montana, South Dakota, Utah, Wyoming
Comite Civico Del Valle	District Court Northern California	6/2/2010	Schedule for processing California State Implementation Plan revision
WildEarth Guardians	District Court Arizona	12/21/2011	Schedule for making attainment designations for 2008 ground level ozone National Ambient Air Quality Standards
WildEarth Guardians	District Court Colorado	6/15/2011	Schedule for processing Regional Haze State Implementation Plans for Wyoming, Colorado, Montana, and North Dakota
Environmental Defense Fund			

National Parks Conservation Association			
Nat'l Parks Conservation Ass'n	District Court D.C.	12/2/2011	Schedule for processing Regional Haze State Implementation Plans for 34 states
Grand Canyon Trust			
Powder River Basin Resource Council			
Plains Justice			
Our Children's Earth Foundation			
San Juan Citizens Alliance			
Montana Environmental Information Center			
Sierra Club			
Environmental Defense Fund			
Sierra Club	District Court D.C.	7/3/2012	Schedule for processing 1997 Ozone National Ambient Air Quality Standards State Implementation Plan by Texas
Sierra Club	District Court D.C.	10/30/2012	Schedule for processing Oklahoma State Implementation Plan revision
WildEarth Guardians	District Court Colorado	8/6/2012	Schedule for processing 1997 Ozone National Ambient Air Quality Standards State Implementation Plan by Utah
Natural Resources Defense Council	District Court Central California	12/23/2010	Schedule for processing California State Implementation Plan revision
Coalition for a Safe Environment			
Sierra Club	District Court Northern California	11/22/2010	Schedule for processing California State Implementation Plan revision
Medical Advocates for Healthy Air			

Sierra Club	District Court D.C.	12/12/2011	Schedule for processing 1997 Ozone National Ambient Air Quality Standard State Imeplementation Plans by Illinoius, Missouri, and Maine
Sierra Club	District Court D.C.	8/1/2012	Schedule for processing State Implementation Plan revisions by Georgia and Alabama
WildEarth Guardians	District Court Colorado	11/4/2010	Schedule for processing Utah Regional Haze State Implementation Plan
WildEarth Guardians	District Court Northern California	6/15/2011	Schedule for processing Arizona State Implementation Plan revision
WildEarth Guardians	District Court Northern California	9/1/2011	Schedule for processing 2006 PM 2.5 NAAQS State Implementation Plans for Alabama, Connecticut, Florida, Mississippi, North Carolina, Tennessee, Indiana, Maine, Ohio, New Mexico, Delaware, Kentucky, Nevada, Arkansas, New Hampshire, South Carolina, Massachusetts, Arizona, Georgia, and West Virginia
Sierra Club			
Association of Irritated Residents	District Court Northern California	12/2/2011	Schedule for processing California State Implementation Plan revision
El Comit[eacute] para el Bienestar de Earlimart			
Sierra Club	District Court Northern California	1/27/2012	Schedule for processing California State Implementation Plan revision
Medical Advocates for Healthy Air			
Sierra Club	District Court D.C.	7/16/2012	Schedule for processing State Implementation Plan revisions by North Carolina and South Carolina
WildEarth Guardians	District Court Northern California	12/7/2009	Schedule for processing 1997 Ozone National Ambient Air Quality Standards State Implementation Plans by New Mexico, Oregon, California, Idaho, Colorado, North Dakota, Oklahoma, North Dakota

Sierra Club	District Court D.C.	11/16/2009	Schedule for review/(if necessary) revise New Source Performance Standards review for nitric acid plants
Environmental Integrity Project			
Comite Civico Del Valle	District Court Northern California	11/30/2009	Schedule for processing of California State Implementation Plan
Sierra Club	District Court D.C.	12/7/2012	Schedule for promulgation of Hazardous Air Pollutants regulations for clay and ceremic plants
Environmental Defense Fund	District Court Southern New York	7/19/2012	Schedule for review/(if necessary) revise New Source Performance Standards review for municipal waste plants
Association of Irritated Residents	District Court Northern California	11/22/2010	Schedule for processing California State Implementation Plan revision
Sierra Club	District Court D.C.	11/30/2010	Schedule for processing Kentucky State Implementation Plan revision
Kentucky Environmental Foundation			
Sierra Club	District Court D.C.	9/22/2011	Schedule for for processing 1997 Ozone, PM 2.5 National Ambient Air Quality Standards State Implementation Plans for Texas
Sierra Club	District Court D.C.	8/17/2011	Schedule for processing Arizona Regional Haze State Implementation Plan
Kentucky Environmental Foundation	District Court D.C.	3/13/2012	Schedule for processing 1997 ozone National Ambient Air Quality Standards State Implementation Plan for Kentucky
WildEarth Guardians	District Court D.C.	12/17/2009	Schedule for review/(if necessary) revise Hazardous Air Pollutans standards for oil and gas sector
San Juan Citizens Alliance			
Center for Biological Diversity	District Court Northern California	9/14/2012	Schedule for review/(if necessary) revise New Source Performance Standards for kraft paper mills
Port Townsend Air Watchers			

Greenpeace			-
Sierra Club	District Court D.C.	8/6/2012	Schedule for processing State Implementation Plan revisions by Massachusetts, Connecticut, New Jersey, New York, Pennsylvania, Maryland, Delaware
Comite Civico Del Valle	District Court Northern California	11/3/2010	Schedule for processing California State Implementation Plan revision
Sierra Club	District Court Northern California	7/14/2010	Schedule for review/(if necessary) revise Hazardous Air Pollutants regulations for 28 catagories
WildEarth Guardians	District Court Colorado	3/12/2010	Schedule for processing State Implementation Plan revisions by Colorado, Utah, New Mexico, and Wyoming
Kentucky Environmental Foundation	District Court D.C.	7/29/2011	Schedule for processing 1997 PM 2.5 National Ambient Air Quality Standards State Implementation Plan for Kentucky
WildEarth Guardians	District Court Colorado	12/7/2009	Schedule for processing Utah SIP revision
Sierra Club	District Court D.C.	10/28/2009	Schedule for promulgating Hazardous Air Pollutants regulations for electricity generating units
American Nurses Association			
Chesapeake Bay Foundation			
Conservation Law Foundation			
Environment America			
Environmental Defense Fund			
Izaak Walton League			
Natural Res. Defense Council			
Waterkeeper Alliance			
Ohio Environmental Council			

Ass'n of Irritated Residents	District Court Northern California	11/2/2009	Schedule for processing California SIP revision
Sierra Club	District Court Northern California	9/1/2011	Schedule for processing 1997 Ozone NAAQS SIPs for Hawaii, Alaska, Idaho, Oregon, Washington, Maryland, Virginia, Arkansas, Arizona, Florida, Georgia, Oklahoma, Nevada, North Carolina, and Tennessee
WildEarth Guardians			
Sierra Club	District Court D.C.	9/21/2011	Schedule for making 1997 1-hour ozone attainment designations for portions of Texas, Maryland, New York, New Jersey, Massachusetts, Connecticut, and New Hampshire
WildEarth Guardians	District Court Northern California	3/29/2011	Schedule for processing State Implementation Plans for Arizona, Nevada, Pennsylvania, and Tennessee for 1997 Ozone National Ambient Air Quality Standards revision
Elizabeth Crowe			
Rocky Mtn Clean Air Action	District Court Colorado	9/4/2009	Schedule for review/(if necessary) revise Hazardous Air Pollutants radon mining
Citizens against Toxic Waste			
Louisiana Env Action Network	District Court D.C.	11/16/2009	Schedule review/(if necessary) revise Hazardous Air Pollutant regulations for PVC manufacturers
Sierra Club			
Mosseville Env'l Action Now			
Nat'l Parks Conservation Ass'n	District Court D.C.	6/26/2012	Schedule for review/(if necessary) revision of particulate matter National Ambient Air Quality Standard
American Lung Association			
New York, California, Rhode Island			
Sierra Club	District Court D.C.	3/30/1999	Schedule to issue Hazardous Air Pollutant regulations for a number of categories and subcategories of sources

Sierra Club	District Court D.C.	10/15/1997	Schedule to issue a study on the public health impact of mercury emissions.
Arizona Center for Law in the Public Interest	Not Specified	10/3/1997	Schedule to impose Federal Implementation Plan contingency provisions for the Phoenix, Arizona non-attainment area for the carbon monoxide National Ambient Air Quality Standard
Arizona Center for Law in the Public Interest	Not Specified	9/3/1997	Schedule to determine whether the Phoenix, Arizona ozone nonattainment area has timely attained the 1979 national ambient air quality standard ("NAAQS") for ozone
Sierra Club	District Court D.C.	3/13/1998	Schedule to issue a study and report to Congress regarding whether EPA should require further reductions in emissions from light-duty vehicles and light-duty trucks.
Sierra Club	District Court D.C.	3/13/1998	Schedule for issuance of rules or control techniques guidelines to reduce emissions of volatile organic compounds from consumer or commercial products.
Midwest Ozone Group	District Court D.C.	7/12/2000	Schedule to promulgate federal implementation plans ("FIPs") establishing (1) attainment demonstrations for a number of areas in Northeast
Connecticut	Not Specified	3/5/1998	Schedule to process a number of Clean Air Act Section 126 petitions to address intrerstate air pollution
Maine			
Massachusetts			
New Hampshire			
New York			
Pennsylvania			
Rhode Island			
Vermont			

Sierra Club	District Court D.C.	12/2/1997	Schedule to meet mandatory deadline under section 112(f)(1) of the Act, 42 U.S.C. 7412(f)(1). Section 112(f)(1) of the Act relates to a report to Congress on the risk to public health remaining, or likely to remain, from sources subject to hazardous air pollutant regulation under section 112
Portneuf Environmental Council	Not Specified	9/8/1998	Schedule to determing attainment status of Power-Bannock Counties nfor the PM-10 national ambient air quality standards
Natural Resources Defense Council	District Court D.C.	12/21/1999	Schedule to address statutory requirements for areas in "severe" nonattainment with the 1979 1 hour ozone National Ambient Air Quality Standards
Sierra Club			
Conservation Law Foundation			
Natural Resources Council of Maine			
Environmental Defense Fund			
Washington Legal Foundation	District Court D.C.	2/21/1997	Schedule to submit to Congress: (1) Cost/Benefit Report regarding the costs and benefits of past compliance with certain CAA standards ("Retrospective Report") and (2) the first Cost/Benefit Report making projections into the future regarding expected costs, benefits and other effects of compliance with CAA standards ("Prospective Report")
Sierra Club	District Court Northern California	8/28/1998	Schedule to process a California State Implementation Plan Revision
Arizona Center for Law in the Public Interest	Unspecified	5/16/1997	Schedule to propose federal implementation plan to reduce volatile organic compound ("VOC") emissions by fifteen percent [15%] from 1990 levels, under Act section 182(b)(1), in the Phoenix, AZ ozone nonattainment area.
Natural Resources Defense Council	District Court Northern California	7/9/2008	Schedule to act on 3 California State Implementation Plan revisions

Association of Irritated Residents			
Sierra Club	District Court Northern California	3/29/2007	Schedule to review/and if necessary revise New Source Performance Standard for Portland Cement manufacturing
Sierra Club	District Court Northern California	4/19/2006	Schedule to review and, if necessary, revise the Hazardous Air Pollutants standards for petroleum refineries.
Our Children's Future Foundation			
Environmental Defense	District Court Northern California	12/21/2005	Schedule to respond by June 12 to petition to add diesel engine exhaust to list of Section 112 Hazardous Air Pollutants
Sierra Club	D.C. District Court	8/29/2006	Schedule to review, and (if necessary) revise New Source Performance Standards for nonmetallic mineral processing plants
Friends of Chattahoochie			
Kentuckians for the Commonwealth			
American Lung Association	D.C. District Court	3/28/2005	Process state SIP revisions pursuant to 1997 NAAQS revision
Environmental Defense			
Sierra Club	D.C. District Court	8/9/2005	Schedule to review/(if necessary) revise 112 HAP standards for 6 categories: Gas dist'n, Sterilizers, Cooling Towers, Magnetic Tape, Degreasing Cleaners, Organics
Lousiana Environmental Action Network			
CBD	D.C. District Court	9/20/2007	Schedule for review/(if necessary) revise Nitrogen Oxides, Sulfur Dioxides National Ambient Air Quality Standards
WildEarth Guardians			
Environmental Defense	District Court Northern California	7/23/2004	Schedule for New Source Performance Standard rulemaking for Stationary Internal Combustion Engines
Our Children's Earth Foundation	District Court Northern California	5/2/2003	Deadline to meet an obligation to publish comprehensive info on all SIPs

American Lung Association	D.C. District Court	11/20/2002	Schedule for promulgating designations for the 1997 8-hour ozone National Ambient Air Quality Standards
Alabama Environmental Council			
Clean Air Council			
Environmental Defense			
Ohio Environmental Council			
Natural Resources Defense Council			
Sierra Club			
Michigan Environmental Council			
Environmental Defense	D.C. District Court	9/8/2003	deadline for BART guidelines
Sierra Club	D.C. District Court	10/15/2004	review/(if necessary) revise 112 HAP standards for coke ovens and dry cleaners by 3/31/2005 (proposal)
Sierra Club	D.C. District Court	3/27/2003	Schedule for promulgating Hazardous Air Pollutant regimes for number of source categories
American Lung Association	D.C. District Court	5/27/2003	Schedule for review/revise ozone, PM National Ambient Air Quality Standards
Natural Resources Defense Council			
Environmental Defense			
Sierra Club			
Sierra Club	District Court Northern California	8/29/2005	NSPS for Petroleum Refineries
Our Children's Earth Foundation			