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1985

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### Recommended Citation

Jeffrey M. Gaba, Informal Rulemaking by Settlement Agreement, 73 Geo. L. J. 1241 (1985)

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# Informal Rulemaking by Settlement Agreement

JEFFREY M. GABA\*

The process of informal rulemaking by the federal government is familiar. After determining that a regulation is necessary, a government agency prepares a proposal which it publishes for public comment. The agency then reviews the comments, decides on the content of the final rule, and publishes the final rule with a statement of basis and purpose explaining its decision. The rule is generally effective thirty days after publication, and the public is blessed with one more government regulation.<sup>1</sup>

Although the description of this process is familiar, it may be incomplete. If the experience of the Environmental Protection Agency (EPA) is a guide,<sup>2</sup> promulgation of regulations pursuant to the notice and comment procedure is merely one step of rulemaking. In many cases, development of these "final"

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1. Administrative Procedure Act § 4, 5 U.S.C. § 553 (1982); see *infra* notes 85 to 90 and accompanying text (discussing Act's requirements).

In addition to informal rulemaking, the Administrative Procedure Act (APA) provides for development of government requirements through formal on-the-record rulemaking as well as through trial-type adjudications. 5 U.S.C. §§ 554, 556-557 (1982). This article is limited to the unique problems associated with the use of settlement agreements to resolve challenges to regulations developed through informal rulemaking.

Negotiated resolution of specific adjudicatory matters is common both in the administrative and the enforcement context. See, e.g., RESOLVING ENVIRONMENTAL REGULATORY DISPUTES (L. Susskind, L. Bacow & M. Wheeler eds. 1983); Huffman, *The Opportunities for Environmentalists in the Settlement of NEPA Suits*, 4 ENVTL. L. REP. (ENVTL. L. INST.) 50,001 (1974); Jinkinson, *Negotiation of Consent Decrees*, 9 ANTITRUST BULL. 673 (1964). The APA specifically provides for development of consent judgments in adjudication. 5 U.S.C. § 554(c) (1982). See also 4 B. MEZINES, J. STEIN & J. GRUFF, ADMINISTRATIVE LAW § 31.02(5) (1985) (discussing consent adjudications under APA). The Department of Justice has special procedures for publication of consent decrees in antitrust and pollution control enforcement cases. 28 C.F.R. §§ 50.7, 50.13 (1984). Negotiation of such adjudicatory matters, involving as they generally do application of existing laws to specific parties, raises questions very different from those raised by negotiations of regulations of general applicability. The opportunity for public comment in the context of rulemaking settlements also suggests different procedural concerns.

2. This article is based on an analysis of actions of the Environmental Protection Agency. The EPA was chosen as the object of study for several reasons. First, it is one of the largest regulatory agencies in the country. Second, the author was employed at the EPA for several years and is familiar with the internal processes of this agency. Further, most observations of the process of rulemaking by settlement agreement have focused on the actions of the EPA. See, e.g., Cohen, *Settling Litigation: A New Role for Regulatory Lawyers*, 67 A.B.A. J. 878 (1981); Compton, *Success at the Negotiating Table: Not Just for Steel Guidelines*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 10,171 (1983); Miller, *Steel Industry Effluent Limitations: Success at the Negotiating Table*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 10,094 (1983); Rosin, *EPA Settlement of Administrative Litigation*, 12 ECOLOGY L.Q. 363 (1985). However, the settlement process described in this article is not necessarily limited to the EPA. Settlement agreements have been used by the Army Corps of Engineers. See Settlement Agreement, National Wildlife Fed'n v. Marsh, No. 82-3632 (D.D.C. Feb. 7, 1984) (concerning responsibilities of Army Corps of Engineers in issuing dredge and fill permits pursuant to § 4041 of Clean Water Act) (copy on file at *Georgetown Law Journal*) [hereinafter cited as Dredge & Fill Agreement]. Professor Harter has noted settlement negotiations by the Department of Interior and Department of Labor. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 36 n.196 (1982).

regulations is merely the first round in a larger process in which truly final regulations may be promulgated only after the government and affected parties have privately negotiated their contents.

These negotiations follow a lawsuit filed to challenge the "first round" regulations. The result is a settlement agreement in which the agency agrees to propose specific "second round" regulations and the parties agree to dismiss the litigation if the negotiated proposal is adopted. The first round rules serve as a "proposal" for negotiation with prospective litigants, and the second round regulations become the final rules.

What is the significance of this larger view of the rulemaking process? Settlement agreements are hardly novel; courts encourage negotiated solutions as an effective and efficient means of resolving lawsuits.<sup>3</sup> Nor are negotiated regulations themselves unknown: the use of negotiations as a mechanism for developing regulations, a concept distinct from informal rulemaking by settlement agreement, has received considerable attention lately.<sup>4</sup> Finally, a properly drafted settlement agreement does not violate the Administrative Procedure Act (APA). An agency merely agrees to propose a particular regulation while presumably retaining full discretion to modify the proposal in response to comments.<sup>5</sup>

Informal rulemaking by settlement agreement, however, is a phenomenon that deserves close attention.<sup>6</sup> First, the process raises concerns about the validity of the final regulations it produces. Second round regulations are developed through private negotiations with affected parties. Knowing that ongoing litigation will be dismissed if it promulgates the negotiated regulations, the agency has a strong incentive to adopt the proposed revisions unchanged. Hence this process raises questions about the good faith of the agency in promulgating regula-

3. Courts generally encourage settlement of disputes without trial as do several provisions of the Federal Rules of Evidence and the Federal Rules of Civil Procedure. See, e.g., FED. R. EVID. 408 (evidence regarding offers to compromise generally not admissible to prove liability or invalidity of claim); FED. R. CIV. P. 68 (party defending against claim may offer judgment against him any time more than 10 days before trial). See generally 10 J. MOORE & H. BENDIX, MOORE'S FEDERAL PRACTICE § 408.02 (1985).

In *American Petroleum Inst. v. EPA*, 661 F.2d 340 (5th Cir. 1981), a challenge to certain EPA oil and gas regulations, the parties had entered into a settlement agreement resolving all but four issues in the case. *Id.* at 341. The court applauded the process: "The parties' commendable willingness to negotiate their differences should not, and does not, go unnoticed by this Court. Nor do we hesitate to say that, as a result of these stipulations, the issues before us are four in number, but narrow in scope." *Id.* at 346.

4. See Harter, *supra* note 2; Note, *Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking*, 94 HARV. L. REV. 1871 (1981); Recommendation of the Administrative Conference of the United States No. 82-4, 1 C.F.R. §§ 305.82-84 (1984) [hereinafter cited as Administrative Conference].

In addition, Professor Harter has said: "Bills which would explicitly authorize [the use of regulatory negotiation] have been introduced in each of the last three Congresses. None of these bills has had a significant chance of passage, but they have focused attention on the issue." Harter, *Regulatory Negotiation: The Experience So Far*, RESOLVE, Winter 1984, at 1, 5.

5. The agreements generally specify the right of the petitioners to challenge the action of the EPA if it does not promulgate a final regulation substantially identical to the one negotiated by the parties. See *infra* note 20 (citing agreements containing such language).

6. Although the development of regulations through settlement agreement may deserve attention, it has not received it. Several commentators have noted the existence of the process. See, e.g., J. O'REILLY, ADMINISTRATIVE RULEMAKING § 14.11 (1983); Cohen, *supra* note 2; Harter, *supra* note 2; Note, *supra* note 4. However, there has been little analysis of the process. As Professor Harter stated, "Interestingly, the settlement of litigation challenging rules has generated little attention in either the literature or regulatory theory." Harter, *supra* note 2, at 36 (footnotes omitted). For a recent discussion of some issues raised by this process, see Rosin, *supra* note 2.

tions. Second, assessments of current problems and possible reform efforts of informal rulemaking might be incomplete if they fail to consider the subsequent settlement process. Finally, familiarity with the role of settlement agreements in developing regulations means greater understanding of how to influence the content of the final regulations. An understanding of the role of settlement agreements may, if nothing else, affect a decision to intervene in a challenge to agency regulations.

This article begins with a review of the role of settlement agreements in the rulemaking practice at the EPA, one of the largest regulatory agencies in the country. The article will examine the types, frequency, and possible effects of the settlement agreements on the rulemaking process at the EPA. The article next discusses the relation between rulemaking by settlement agreement and proposals for "negotiated" rulemaking. Differences between the two processes suggest both the strengths and weaknesses of settlement agreements.

The article next will consider the legal issues relating to the settlement process and to the final rules developed pursuant to these agreements. Although final second round rules should be valid, there are a number of steps, relating both to the structure of the agreement and to the courts' role in supervising the process, which should be taken to ensure that the settlement process is not abused. This article concludes with some suggestions for supervision of the process. It contends that rulemaking through settlement agreement, if properly supervised, may be an appropriate and effective way to implement agencies' rulemaking responsibilities.

## I. THE ROLE OF SETTLEMENT AGREEMENTS IN INFORMAL RULEMAKING

The role of settlement agreements in informal rulemaking at the EPA is varied and complex; different types of agreements are used to structure various aspects of the rulemaking process. A discussion of the various types of settlement agreements and their practical consequences sheds light on the legal consequences of those substantive agreements which actually specify the content of regulations.

### A. TYPES OF SETTLEMENT AGREEMENTS

The process of developing regulations through informal rulemaking has several stages, and court-sanctioned settlement agreements have been used at the EPA to establish requirements for various aspects of the Agency's responsibilities in the development and promulgation of regulations. Basically, these agreements have fallen into one of three categories: scheduling agreements, process agreements, and substantive agreements.

#### 1. Scheduling Agreements

One type of settlement agreement that the EPA has used is a "scheduling" agreement, which specifies the date by which the EPA will promulgate a regulation. Agreements of this type are usually negotiated in the course of litigation challenging the Agency's failure to issue regulations specifically required by stat-

ute.<sup>7</sup> Through scheduling agreements, the parties can establish specific time obligations, not contained in the statutes, for promulgation of these regulations. For example, a scheduling agreement might specify particular times by which proposed and final regulations must be published.<sup>8</sup>

The important characteristic of scheduling agreements is that usually they dictate neither the content of final regulations nor the steps the Agency will take to develop the regulations. Moreover, court-enforced scheduling agreements can be an extremely important tool in keeping continuing pressure to bear on a sometimes sluggish bureaucracy. They have been used to structure Agency actions in a number of regulatory programs that rely on informal rulemaking.<sup>9</sup>

## 2. Process Agreements

Settlement agreements can also be used to structure the rulemaking process by specifying not the date or content of a regulation but the process the Agency will employ to develop the regulation. In resolving a series of lawsuits consolidated in *Natural Resources Defense Council, Inc. v. Train*,<sup>10</sup> the EPA negotiated a consent decree with environmentalists and industry intervenors that specified a comprehensive course of action the Agency would take to regulate the discharge of toxic pollutants under the Clean Water Act.<sup>11</sup> This process agreement, the so-called *Flannery Decree*, required the Agency to investigate the discharge of a

7. Most of the major federal environmental statutes authorize "citizen suits" to compel the government to undertake action that is "not discretionary" with the Administrator of the EPA. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1365(a)(1) (1982); Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(2) (1982); Clean Air Act, 42 U.S.C. § 7604(a)(2) (1982). Litigation to compel "nondiscretionary" duty typically alleges a failure of the EPA to promulgate regulations specifically required by statute. *See* *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692 (D.C. Cir. 1975) (suit to compel publication of effluent limitations mandated by Federal Water Pollution Control Act).

In characterizing one lawsuit challenging the EPA's failure to promulgate hazardous waste regulations required by the Resource Conservation and Recovery Act (RCRA), one court noted, "This is simply a deadline suit, nothing more. The sole purpose of deadline suits is to bring the equitable powers of the Court into play to effectuate the declared intentions of Congress." *Illinois v. Gorsuch*, 530 F. Supp. 337, 339 (D.D.C. 1981).

8. *See* Settlement Agreement, *Natural Resources Defense Council, Inc. v. Costle*, No. 79-3442 (D.D.C. July 9, 1980) (specifying deadlines for completion of data review and promulgation of new source performance standards for offshore oil and gas facilities under Clean Water Act) (copy on file at *Georgetown Law Journal*) [hereinafter cited as Oil & Gas Agreement].

9. *See* Settlement Agreement at 2-3, *Environmental Defense Fund, Inc. v. EPA*, No. 82-2234 and consol. cases (D.C. Cir. Jan. 16, 1984) (calling for specific rulemaking to resolve National Contingency Plan under Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9605 (1982)) (copy on file at *Georgetown Law Journal*) [hereinafter cited as Contingency Plan Agreement]; Oil & Gas Agreement, *supra* note 8 (scheduling rulemaking activity under Clean Water Act); Interview with Lisa Friedman, Associate General Counsel, Solid Waste Division, EPA (Mar. 1, 1985) (discussing additional settlement agreements) (copy on file at *Georgetown Law Journal*) [hereinafter cited as Friedman Interview]. Such agreements also may be drafted by parties after the Agency has lost on the merits and the parties are developing a schedule to be included in the court's order. *See* *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d at 704-05 (D.C. Cir. 1975).

10. 8 Env't Rep. Cas. (BNA) 2120 (D.D.C. 1976), *modified*, 12 Env't Rep. Cas. (BNA) 1833 (D.D.C. 1979) *modified*, No. 72-2153 (D.D.C. Oct. 26, 1982), *modified*, No. 73-2153 (D.D.C. Aug. 2, 1983 and Jan. 6, 1984).

11. 33 U.S.C. § 1317 (1982). This settlement, among other things, required the EPA by specified dates to study and issue regulations controlling 65 toxic pollutants discharged by 21 primary industries; specified the legal basis, ambiguous under the Clean Water Act, for controlling pollutants that industry discharges into publicly owned treatment plants rather than directly into navigable waters; established timetables for regulating these "indirect" discharges; and required specific justification for failure to regulate an industry or pollutant. 8 Env't Rep. Cas. (BNA) at 2122-29. *See generally* Hall, *The Control of*

negotiated list of sixty-five toxic pollutants in a specified group of major industries.<sup>12</sup> The agreement required the EPA to promulgate regulations limiting the discharge of the pollutants except in narrowly defined circumstances.<sup>13</sup> In addition, the agreement specified the approach the EPA would use to regulate the pollutants when they were sent by industry to municipal sewage treatment plants.<sup>14</sup> The agreement, however, did not specify the content of any final regulations.

It may be misleading to refer to process "agreements," because the *Flannery Decree* may be the only significant process agreement entered into by the Agency.<sup>15</sup> Its importance, however, cannot be underestimated: the EPA and other parties to the litigation, including industry and environmentalists, negotiated a structure for implementing toxic control requirements, which is in place today and which has produced significant results. The Agency probably would not have done as much as fast without this structure. Questions have been raised, however, as to whether such an agreement impermissibly restricts the Agency's exercise of its discretion,<sup>16</sup> and it is unlikely that so comprehensive a process agreement will be negotiated in the future.

### 3. Substantive Agreements

Settlement agreements can also be used to specify the substantive content—even the precise language—of regulations. Substantive agreements arise in the course of lawsuits seeking judicial review of a putative final regulation. In resolving the lawsuit, the parties may negotiate a substantive modification of the regulation that will satisfy their objectives.<sup>17</sup> Settlement agreements resulting

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*Toxic Pollutants under the Federal Water Pollution Control Act Amendments of 1972*, 63 IOWA L. REV. 609 (1978) (discussing *Flannery Decree*).

This settlement agreement was the basis for amendments to the Clean Water Act. As Senator Muskie, floor manager in the Senate of the conference report on the 1977 amendments, stated: "The conference agreement was specifically designed to codify the so-called 'Flannery decision.'" 123 CONG. REC. 39,181 (1977).

12. 8 Env't Rep. Cas. (BNA) at 2125. These requirements were later expanded to apply to 34 industrial categories and a more detailed list of 129 toxic pollutants. National Pollutant Discharge Elimination System Permit Regulations, 49 Fed. Reg. 37,998, 38,000 (1984) (to be codified at 40 C.F.R. §§ 122, 124-125).

13. 8 Env't Rep. Cas. (BNA) at 2125.

14. *Id.* at 2124.

15. Mr. James Rogers, formerly Associate General Counsel at the EPA, described the *Flannery Decree* as "sui generis." Letter from James Rogers to Jeffrey M. Gaba (Mar. 26, 1985) (copy on file at *Georgetown Law Journal*).

16. In *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 111 (D.C. Cir. 1983), the court, reviewing the validity of the agreement, noted that the EPA and environmental plaintiffs conceded that the *Flannery Decree* infringes to some extent the EPA's discretion under the Clean Water Act. *Id.* at 1127. The agreement has also limited some of the Agency's discretion on allocation of funds. See *infra* note 73; see also *infra* notes 119 to 168 and accompanying text (discussing issues raised in *Citizens*, in which *Flannery Decree* was challenged as impermissibly limiting discretion of Administrator).

17. Although the parties may prefer a comprehensive settlement that resolves all issues, some settlement agreements reserve specific issues for later litigation. See, e.g., Settlement Agreement, Natural Resources Defense Council, Inc. v. EPA, No. 80-1607 and consol. cases (D.C. Cir. June 7, 1982) (concerning National Pollutant Discharge Elimination System (NPDES) permit issues in EPA's consolidated environmental permit regulations) (copy on file at *Georgetown Law Journal*) [hereinafter cited as NPDES Agreement]; Settlement Agreement at 2, Natural Resources Defense Council, Inc. v. EPA, No. 80-1607 and consol. cases (D.C. Cir. Nov. 1981) (concerning hazardous waste issues in EPA's consolidated environmental permit regulations) (copy on file at *Georgetown Law Journal*) [hereinafter cited as RCRA Agreement]; Contingency Plan Agreement, *supra* note 9, at 2.

from these negotiations generally call for a second round of rulemaking to implement the agreement.<sup>18</sup>

In most cases, the Agency agrees to propose a revised regulation containing the precise language agreed upon by the parties.<sup>19</sup> Although there is no explicit agreement to adopt this proposed language, the settlement agreements generally provide that if the negotiated language is adopted without substantial change, the plaintiffs will move to dismiss the underlying lawsuit.<sup>20</sup> In some cases, the agreements have required the Agency to publish guidelines interpreting the existing regulations in a manner satisfactory to the parties.<sup>21</sup> Other agreements have called for publication of specific language in preambles to regulations explaining the Agency's interpretation of its regulations.<sup>22</sup>

The court can implement these settlement agreements in many ways.<sup>23</sup> In some cases, the agreements have been embodied in actual consent decrees issued as judgments of the court.<sup>24</sup> Concerned about the inflexibility of judicially en-

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18. Some agreements do provide for immediate action such as publication of regulatory guidance. *See infra* notes 21 to 22 and notes 185 to 191 and accompanying text.

19. Recent settlement agreements, for example, generally specify that the EPA must propose specific regulatory language contained in appendices to the agreement. The agreements also provide for prompt completion of the rulemaking requirements, including submission of the proposal to the Office of Management and Budget for review, and prompt review of comments received during the public comment period. *See, e.g.,* Settlement Agreement, Natural Resources Defense Council, Inc. v. EPA, No. 83-1122 (D.C. Cir. Nov. 17, 1984) (concerning petroleum refining effluent guidelines) (copy on file at *Georgetown Law Journal*) [hereinafter cited as Petroleum Refining Agreement]; Settlement Agreement, Porcelain Enamel Inst. v. EPA, No. 82-2124 and consol. cases (4th Cir. Aug. 19, 1983) (concerning porcelain enameling effluent guideline) (copy on file at *Georgetown Law Journal*) [hereinafter cited as Porcelain Agreement]; NPDES Agreement, *supra* note 17.

20. The NPDES Agreement provides:

If the final regulations that are promulgated, and the preamble language that is published, are substantially the same as and do not alter the meaning of the language set forth in Exhibit C, then the undersigned petitioners will voluntarily dismiss their petitions for review and their district court complaints . . . and shall not seek judicial review of the regulations adopted pursuant to this Agreement.

NPDES Agreement, *supra* note 17, at 3; *see also* Petroleum Refining Agreement, *supra* note 19, at 4; Contingency Plan Agreement, *supra* note 9, at 3-4.

21. The settlement agreement on RCRA-related issues in the consolidated permit litigation provided that "EPA shall publish the Regulatory Interpretation Memorandum . . . set forth in Exhibit B to the Agreement." RCRA Agreement, *supra* note 17, at 3, *see also* Settlement Agreement at 1-2, National Steel Corp. v. EPA, No. 82-3225 and consol. cases (3rd Cir. Feb. 24, 1983) (incorporating similar language) (copy on file at *Georgetown Law Journal*) [hereinafter cited as Steel Agreement]; Settlement Agreement at 3, Natural Resources Defense Council, Inc. v. EPA, No. 80-1607 and consol. cases (D.C. Cir. 1981) (same; dealing with Underground Injection Control Program of Safe Drinking Water Act) (copy on file at *Georgetown Law Journal*) [hereinafter cited as Underground Injection Agreement]; Dredge & Fill Agreement, *supra* note 2, at 3 (same).

The agreements also have called for final, immediately effective, "technical" corrections to existing regulations. *See, e.g.,* Underground Injection Agreement, *supra*, at 2; RCRA Agreement, *supra* note 17, at 3.

22. The settlement agreement on common issues in the consolidated permit litigation provides that not only will the EPA propose specific amendments but that "the preamble to the proposed amendments shall include, the same language set forth in Exhibit B." Settlement Agreement, Natural Resources Defense Council, Inc. v. EPA, No. 80-1607 and consol. cases (D.C. Cir. Nov. 16, 1981) (concerning common and New Discharger issues in consolidated permit litigation) (copy on file at *Georgetown Law Journal*) [hereinafter cited as Common Issues Agreement]; *see also* Steel Agreement, *supra* note 21, at 6 (incorporating similar language).

23. Although the parties generally implement these agreements through court judgments or stays, the agreements are also contracts between the parties themselves. *See infra* notes 147 to 168 and accompanying text (discussing contract nature of settlement agreements).

24. *See supra* notes 10 to 14 and accompanying text (discussing *Flannery Decree*). Agreements also

forceable agreements, the Agency has preferred recently to use the settlement agreements as the basis for a motion to stay proceedings.<sup>25</sup>

Although it is difficult to determine the number of EPA regulations based upon substantive agreements,<sup>26</sup> in recent years the Agency has relied extensively on such agreements to implement major portions of its water, hazardous waste, and air programs.<sup>27</sup> Under the Clean Water Act,<sup>28</sup> settlement agreements have been widely used to establish "effluent limitations guidelines" which specify numerical limitations on the discharge of pollutants by specific industries;<sup>29</sup> to set the basic requirements for obtaining a pollution discharge permit;<sup>30</sup> and to establish criteria for obtaining a permit to discharge material in wetlands.<sup>31</sup> The EPA has also entered into a settlement agreement resolving challenges to the Underground Injection Control program of the Safe Drinking Water Act.<sup>32</sup>

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may be entered as stipulations resolving portions of a case. See *American Petroleum Inst.*, 661 F.2d at 346 (stipulation of settlement resulted in revised regulations and narrowed unresolved issues).

25. See, e.g., Joint Motion to Defer Briefing on NPDES Issues Pursuant to Settlement Agreement, Natural Resources Defense Council, Inc. v. EPA, No. 80-1607 and consol. cases (D.C. Cir. June 9, 1982) (copy on file at *Georgetown Law Journal*); Petroleum Refining Agreement, *supra* note 19, at 6; Dredge & Fill Agreement, *supra* note 2, at 4.

Although the parties may request a stay, courts sometimes prefer to handle this matter in other ways. The Court of Appeals for the D.C. Circuit, in response to a motion for a partial stay of proceedings pursuant to a settlement agreement, issued an order dismissing the litigation and directed the clerk to note on the docket that "this case has been terminated and no longer will be carried as an active case", but also provides for the reopening of this case upon certain conditions . . . ." Order, Natural Resources Defense Council, Inc. v. EPA, No. 83-1122 (D.C. Cir. July 24, 1984) (copy on file at *Georgetown Law Journal*).

26. No filing system at the EPA could record the number or percentage of regulations preceded by a settlement agreement. Nevertheless, to determine the size of the practice and the problem experienced by lawyers engaged in such negotiations, the author interviewed attorneys in the air, water, and hazardous waste divisions of the Office of General Counsel at the EPA. The Office of General Counsel is generally responsible for helping to prepare regulations and defending legal challenges to regulations adopted by the Agency. The attorneys with whom the author spoke had considerable experience with the Agency's use of settlement agreements in its programs. The author also interviewed attorneys representing both industry and environmental groups, who had participated in negotiating settlement agreements with the EPA.

27. The EPA also manages other major environmental programs, including toxic substances control under the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2629 (1982), and pesticides management under the Federal Insecticide, Fungicide and Rodenticide Act, (FIFRA) 7 U.S.C. §§ 135-364 (1982). The programs under these statutes generally rely on specialized rulemaking proceedings that are not governed by the informal rulemaking proceedings of the APA. See generally J. ARBUCKLE, G. FRICK, R. HALL, JR., M. MILLER, T. SULLIVAN & T. VANDERVER, JR., ENVIRONMENTAL LAW HANDBOOK 223-27 (7th ed. 1983) [hereinafter cited as HANDBOOK]. There have been interesting developments relating to the use of negotiated settlements under these statutes as well. The EPA has recently agreed to propose regulations allowing greater public participation in Agency decisions under FIFRA. See [News Notes] Env't Rep. Cas. (BNA) Decision No. 13 (Oct. 5, 1984); cf. Natural Resources Defense Council, Inc. v. EPA, 21 Env't Rep. Cas. (BNA) 1625 (S.D.N.Y. 1984) (noting court's invalidation of EPA procedures for privately negotiated testing procedures under TSCA).

28. 33 U.S.C. §§ 1251-1376 (1982).

29. Since 1981, the EPA has promulgated "effluent limitations guidelines" for 23 "primary" or major polluting industries. Of these, 16 have been subject to court challenge, and a number of these challenges already have been resolved by settlement agreement. See Letter from Susan Lepow, Office of General Counsel, EPA to Jeffrey M. Gaba (Mar. 22, 1985) (copy on file at *Georgetown Law Journal*) [hereinafter cited as Lepow Letter]. For additional agreements see Settlement Agreement, Coal Ass'n v. EPA, No. 82-1939 and consol. cases (4th Cir. Aug. 1, 1983) (concerning effluent guidelines for the coal mining manufacturing point source category) (copy on file at *Georgetown Law Journal*) [hereinafter cited as Mining Agreement]; Steel Agreement, *supra* note 21; Porcelain Agreement, *supra* note 19; Petroleum Refining Agreement, *supra* note 19. See also [Current Developments] ENV'T RPTR. 334 (June 28, 1985) (reporting settlement of challenge to Aluminum Forming Effluent Guidelines). Additional agreements are still being negotiated, and some agreements have been reached with individual parties to litigation. Lepow Letter.

30. See Common Issues Agreement, *supra* note 22; NPDES Agreement, *supra* note 17.

31. See Dredge & Fill Agreement, *supra* note 2.

32. 42 U.S.C. § 300h to 300h-4 (1982); see Underground Injection Agreement, *supra* note 21.



It is somewhat easier to determine the number of settlement agreements relied on to implement hazardous waste requirements under the Resource Conservation and Recovery Act (RCRA).<sup>33</sup> Virtually all of the regulations issued under this Act have been challenged and are the subject of substantive settlement negotiations.<sup>34</sup> Some negotiations have been concluded by signed agreements;<sup>35</sup> negotiations continue on other challenges.<sup>36</sup> A substantive settlement agreement was also used to resolve a challenge to the listing of priority hazardous waste sites pursuant to the Comprehensive Environmental Response, Compensation and Liability Act.<sup>37</sup> Thus, almost the entire federal program for control of hazardous wastes has or is being prepared, in part, through negotiated agreements among parties to litigation.<sup>38</sup> Guidelines for disposal of nonhazardous solid wastes promulgated pursuant to the RCRA also were developed through settlement agreement.<sup>39</sup>

Implementation of the Clean Air Act<sup>40</sup> has depended less on settlement agreements than has implementation of the water or hazardous waste programs.<sup>41</sup> Major aspects of the air program, however, have been developed through a substantive agreement, including requirements relating to the location of new sources in areas with particularly clean or dirty air.<sup>42</sup>

#### B. CONSEQUENCES OF THE USE OF SETTLEMENT AGREEMENTS IN RULEMAKING

Settlement agreements to resolve challenges to regulations are used primarily

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33. 42 U.S.C. §§ 6901-6907 (1982). The RCRA requires that the EPA develop a comprehensive set of regulations controlling the disposal of hazardous waste by generators, transporters, and disposal facilities. See generally HANDBOOK, *supra* note 27, at 187-221.

34. As one commentator observed, "Nearly all of the major rulemakings promulgated by EPA to implement the hazardous waste program have produced litigation." J. QUARLES, *FEDERAL REGULATION OF HAZARDOUS WASTES, A GUIDE TO RCRA* 46 (1982).

35. See RCRA Agreement, *supra* note 17; see also Friedman Interview, *supra* note 9 (listing series of lawsuits and settlement negotiations involving regulations issued under RCRA).

36. As of April 1985, negotiations were incomplete in litigation involving the EPA's land disposal regulations and "Phase I" RCRA regulations. Friedman Interview, *supra* note 9. Describing the status of the Phase I negotiations, John Quarles has noted: "In the Shell Oil Co. case, no effort has been made to work toward a single comprehensive settlement package. Instead, many individual issues have been resolved and EPA has initiated proposed changes in the original regulations on several points." J. QUARLES, *supra* note 34, at 47.

37. 42 U.S.C. § 9605 (1982); see Contingency Plan Agreement, *supra* note 9.

38. As John Quarles has noted, "*The conduct of these cases has been handled through negotiation rather than briefing and judicial decision.*" J. QUARLES, *supra* note 34, at 46 (emphasis in original).

39. See 45 Fed. Reg. 71,818 (1980) (proposed modifications to guidelines for solid waste management plans); 45 Fed. Reg. 72,709 (1980) (proposed modifications concerning criteria for groundwater and air protection); 46 Fed. Reg. 47,048 (1981) (amended guidelines to expand public participation in planning process and to hasten approval of portions of state plans).

40. 42 U.S.C. §§ 7401-7642 (1982).

41. For example, there have been no settlement agreements involving national ambient air quality standards, in part because the standards are established only after extensive hearings. In addition, actions the EPA takes regarding specific provisions of State Implementation Plans under the Clean Air Act are directed at states with which it is not common to negotiate. Interview with William Pedersen, Associate General Counsel, Air Division, EPA (July 27, 1984) (copy on file at *Georgetown Law Journal*) [hereinafter cited as Pedersen Interview].

42. See [Current Developments] ENV'T RPTR. 1639 (Apr. 16, 1982) (discussing settlement agreement in *Chemical Mfrs. Ass'n v. EPA*, No. 79-1112 and consol. cases). Professor Harter also noted negotiations relating to automobile emission standards and mileage testing procedures. Harter, *supra* note 2, at 36 n. 196.

to spare the parties the time, expense, and uncertainty of litigation.<sup>43</sup> In this regard, they do not differ from any other negotiated resolution of a lawsuit.<sup>44</sup> In the case of settlements that provide for second round rulemaking, however, a number of other consequences are worth noting.

### 1. Commitment to the First Round Rule

Not all regulations are negotiated when challenged,<sup>45</sup> but when the EPA does negotiate a revision to the first round regulation it is repudiating a position it had determined to be proper. This willingness to negotiate immediately raises questions about the Agency's basis for developing regulations. One possible reason for the Agency's change of position is that it promulgates its first round rules with the expectation that these rules will be revised through negotiations. Discussions with the affected parties usually will alert the Agency to the likelihood of litigation after first round regulations.<sup>46</sup> The Agency, therefore, can anticipate settlement negotiations. Perhaps the first round regulations do not represent the Agency's true position on appropriate final regulation, but are simply a basis for negotiation and compromise.<sup>47</sup> There is no indication, however, that attorneys' advice on the substantive content of the regulations is consciously affected by the prospect of negotiations.<sup>48</sup>

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43. See Cohen, *supra* note 2, at 880; Compton, *supra* note 2, at 10,171.

44. As the Supreme Court noted in the context of antitrust consent decrees:

Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached is normally a compromise; in exchange for saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

United States v. Armour & Co., 402 U.S. 673, 681 (1971).

45. Interview with Colburn Cherney, Associate General Counsel, Water Division, EPA (Mar. 27, 1985) (copy on file at *Georgetown Law Journal*) [hereinafter cited as Cherney Interview]; see Interview with James Rogers, former Associate General Counsel, Air and Water Division, EPA (Mar. 26, 1985) (no formal selection procedure regarding which issue will be negotiated and which litigated; depends on discretion of staff attorney) (copy on file at *Georgetown Law Journal*) [hereinafter cited as Rogers Interview]; see also *infra* note 50 and accompanying text (discussing additional considerations regarding negotiations).

46. See Cherney Interview, *supra* note 45 (information received during first round proposal indicates likelihood of litigation); Rogers Interview, *supra* note 45 (attorneys in EPA's Water and Solid Waste Division assumed major regulations from 1977 to 1980 would be challenged in court).

47. Occasional proposals are developed that do not necessarily reflect the Agency's view on the content of the final rule. Such proposals may identify options on which the Agency wants to receive comments in order to preserve its flexibility to act without reproposal. Since it is often bureaucratically easier to retreat from an extreme position to a more moderate one, a tough proposal may be published in order to make it easier for the Agency to promulgate a final, less stringent regulation.

48. See Cherney Interview, *supra* note 45 (advice to program office on content of first round regulations not affected by prospect of later negotiations); Friedman Interview, *supra* note 9 (EPA's decision on content of regulation not directly affected by prospect of later negotiations; regulations strongest possible under constraints of time and data); Rogers Interview, *supra* note 45 (justification of first round regulations not a concern since regulations could subsequently be patched up).

The government is not the only party, however, whose conduct may be affected by the prospect of negotiations. For environmental groups especially, the knowledge that a regulation will be subject to negotiations means less of their limited resources spent on developing comments on the first round rule. As long as they submit sufficient comments to raise issues with which they are concerned, they can be assured of participation in the later negotiations. Thus, the first round comments may be submitted less to influence the rule than to ensure a place in later negotiations. See Interview with James Banks, Attorney, Natural Resources Defense Council (Mar. 1, 1985) (copy on file at *Georgetown Law Journal*) [hereinafter

If the prospect of negotiations does not affect the content of first round negotiations, the troubling question remains why the Agency is willing to change its position in the settlement agreements. Compromise of weak positions to avoid litigation is an aspect of most settlement agreements.<sup>49</sup> As one might expect, regulations with questionable legal or factual support are more likely to be negotiated.<sup>50</sup>

It appears that this reversal represents a retreat, for purposes of avoiding litigation, from a position the Agency believed was proper. Still, the reversal may not reflect improper motives or suggest an unacceptable result. In some cases, neither the Agency nor the affected community have focused adequately on the issues during the first round process, and it is only during later negotiations that the precise problems will be grasped.<sup>51</sup> Although all available information should have been submitted during the comment period,<sup>52</sup> ambiguous information may be clarified during negotiations. Also, because regulations are not stayed during possibly protracted negotiations, parties receive important information on the actual implementation of the regulations.<sup>53</sup>

The Agency may also just change its mind.<sup>54</sup> Parties may legitimately disagree over vague statutes that require complex technical and economic judgments.<sup>55</sup> On additional reflection and discussions with parties, the Agency may decide that there is a better position than the one it first adopted.<sup>56</sup> Also, the change from the Carter to the Reagan Administration expanded the range of issues the EPA was willing to negotiate,<sup>57</sup> and in many cases the negotiations

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cited as Banks Interview]. One participant in negotiations has raised the concern that parties also may take more extreme positions in the first round rulemaking knowing that there will be later negotiations. See Harter, *supra* note 2, at 18 n.106, 37 n.199 (quoting Interview with Anthony Z. Roisman, Hazardous Waste Section, Lands Division, United States Department of Justice).

49. See *Armour & Co.*, 402 U.S. at 681 (discussing compromise in antitrust decrees).

50. See Cherney Interview, *supra* note 45 (attorneys consider environmental significance of changes); Friedman Interview, *supra* note 9 (additional considerations include clients' interest, Administration's interest, and possibility of "horsetrading" of challenged issues); Rogers Interview, *supra* note 45 (small meetings of key people determine which issues worthy of defense).

51. One participant in the formulation and negotiation of regulations observed that in the early years (pre-1977) of developing effluent guidelines, the EPA's efforts suffered because of time pressures from court deadlines. He observed that industry comments were weak and noted that "the more meaningful technical analysis took place after the issuance of regulations." Rogers Interview, *supra* note 45, at 2.

52. See *Wagner Elec. Co. v. Volpe*, 466 F.2d 1013, 1020 (3d Cir. 1972) (order of National Highway Traffic Safety Administration amending motor vehicles standards invalid where no adequate notice of proposed rulemaking).

53. See Cherney Interview, *supra* note 45 (although few comments usually submitted during comment period on second round regulations, significant comments sometimes submitted).

54. As one court has noted: "Nothing in the Administrative Procedure Act prohibits an agency from changing its mind, if that change aids it in its appointed task." *American Petroleum Inst.*, 661 F.2d at 355.

55. The statutes that the EPA is implementing are extremely complex and in many cases contain ambiguous requirements that reflect the results of congressional compromise. In many cases, regulations are based on information on the frontier of science, such as the detection of extremely low levels of toxic pollutants or the extent of health effects from exposure to environmental pollutants. In these cases, there is often no correct answer, and the Agency is forced to choose from an array of equally possible choices.

56. An agency may get a great deal from settlement negotiations even if no final agreement is reached. To the extent that the agency modifies its regulations in response to negotiations to make them more credible and defensible, it has achieved most of its objectives. The EPA, for example, could use the negotiations to obtain defensible regulations or to achieve an enforceable agreement. Rogers Interview, *supra* note 45. There may be too much concern on an agency's part, however, in achieving a comprehensive settlement when it could achieve a great deal without full compromise of its positions.

57. See Friedman Interview, *supra* note 9 (new Administration concerned with meeting content of

appeared to serve as a vehicle for the new Administration to reconsider earlier decisions.

## 2. Justification of the Second Round Regulation

When the EPA agrees to modify a regulation, the replacement is often the result of compromise among the parties.<sup>58</sup> The compromise might neither represent the preferred positions of those parties, nor be supported by any information in the record.<sup>59</sup> This is especially true of regulations containing specific numerical limitations.<sup>60</sup>

In preparing a proposal implementing a compromise, however, an agency must prepare an explanation of the proposal, and, upon promulgation of the final regulation, publish a statement of basis and purpose explaining its action.<sup>61</sup> This can be extremely difficult with negotiated regulations. In some cases, the preamble to the proposal merely states the provisions required to be proposed in the settlement agreement, and the final regulation merely adopts the proposal.<sup>62</sup>

## 3. Modification of the Second Round Proposal

After a settlement agreement is negotiated, the EPA has a strong incentive to adopt proposed regulations without modification. In such cases, the Agency is assured that ongoing litigation will be dismissed.<sup>63</sup> It is hard to ascertain the extent to which this knowledge influences the Agency's decision to adopt the second round proposal unchanged. But the consequence of a settlement agreement is significant; in most cases the negotiated provision is adopted as proposed.<sup>64</sup> This need not reflect a failure of the Agency to consider adverse comments, since most of the interested and affected parties will have participated in the settlement. However, even when the Agency legitimately wants to review independently the propriety of a second round final rule, the settlement agreement will exert influence. Minor language or even substantive changes from a settlement-based proposal must be reviewed, since the changes might be inconsistent with the settlement agreement, but such resistance to change is not neces-

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RCRA regulations); Pedersen Interview, *supra* note 41 (new Administration substantially affected consolidated permit settlement regulations).

58. See Cohen, *supra* note 2, at 878; Compton, *supra* note 2, at 10,172; Miller, *supra* note 2, at 10,094.

59. One technique the EPA has used to bolster the record of the second round rulemaking is to require, in the settlement agreement itself, that parties submit comments in support of the proposal. See Porcelain Agreement, *supra* note 19.

60. This problem is far less acute when an agency is negotiating on legal positions that do not require the same technical or data support in the record.

61. See *infra* note 87 (discussing APA requirements for publication of statement of basis and purposes concurrently with promulgation of regulation).

62. The preamble to the proposal of iron and steel effluent guidelines merely recites that the proposal is in accordance with a negotiated settlement agreement. In explaining a proposal to modify an existing limitation on the amount of zinc a plant may discharge, the preamble merely states: "In accordance with the settlement agreement, the proposed . . . [discharge limits] for zinc are slightly higher than those contained in the final regulation." 48 Fed. Reg. 46,946 (1983).

63. See *supra* note 20 (discussing settlement agreements providing for voluntary dismissal of petitions for review).

64. In only one case has the EPA rejected or substantially modified the negotiated proposal. See *infra* note 66 (discussing NPDES regulations). Relatively minor changes were also made in the EPA's pretreatment regulations. See *infra* notes 198 to 200 and accompanying text (discussing *National Ass'n of Metal Finishers v. EPA*).

sarily pernicious. Possible changes in any proposal are scrutinized if they are likely to produce litigation.<sup>65</sup>

Indeed, it is the Agency's willingness to modify negotiated proposals which seems surprising. In recently promulgated National Pollutant Discharge Elimination System (NPDES) regulations, for example, the EPA rejected many of the major positions it had negotiated with the parties in litigation challenging the Agency's "consolidated" environmental permit regulations.<sup>66</sup> Still, although the Agency has been willing to reverse a decision contained in a settlement, such changes have involved legal or policy decisions; specific numerical or technical regulations have not been modified on second round promulgation.

#### 4. Regulatory Reform

One aspect of so-called regulatory reform efforts involves review of regulations by executive officials outside of the administrative agency.<sup>67</sup> Executive Order 12,991 establishes procedures by which the Office of Management and Budget (OMB) reviews major regulations to assess their provisions in light of an agency prepared Regulatory Impact Analysis.<sup>68</sup> The Executive Order precludes the agency from publishing proposed or final regulations until the OMB has had an opportunity to review the regulation.<sup>69</sup>

The Executive Order does not, on its face, require the OMB to review proposed settlement agreements, and, as far as the author could determine, the EPA has not submitted such agreements to the OMB before signing them.<sup>70</sup> Review of proposed regulations by the OMB is presumably not intended to be a meaningless exercise. The OMB is authorized to comment on a proposed rule and, if necessary, to delay publication of the rule until its review is concluded.<sup>71</sup> But by the terms of the settlement agreement, and sometimes by judicial order, the Agency is required to propose the regulation notwithstanding comments by the OMB. In most cases, industry concerns have presumably been addressed in the settlement, and the OMB's comments can be taken into account in adopting a final regulation. Nonetheless, settlement agreements can defeat the purpose of some of the Reagan Administration's regulatory reform.<sup>72</sup> Thus, in considering

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65. One commentator noted that he scrutinized changes from the negotiated proposal in the same way he scrutinized a provision of a final regulation he thought could probably lead to litigation. Cherney Interview, *supra* note 45.

66. NPDES Permit Regulations, 49 Fed. Reg. 37,988 (1984) (to be codified at 40 C.F.R. §§ 122-125); see also *infra* notes 198 to 200 and accompanying text (discussing pretreatment settlement agreement in which EPA promulgated virtually all negotiated positions but court concluded that some slight changes opened entire set of regulations to industry challenge). Although the EPA entered into the RCRA-related settlement agreement in 1981, it has not yet proposed the negotiated regulations as required by the agreement; perhaps it has had second thoughts.

67. For a discussion of current regulatory reform proposals, see generally Neustadt, *The Administration's Regulatory Reform Program: An Overview*, 32 AD. L. REV. 129 (1980), reprinted in 5 U.S.C. § 601, at 431-34 (1982).

68. Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

69. *Id.* § 3(c).

70. Several settlement agreements do specifically provide for prompt formal submission to the OMB of the proposed amendments required by the settlement agreement. NPDES Agreement, *supra* note 17, at 2; Porcelain Agreement, *supra* note 19, at 2.

71. Exec. Order No. 12,291, 3 C.F.R. 127, § 3(f).

72. Settlement agreements have sometimes been the basis for the Agency's exempting a regulation from the requirements of Executive Order 12,291. At its adoption in February, 1981, the Executive Order called for a suspension of pending and proposed regulations that were not yet effective. Several exemp-

regulatory "reform" efforts, the President and Congress should be aware of the significance and scope of settlement agreements.<sup>73</sup>

## II. RELATIONSHIP OF SETTLEMENT AGREEMENTS TO PROPOSALS FOR "NEGOTIATED" REGULATIONS

One of the key elements of rulemaking by settlement agreement is the direct negotiations among affected parties which lead to agreement on a second round proposed regulation. Rulemaking by settlement agreement bears a strong resemblance to suggestions for "negotiated" regulations, which seek to cure a supposed "malaise" in the current process of informal rulemaking by using prerulemaking negotiations among selected parties in order to achieve consensus proposals.<sup>74</sup> Indeed, Professor Harter, who drafted the report of the Administrative Conference on the use of negotiated rulemaking, pointed to the use of negotiated settlement agreements as support for the concept of negotiated regulations.<sup>75</sup> There are, however, significant differences between these processes, and a comparison shows both the strength and weakness of rulemaking by settlement agreement.

Proposals for negotiated regulations have several basic elements: 1) identification of regulations suitable for negotiation; 2) selection of a small group of parties, representative of a range of interests, to participate in negotiations; 3) private talks among the parties with the intent to promote compromise; 4) consensus as to the appropriate proposed regulation; and 5) independent exercise of the agency's judgment as to the content of the final regulation. These procedures are intended to avoid the adversarial climate that some claim increases the time and cost of rulemaking and produces extreme regulations.<sup>76</sup>

There are several problems with negotiated regulations, which are avoided by use of the settlement agreement process. First, the process of negotiated regulations is probably illegal. The Federal Advisory Committee Act (FACA),<sup>77</sup> which requires public notice and public access to meetings of a broadly defined group of government "advisory committees," would probably prohibit private

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tions from this requirement were specified, including conflicts "with deadlines imposed by statute or judicial order." The EPA justified excluding several regulatory actions from the suspension because they were required by the specific terms of a settlement agreement.

73. Settlement agreements can affect another major aspect of bureaucratic control. To the extent that a settlement agreement commits an agency to take action within a certain period of time, it can be useful in obtaining funding for the responsible part of the agency. The obligation to commit funds to satisfy the *Flannery Decree* is clear from an order issued by the judge directing the EPA to develop a revised schedule for promulgation of required regulations which "shall reflect all possible internal and external agency actions, under defendants' authority to accomplish or request, for minimizing or eliminating any material effects on the suggested dates caused by resource constraints (both funding and personnel)." Order at 4, *Natural Resources Defense Council, Inc. v. Gorsuch*, No. 2153-73 and consol. cases (D.D.C. May 7, 1982). Scheduling agreements and the *Flannery Decree* process agreement, which require preparation of studies and analyses in support of regulations, may actually be welcomed by some members of the government who receive a bureaucratic benefit from the commitment.

74. The current adversarial nature of informal rulemaking has produced problems often referred as the regulatory "malaise." *American Airlines v. CAB*, 359 F.2d 624, 630 (D.C. Cir.), cert. denied, 385 U.S. 843 (1966); see Harter, *supra* note 2, at 1-28 (discussing problems with current approach to rulemaking).

75. Harter, *supra* note 2, at 36-38 (four prerequisites for successful regulatory negotiation present during negotiated settlement).

76. See Harter, *supra* note 2, at 19-22 (discussing drawbacks of adversarial process).

77. 5 U.S.C. app. §§ 1-15 (1982).

negotiations with a government selected and supervised group of affected parties.<sup>78</sup> Recognizing this problem, the Administrative Conference has called for the amendment of FACA to allow for such meetings.<sup>79</sup> This is not a minor problem because negotiations intended to produce compromise and consensus may need secrecy to be effective.<sup>80</sup> Settlement agreements, however, are developed in the context of ongoing litigation. This offers the possibility of privacy and an established body of rules that secures the confidentiality of settlement discussions.<sup>81</sup>

Second, negotiated rulemaking does not encourage parties to participate. In a world of conflicting interests, it is naive to believe that parties with even closely aligned interests will be able to agree on consensus proposals.<sup>82</sup> This is especially true if consensus involves a trading of interests among parties. Negotiated rulemaking fails to provide the incentive to force tough compromises. This problem is reduced in the context of settlement agreements. In the absence of compromise, parties face both the certainty of the government's existing position on the first round regulation and the prospect of immediate, and potentially vexatious, litigation on those first round regulations.

Finally, negotiated regulations lack perhaps the most important element for successful negotiations—a method of enforcing the consensus agreement.<sup>83</sup> Talk is cheap, but if the government has no incentive to comply and the parties can renege on the agreement by challenging consensus regulations, the prospect of

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78. *Id.* § 10.

79. Administrative Conference, *supra* note 4, at § 2.

80. Almost all commentators on the negotiating process identify secrecy and confidentiality as important elements in reaching successful results. *See, e.g.,* Cohen, *supra* note 2, at 80 (public meetings usually do not provide atmosphere of frank discussion among parties); Compton, *supra* note 2; Harter, *supra* note 2, at 83 (discussing benefits of private negotiations).

81. *See* FED. R. EVID. 408 (evidence of statements of conduct made during negotiations generally inadmissible); FED. R. CIV. P. 68 (evidence of offer to settle claim inadmissible). The Freedom of Information Act (FOIA) also exempts from disclosure material that would not be available to a party in litigation with the agency. 5 U.S.C. § 552(b)(5) (1982); *see* EPA v. Mink, 410 U.S. 73, 85-89 (1973) (construing § 552(b)(5)).

Although FACA seems broad enough to include groups established to negotiate regulations, the status of settlement negotiations as adjuncts to court proceedings should exempt these talks from the reach of the statute. Such groups may be excluded from the definition of "advisory committee." 5 U.S.C. app. § 3(2) (1982); *see* Lombardo v. Handler, 397 F. Supp. 792, 800 (D.D.C. 1976) (committee on Motor Vehicle Emissions of National Academy of Sciences not "advisory committee" under FACA). Or these negotiations may be subject to the provisions of FACA that incorporate the FOIA exemptions from disclosure, including exclusion of materials not discoverable during litigation. 5 U.S.C. app. § 10(b) (1982).

82. One EPA lawyer noted that in the negotiations on RCRA landfill regulation only 10 out of 150 issues were common to more than 5 parties. Interview with Mark Greenwood, Esq. (July 30, 1984) (copy on file at *Georgetown Law Journal*) [hereinafter cited as Greenwood Interview]. In some of the major settlement negotiations, industry parties have tried to minimize their conflicts by forming an industry steering committee to develop consensus proposals. This has not always worked, and in several agreements individual industries would not accept the negotiated position. *See* NPDES Agreement, *supra* note 17.

83. Professor Harter recognizes that effective negotiations depend on assurance that an agreement will be implemented. Harter, *supra* note 2, at 51. Nowhere in the proposal for negotiated regulations, however, is there any enforceable commitment from the agency that it will at least propose the consensus regulations or from the parties that they will not challenge their own proposal. Assurance of implementation seems to rest on the good faith of the parties, represented by their active participation in the negotiation process. Some benefit of participation is provided through Professor Harter's recommendation that negotiated regulations be subject to a relaxed standard of judicial review. *But see infra* notes 237 to 247 and accompanying text (discussing standards of judicial review of agency rulemaking).

using negotiated regulations effectively is dim. As discussed below, settlement agreements are implemented by consent judgment or stay of litigation and are premised on an enforceable promise that the plaintiffs will dismiss litigation if the negotiated proposal is adopted.

A major weakness of rulemaking by settlement agreement is, of course, that it occurs after the government has already gone through the time and expense of developing the first regulation. Thus, although settlement negotiations may produce the perceived advantages of consensus regulation, they do so at a far greater cost than negotiated regulations. Further, the strengths of rulemaking by settlement agreement are perhaps its greatest weaknesses. Settlement agreements work because of their secrecy and enforceability. Both of these "advantages" raise questions about the legitimacy of the process and the final regulations it produces.

### III. VALIDITY OF REGULATIONS ISSUED THROUGH THE SETTLEMENT PROCESS

Regulations developed through informal rulemaking are a major method by which the federal government establishes requirements for private conduct.<sup>84</sup> Through the notice and comment procedures specified by the APA, a federal agency can obtain necessary information from affected parties. By publishing a statement of basis and purpose, the agency gives the public an understanding of its rationale and the courts a basis for judicial review.

There are few APA procedures for informal rulemaking. Section 553 merely requires that notice of the proposed rule be published,<sup>85</sup> that interested persons be offered an opportunity to submit comments,<sup>86</sup> and that the agency, after consideration of relevant matters, develop the rule and incorporate a concise statement of basis and purpose.<sup>87</sup> Although courts had begun to expand procedures

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84. As one commentator remarked, "Most observers will concede that the legislating role practiced by the Agencies exceeds in detail and volume that which Congress could practicably do." J. O'REILLY, *supra* note 6, at 2. Federal agencies generally adopt requirements either through the formal rulemaking provisions of § 553, or the process of adjudication specified in § 554.

85. 5 U.S.C. § 553(b) (1982). The APA provides that this notice shall be "sufficient to fairly apprise interested parties of the issue involved." In reviewing the adequacy of the content of a proposal, courts have focused on whether the notice provides enough information to give the public an opportunity to comment fully on the issues raised by the proposal. See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973) (EPA did not provide manufacturer with sufficient detail regarding test and methodology to allow adequate opportunity to comment), *cert. denied*, 417 U.S. 921 (1974). Notice is generally satisfied by publication in the Federal Register. 44 U.S.C. § 1507 (1982); see *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947) (appearance of rules and regulation in Federal Register gives legal notice of contents).

86. 5 U.S.C. § 553(c) (1982). The APA requires at least 30 days for public comment. *Id.* § 553(d). A longer period may sometimes be needed to comment on new information. See *Portland Cement*, 486 F.2d at 393 (manufacturer not given enough time to comment on proposed rule).

87. 5 U.S.C. § 553(c) (1982). Although § 553(c) requires the publication of a "concise . . . statement of . . . basis and purpose" in the final rule, the scope of that requirement is not well defined. It is clear that an agency is limited in its ability to justify a regulation based on so-called "post-hoc" rationalizations. See *Ethyl Corp. v. EPA*, 541 F.2d 1, 13 (D.C. Cir.) (under Clean Air Act, EPA must make threshold determination that substance "poses significant risk of harm" before promulgating regulation), *cert. denied*, 426 U.S. 941 (1976). Preambles also form an important part of an agency's explanations of the rationale for its decisions. The preamble is not the complete record of the decision, however, and rulemaking files also are an important aspect of agency justification of its action. See Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 79 (1975) (proposing filing or docket system in



in light of presumed inadequacies of the APA,<sup>88</sup> the Supreme Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*<sup>89</sup> called a halt to this development of so-called "hybrid rulemaking" by holding that in virtually all cases, the minimal requirements of the APA defined the procedures necessary for informal rulemaking.<sup>90</sup>

Settlement agreements generally provide for APA-required notice and comment procedures before a final second round rule is adopted. If the APA defines the minimum requirements of informal rulemaking and second round rules are developed in compliance with the APA, what concerns can there be about the legal validity of the settlement agreement process or the final regulations it produces?

Settlement agreements implicate several issues regarding informal rulemaking. For those portions of an agreement which call for notice and comment procedures, the issues include the agency's vested interest in adopting the proposed second round rule, the possible limitations of the agency's discretionary power, and the exclusion of interested parties from development of the settlement agreement. For those portions of an agreement that call for immediate issuance of guidance or agency position memoranda, the question is whether these documents are rules subject to APA notice and comment requirements.

#### A. VESTED INTEREST IN ADOPTING PROPOSED RULE

A disturbing aspect of rulemaking by settlement agreement is the agency's incentive to adopt a proposed second round regulation without significant revision. If the agency adopts the proposed regulation, it knows the lawsuit will be dismissed or at least some issues will not be litigated.<sup>91</sup> This raises the question whether this vested interest has improperly biased the agency's review during the second round rulemaking.<sup>92</sup> If nothing else, the agency's appearance of fairness and good faith in the conduct of the second round rulemaking is in question.

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which documents would be stored; files would be closed after promulgation of final rule and would serve as basis for judicial review).

88. See *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 630 (D.C. Cir. 1973) (in controversial rulemaking governing competitive practices, legislative-type hearing required beyond minimum opportunity for comment provided by APA). See generally Williams, *Hybrid Rulemaking Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401 (1975).

89. 435 U.S. 519 (1978). See also Byse, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823 (1978); Rogers, *A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny*, 67 GEO. L.J. 699 (1979).

90. *Id.* at 548; see generally Scalia, *Vermont Yankee: The APA, the D.C. Circuit and the Supreme Court*, 1978 SUP. CT. REV. 345 (1978).

91. Of course the fact that most proposals based on settlements are adopted unchanged does not mean that the agency has acted improperly. One explanation is that the proposals are unchanged because the agency, in negotiations with the affected parties, has finally made the right decision. See *supra* notes 49 to 57. These second round regulations, however, represent a change from the position the agency initially identified as appropriate. The agency, of course, does not agree to modify or even negotiate all of the positions it takes. Considering the manner in which the regulations were developed, the legitimacy of the second round rulemaking and the good faith of the agency in conducting that rulemaking are open to question.

92. Agency decisions on the content of final regulations are inevitably based in part on the likelihood that a rule will provoke litigation. In the case of rulemaking by settlement agreement, however, the agency is compromising previously adopted positions to comply with a specific and enforceable deal. Although the effect of the agreement, compared to some unenforceable understanding by the agency of the likelihood of litigation, may be one of degree, such distinctions are the stuff of due process. The concern about an agency's vested interest is hardly frivolous. As discussed above, in only a limited

The APA does not specifically require impartial decision makers in informal rulemaking.<sup>93</sup> Although statutes and agency rules prohibit direct financial conflict of interest,<sup>94</sup> no regulation or statute directly limits the types of bias or vested interest suggested by rulemaking through settlement agreement. Any limitation on decision making by a biased decision maker or agency must be found, if at all, in principles of due process.<sup>95</sup>

Due process constraints, including limitations on decision making by biased officials, have been articulated in the context of adjudicatory, or trial type, proceedings.<sup>96</sup> Both legislative activity and the quasilegislative activity of informal rulemaking, however, have traditionally been subject to few if any due process requirements.<sup>97</sup> In part this is based on a view of the "legislative" aspect of rulemaking, which frequently involves general "legislative" facts and policy questions which are applicable to a large class of people and which would not benefit from application of due process protections in factfinding.<sup>98</sup> It is also based on a view that legislative activity inherently contains elements of bias. To

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number of settlements has the agency not promulgated final rules substantially identical to the negotiated position. See *supra* note 66 and accompanying text.

93. Compare APA § 554(d) and § 556(b) with § 553. Section 554(d) establishes requirements for impartiality of decision makers in the context of formal rulemaking where a hearing is required to be made on the record. 5 U.S.C. § 554(d) (1982). Similarly, § 556(b) provides for removal of a presiding or participating agency employee in "on the record" proceedings on a showing of "personal bias or other disqualification." *Id.* § 556(b). Section 553, however, contains no similar requirement of impartiality.

94. See, e.g., 18 U.S.C. § 208 (1982); 5 C.F.R. §§ 401-412 (1985); 5 C.F.R. §§ 735.201-210 (1985); see generally Strauss, *Disqualification of Decisional Officials*, 80 COLUM. L. REV. 990, 997-1002 (1980).

95. In *Vermont Yankee*, the Supreme Court strongly indicated that courts are not free to fashion additional procedural constraints on agency rulemaking beyond the minimum specified in the APA. 435 U.S. at 549. Thus, any additional requirements on decision makers will be constitutionally based if they are to be found at all. Although the Court did not completely foreclose the possibility of such additional requirements, it strongly suggested that they would be required only in extremely compelling circumstances. *Id.* at 543.

96. A series of cases indicated that in the adjudicatory context demonstration of some form of closed mind or prejudice of specific adjudicative facts may be grounds for disqualifying a decision maker. See *Cinderella Career & Finishing Schools v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (public speeches by chairman constituted impermissible bias and violation of due process); *Pillsbury v. FTC*, 354 F.2d 952, 963-65 (5th Cir. 1966) (pointed questioning by Senate subcommittee of hearing examiner before decision rendered violated due process); *Texaco v. FTC*, 336 F.2d 754 (D.C. Cir. 1964) (Chairman's statement concluding oil company violated Act constituted denial of due process where case before FTC hearing examiner), *vacated on other grounds*, 381 U.S. 739 (1965); cf. *FTC v. Cement Inst.*, 333 U.S. 683 (1948) (FTC not disqualified from adjudication where it had previously expressed opinion on issues).

97. Due process limitations on legislative activity are less stringent than those on adjudicative actions. See *Philly's v. Byrne*, 732 F.2d 87, 92 (7th Cir. 1984) (notice and opportunity for hearing not required in legislative action). See generally Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976). As the Supreme Court has stated, control over the legislative process may be exercised and the rights of individuals protected "in the only way that they can be in complex society, by their power, immediate or remote, over those who make the rule." *Bi-Metallic Inv. Co. v. Colorado*, 239 U.S. 441, 445 (1915). Informal rulemaking, distinguished by its focus on legislative rather than adjudicative facts, has many of the characteristics of legislative activity. Strauss, *supra* note 94, at 993-97. Bias, or at least a significant commitment to a rule prior to its promulgation, is also inherent in the rulemaking process. *Id.* As Judge Leventhal noted, "one cannot even conceive of an agency conducting a rulemaking proceeding unless it had delved into the subject sufficiently to become concerned that there was an evil or abuse that required regulatory response." *Association of Nat'l Advertisers v. FTC*, 627 F.2d 1157, 1176 (D.C. Cir. 1979) (Leventhal, J., concurring), *cert. denied*, 447 U.S. 921 (1980). Although there may be a basis for distinguishing rulemaking from legislating, see Linde, *supra*, at 225-30, or distinguishing rulemaking decisions involving legislative as opposed to adjudicative facts, see Strauss, *supra* note 94, at 1041-43, the basic issue of applying procedural due process limits to rulemaking is still being resolved in the courts. See *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1179-80 (D.C. Cir.) (due process requirement may differ between adjudication and rulemaking), *cert. denied*, 449 U.S. 1042 (1980).

98. See 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 15.03 (1958). Compare *Bi-Metallic*, 239 U.S.

a certain extent, elected officials and officials of administrative agencies are expected to implement preexisting policy biases.<sup>99</sup> Certainly one hopes that the Administrator of the EPA is implementing a "bias" of the Agency in favor of protection of the environment. Bias exists in rulemaking even beyond these general policy views. In the context of individual rulemaking, agencies announce a preferred position through proposed rules before they decide on a final regulation.

Informal rulemaking by settlement agreement, however, suggests a type of bias different from that normally encountered in rulemaking. First, it involves an unusually intense commitment to a proposal because the agency knows the litigation will be dismissed if the proposal is adopted. Second, it indicates the intrusion of factors unrelated to the merits of the proposal into the development of the final rule.

It is extremely unlikely, however, that a court would invalidate a regulation on due process grounds, despite bias in the settlement agreement process. Case law concerning decision makers with announced bias in individual rulemaking proceedings and institutional bias in adjudications suggests factors that may be considered in determining whether the vested interest reflected in rulemaking by settlement agreement violates due process. But the case law indicates that due process limits, if they exist at all, could only be reached on an extraordinary showing of bias.

Attention has focused recently on rulemaking by decision makers with announced policy bias.<sup>100</sup> In *Association of National Advertisers v. FTC*,<sup>101</sup> the Court of Appeals for the District of Columbia articulated a very stringent test to invalidate rulemaking on this basis.<sup>102</sup> In *National Advertisers*, several advertising associations challenged the participation of the chairman of the FTC in decisions on a rule, proposed under the Magnuson-Moss Federal Trade Commission

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at 445 (no prior right to be heard where rule is of general applicability) with *Londoner v. Denver*, 210 U.S. 373, 385-86 (1908) (prior right to be heard where taxation measure affects particular group of people).

99. Legislators are elected precisely because they have articulated positions on public issues. See Linde, *supra* note 97. This can raise questions when these legislators are placed in the role of adjudicators. See *Marmah v. Greenwich*, 176 Conn. 116, 123-24, 405 A.2d 63, 67-68 (1978) (zoning commission acted illegally in changing zoning regulations primarily to bar particular project).

In discussing why administrative decision makers are not disqualified for alleged policy bias in rulemaking, the court in *Lead Indus. Ass'n v. EPA* wrote, "The rule could hardly be otherwise, particularly with respect to administrative agencies which are created for the specific purpose of accomplishing certain tasks. Agency decisionmakers are appointed precisely to implement statutory programs, and so inevitably have some policy preconceptions." 647 F.2d at 1179. See also *United Steel Workers of Am. v. Marshall*, 647 F.2d 1189, 1209 (D.C. Cir. 1980) (administrator not disqualified because of strong public position taken), *cert. denied sub nom. Lead Indus. Ass'n v. Donovan*, 453 U.S. 913 (1981); *Carolina Envtl. Study Group v. United States*, 510 F.2d 796, 801 (D.C. Cir. 1975) (agency officials need not be impartial).

100. See *United Steelworkers of Am.*, 647 F.2d at 1208-09 (prior public statements insufficient to overcome presumption of official's fairness); *National Advertisers*, 627 F.2d at 1154 (prior public statements inadequate to disqualify chairman of FTC without clear showing of "unalterably closed mind"). See also Strauss, *supra* note 94; Note, *Bias in Administrative Rulemaking After Association of National Advertisers v. FTC*, 54 NOTRE DAME LAW. 886 (1979); Recommendation of the Administrative Conference of the United States, Recommendation 80-4, 1 C.F.R. § 305.80-4 (1985).

101. 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980).

102. In *Lead Indus. Ass'n v. EPA*, the court noted that "Ass'n of Nat. Advertisers, Inc. v. FTC . . . is the only case we know of in which an agency decisionmaker has been disqualified from participating in a rulemaking proceeding on prejudgment grounds." 647 F.2d at 1179 n.151. See generally Koch, *Prejudgment: An Unavailable Challenge to Official Administrative Action*, 33 FED. B.J. 218 (1974).

Improvement Act,<sup>103</sup> to limit television advertising directed at children. The plaintiffs claimed that the Chairman's prior statements, in which he indicated his belief that such a regulation was necessary, constituted impermissible bias. The district court, relying on a bias standard developed in adjudicatory proceedings, held that the Chairman "has prejudged and given the appearance of having prejudged issues of fact involved in a fair determination of the Children's Advertising rulemaking proceeding."<sup>104</sup>

The court of appeals reversed, concluding that although bias might in some cases disqualify a decision maker from the rulemaking process, as to these proceedings a commissioner should be disqualified only when there has been a "clear and convincing" showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding.<sup>105</sup> The court stated that "[t]he 'clear and convincing' test is necessary to rebut the presumption of administrative regularity. The 'unalterably closed mind' test is necessary to permit rulemakers to carry out their proper policy-based functions while disqualifying those unable to consider meaningfully a section 18 hearing."<sup>106</sup>

This conclusion was based on the essentially legislative character of the rulemaking. The *National Advertisers* court recognized a distinction between specific adjudicative facts and the more policy-related legislative facts normally implicated in rulemaking. It stated that the "view of a neutral and detached adjudicator is simply an inapposite role model for an administrator who must translate broad statutory commands into concrete social policies."<sup>107</sup> Although the case dealt with formal rulemaking mandated by the Magnuson-Moss Act, the court's logic should apply to informal rulemaking.

Agencies as a whole may be biased, and courts have in some situations reviewed the problem of "institutional" bias. As one court noted, "When Congress creates an agency with an express mission . . . the agency officials will almost inevitably form views on the best means of carrying out the mission."<sup>108</sup>

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103. 15 U.S.C. § 57(a) (1982).

104. 460 F. Supp. 996, 997 (D.D.C. 1978). The court concluded that the rulemaking in this case had the characteristics of an adjudicatory proceeding and then asked "whether 'a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'" *Id.* (quoting *Cinderella Career & Finishing Schools*, 425 F.2d at 591).

105. 627 F.2d at 1168-69. The Magnuson-Moss Federal Trade Commission Improvement Act includes many elements similar to on-the-record rulemaking. The Act, however, does not contain any explicit requirement of impartiality. One issue in the case was whether the quasiaudicatory procedures in the Act converted the rulemaking into an adjudicatory act. The court of appeals rejected this position, concluding that "[t]he proceeding is not adjudication or quasi-adjudication. It is a clear exercise of the Commission's rulemaking authority." 627 F.2d at 1161.

One question is whether the decision in *National Advertisers* is limited to the specific situation of rulemaking under the special procedures of the Magnuson-Moss Act. Although the court found that the procedures of the Magnuson-Moss Act did not convert the rulemaking into an adjudication per se subject to limitations developed in the adjudicatory context, the court's decision was in part colored by the procedures and the history of the Act. Indeed, one commentator has stated, "Despite the trappings of constitutional language and evident concern of the judges for 'fairness,' the decision in ANA is best understood as a statutory holding only." Strauss, *supra* note 94, at 1034-35.

106. 627 F.2d at 1170.

107. *Id.* at 1168-69.

108. *United Steelworkers of Am.*, 647 F.2d at 1209; see also *Lead Indus. Ass'n v. EPA*, 647 F.2d at 1179 (agency decision makers inevitably have policy preconception because appointed to implement programs). In addition to such policy bias, issues of institutional bias stemming from the combination of investigative and adjudicatory functions have arisen. In *Withrow v. Larkin*, 421 U.S. 35 (1975), the Court reviewed

In reviewing claims of institutional bias, courts have not focused on the subjective impartiality of decision makers, but rather have focused on good faith compliance with applicable procedures.<sup>109</sup> In *Carolina Environmental Study Group v. United States*,<sup>110</sup> for example, the validity of construction permits issued to a nuclear power plant by the Atomic Energy Commission (AEC) was challenged in part on a claim that the AEC, then responsible for both the promotion and regulation of nuclear power, had displayed an institutional bias in favor of nuclear power. The court stated that "agencies are required to consider in good faith, and to objectively evaluate, arguments presented to them," but found that the AEC had provided all parties a full opportunity to present their views and that nothing suggested that plaintiffs had been denied the "fair play" that due process requires.<sup>111</sup> The court held that this satisfied due process requirements despite the possible partiality of Agency officials.

One other factor is particularly relevant in determining whether the institutional bias of an agency should preclude it from acting. The "rule of necessity" provides that actions by potentially biased decision makers must be allowed if they are the only group empowered to make the decision.<sup>112</sup> In *FTC v. Cement Institute*,<sup>113</sup> the Supreme Court considered whether the FTC's determination that a practice violated the antitrust laws was invalid because the members of the Commission had publicly characterized the practice as price fixing. The Court observed that the statements did not mean the members' minds were "irrevocably" closed, and that disqualification of the entire Commission would effectively immunize the trade association from regulation.<sup>114</sup> Where an agency has the sole responsibility for adopting a regulation, it is difficult to limit the agency's authority to act because of bias.

An agency's adoption of a second round rule should usually be upheld under due process requirements. Compliance with APA procedures should rebut any suggestion of impropriety. Notice and comment procedures will give the public an opportunity to present its views. The requirement of a reasoned statement of basis and purpose will give the agency an opportunity to respond to any significant comments and present the basis for its decision. Where an agency has not adequately justified its final regulation, judicial review of the regulation should prevent agency arbitrariness.<sup>115</sup> Aside from a smoking gun indicating an agency's unwillingness to consider reasonable views because of its interest in the

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cases in this area and concluded that combination of functions in adjudicatory proceedings did not give rise to a per se presumption of violation of due process. *Id.* at 46-55; see also *Cement Inst.*, 333 U.S. at 700-03 (no due process violation where FTC adjudicated cases it had also investigated); *Pangburn v. CAB*, 311 F.2d 349, 356 (1st Cir. 1962) (combination of investigative and judicial functions within agency does not violate due process). In the federal context, the APA requires separation of functions for individuals participating in adjudicatory proceedings. 5 U.S.C. § 554(d) (1982). No such statutory requirements apply, however, to informal rulemaking. *Lead Indus. Ass'n v. EPA*, 647 F.2d at 1179 n.151. See generally Pedersen, *The Decline of Separation of Functions in Regulatory Agencies*, 64 VA. L. REV. 991 (1978).

109. *Cement Inst.*, 333 U.S. at 701; *United Steelworkers of Am.*, 647 F.2d. at 1209; *Carolina Envtl. Study Group*, 510 F.2d at 801.

110. 510 F.2d 796 (D.C. Cir. 1975).

111. *Id.* at 801.

112. *Evans v. Gore*, 253 U.S. 245, 247 (1920).

113. 333 U.S. 683 (1948).

114. *Id.* at 701.

115. See *infra* notes 237 to 247 and accompanying text (discussing standards of judicial review of final agency regulations).

settlement agreement, it is hard to imagine a set of facts indicating that the agency has acted in bad faith, and that its bias is so strong that its mind is unalterably or irrevocably closed.<sup>116</sup>

#### B. LIMITATION ON AGENCY DISCRETION

When the agency enters into a substantive settlement agreement, it commits itself to taking actions—such as proposing a specific regulation or guidance document—that are not required by law but that have been committed by Congress to the agency's discretion. Although the agency at least nominally retains its discretionary authority to decide the content of final rules, and presumably to modify regulatory guidance, it has limited some of its discretionary power by agreeing to take these actions.<sup>117</sup> In question is the scope of an agency's power to bind itself to take actions otherwise committed to its discretion, or as Judge Skelly Wright described the issue, "the power of the Executive Branch to restrict its exercise of discretion by contract with a private party."<sup>118</sup>

In *Citizens for a Better Environment v. Gorsuch*,<sup>119</sup> the Court of Appeals for the District of Columbia considered whether the *Flannery Decree* impermissibly limited agency discretion.<sup>120</sup> Noting that the agreement limited the Agency's discretion to some extent,<sup>121</sup> the *Citizens* court nonetheless upheld the district court's approval of the consent decree, primarily because the terms of the decree were shaped by the EPA and voluntarily agreed to by the Agency. The court distinguished cases that limited a district court's authority to impose a judgment compelling federal agencies to take actions otherwise committed to their discretion.<sup>122</sup> The court also noted that Congress had implicitly sanctioned the agreement when amending the Clean Water Act in 1977.<sup>123</sup>

Judge Wilkey, in dissent, concluded that a consent decree embodying an agreement of this kind was an impermissible infringement of agency discretion.

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116. Judge MacKinnon, in his dissent in *National Advertisers*, stated that the majority's test, which required proof of an unalterably closed mind, "in many cases is practically impossible to prove, imposes too high a barrier to the public's obtaining fair decisionmakers . . ." 627 F.2d at 1181 (MacKinnon, J., dissenting).

117. The agency agrees to propose a regulation on a subject that often is subject to its discretionary control. For example, not all of the permit requirements that EPA agreed to propose in the NPDES Agreement involved subjects which the Agency was under a nondiscretionary duty to address. See *supra* note 17. Similarly, a substantive agreement binds the agency to propose specific language, the content of which is normally within the agency's discretion. And having promulgated the rule, the agency must follow APA procedure and justify in its statement of basis and purpose its rationale for adopting or modifying the proposal. 5 U.S.C. § 553 (1982). Finally, these substantive agreements often bind the agency to publish immediately specific legal interpretations, the content of which are otherwise within its discretion. See *infra* notes 185 to 191 and accompanying text.

118. *National Audubon Soc'y, Inc. v. Watt*, 678 F.2d 299, 301 (D.C. Cir. 1981).

119. 718 F.2d 1117 (D.C. Cir. 1983), *cert. denied sub nom. Union Carbide Corp. v. Natural Resources Defense Council, Inc.*, 104 S. Ct. 2668 (1984).

120. *Id.* at 1127-30.

121. *Id.* at 1127. Although this case dealt with a "process" decree, the court's analysis is relevant to substantive agreements. It is true that the process agreement at issue differs from a substantive agreement in several respects. The *Flannery Decree* does not require that the Agency propose or adopt any specific regulation, but rather requires that the Agency take certain steps to develop a regulation, outline the legal approach to be used in developing the regulation, and specify the date by which certain actions, including promulgation of the final regulations, are to be completed. See *supra* note 11. A substantive agreement, however, has similar consequences.

122. See *infra* note 132.

123. 718 F.2d at 1129-30.

The judge considered this question in the context of a consent judgment, which he characterized as a "judicial act" and "not a contractual settlement agreement."<sup>124</sup> Under these circumstances, he found that the consent decree was an impermissible, presumably unconstitutional, action by the district court.

Noting the difficulty of distinguishing between "substantive" and "procedural" requirements, Judge Wilkey rejected the Agency's arguments that the consent decree specified only procedural obligations.<sup>125</sup> He dismissed arguments that the EPA had consented to the judgment by indicating that the decree would bind subsequent administrations.<sup>126</sup> The judge concluded that the decree was beyond the equitable powers of the trial court because it mandated acts committed to agency discretion.<sup>127</sup>

Judge Wilkey saved his strongest language for his views on the implications of such consent decrees. The judge stated that "[t]he greatest evil of government by consent decree, however, comes from its potential to freeze the regulatory processes of representative democracy."<sup>128</sup> He identified three consequences of this evil, including the difficulty of citizens to monitor the decrees, the inhibition of congressional influence on agency action, and the hindering of Executive Branch control over agency policy.<sup>129</sup>

Notwithstanding Judge Wilkey's impassioned dissent, the majority in this case correctly concluded that settlement agreements will not normally interfere with the exercise of agency discretion. It may be more appropriate to characterize them as an exercise of agency discretion. Implementation of an agency decision through a settlement agreement should not be unconstitutional, as long as the content of the agreement is within the scope of permissible options available to the agency and the requirements of the agreement do not contravene the requirements of the APA. Nonetheless, some of the concerns expressed by Judge Wilkey deserve comment.

### 1. Coercive or consensual

Judge Wilkey characterized the *Flannery Decree* as a judicial act and not a contractual settlement agreement.<sup>130</sup> Apparently, he concluded that the trial court's review and apparent modification of some portions of the agreement converted this voluntary settlement into a court-imposed obligation.<sup>131</sup>

If the decree imposed requirements contrary to the EPA's wishes, there would be serious questions whether the trial court had the authority to coerce specific actions otherwise committed to agency discretion.<sup>132</sup> It is difficult, however, to

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124. *Id.* at 1130 (Wilkey, J., dissenting).

125. *Id.* at 1133-34.

126. *Id.* at 1135.

127. *Id.* at 1134.

128. *Id.* at 1136.

129. *Id.*

130. *Id.* at 1134.

131. *Id.* at 1130. Judge Flannery reviewed the original settlement agreement and required changes before he would adopt the agreement as a consent judgment of the court. See *Natural Resources Defense Council, Inc. v. Train*, 8 Env't Rep. Cas. (BNA) 2120, 2121 (D.D.C. 1976).

132. Although the majority and dissent disputed the proper characterization of the consent decree, they both recognized that court-ordered relief not consented to by the government, which infringed the exercise of judgment committed to agency discretion, was impermissible. 718 F.2d at 1128, 1131. In *National Ass'n of Postal Supervisors v. United States Postal Serv.*, 602 F.2d 420 (D.C. Cir. 1979), for

characterize the provisions of the consent decree as nonconsensual. These provisions were the product of long negotiations among the parties to the litigation and were presented to the court as a settlement before the court had ruled on the merits of the litigation.<sup>133</sup> Although the court reviewed the propriety of the settlement and made some alterations, these alterations mainly limited the court's role in supervision of the agreement. The court was seeking to make the agreement less rather than more restrictive of the Agency's ability to exercise its ultimate discretion on the merits of any final regulation.<sup>134</sup> It was undisputed that the Agency supported the final modified agreement.<sup>135</sup>

A court's role in shaping an agreement does not make the agreement coercive. It is in the nature of negotiations that parties may be presented with nonnegotiable conditions. Although additional conditions may have been required by the trial court, the EPA presumably could have rejected the decree and litigated the merits. Its decision to accept the consent decree was no different from the Agency's decision to accept conditions important to other parties. This choice is what distinguishes a consent judgment from a court-imposed judgment on the merits.<sup>136</sup> Court review and even modification of a settlement agreement should not turn a voluntary agreement into a court-imposed judgment.<sup>137</sup>

## 2. Judgment or Stay

As noted above, the EPA has implemented settlement agreements both as consent judgments and as the basis for stays of litigation. In perhaps the most interesting portion of his dissent, Judge Wilkey concluded that the consent decree was impermissible because it took the form of a consent judgment rather than a stay of litigation. He explicitly stated that "the agency could . . . have agreed to issue proposed regulations, with the litigation held in abeyance pending the issuance of the regulations."<sup>138</sup> Whether by consent judgment or stay of litigation, an agency has committed itself to follow a particular course of action. Do the

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example, the court dealt with a district court order that required the postal service to maintain a specific salary differential of 25% between management and rank-and-file workers. The court held that the order was improper because the postal service was vested with broad discretion over internal management. *Id.* at 420; see also *Public Service Comm'n v. Federal Power Comm'n*, 543 F.2d 757 (D.C. Cir. 1974) (exercise of statutory discretion by Federal Power Commission presumed valid without showing of unjustness or unreasonableness). See generally Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982) (trial court's exercise of remedial discretion appropriate only when political bodies that should ordinarily exercise this discretion are seriously and chronically in default); Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 61 (1978) (courts should limit equitable relief function by reference to separation of powers and relative intrusiveness).

133. *Natural Resources Defense Council, Inc. v. Gorsuch*, 16 Env't Rep. Cas. (BNA) 2085, 2086 (D.D.C. 1982).

134. *Natural Resources Defense Council, Inc. v. Train*, 8 Env't Rep. Cas. (BNA) at 2121.

135. As the EPA noted in a submission to the district court, "the then-Administrator not only consented to its terms in order to avoid risks of continued litigation, but exercised his independent judgment that the decree provided an appropriate means of implementing the [Clean Water] Act." *Natural Resources Defense Council, Inc. v. Gorsuch*, 16 Env't Rep. Cas. (BNA) at 2087.

136. See *United States v. Ward Banking Co.*, 376 U.S. 327 (1964) (district court may not enter consent judgment where government seeks relief to which it may be entitled and does not agree to terms of such judgment).

137. See *infra* notes 232 to 236 and accompanying text (discussing role of court in reviewing substance of settlement agreements).

138. *Citizens*, 718 F.2d at 1135 n.35.



differences in form justify characterizing a consent decree as a threat to representative democracy?

There are several differences between a consent judgment and a stay that may be significant in this context. A trial court may have greater authority to review a consent decree than it does to review a stay. Because a consent decree is an order of the court,<sup>139</sup> the court may review such a decree to determine if it is in the "public interest."<sup>140</sup> A stay of litigation, however, is not issued as of right to consenting parties. The court presumably has authority to review the grounds for the motion for a stay to determine if it should be granted, and also can review the merits of the settlement agreement.<sup>141</sup> Whatever the utility of such a review, judgment and stay are probably not different enough on this ground to warrant different treatment of settlement agreements.

A second distinction between a consent judgment and a stay involves the ability of the agency to modify provisions of the agreement. A court can modify a consent judgment if circumstances have changed sufficiently.<sup>142</sup> In implementing the *Flannery Decree*, the judge said he was willing to consider requests by the EPA for modifications.<sup>143</sup> If the agency seeks modification of an agreement contained in a stay, it would (if compliance with the agreement were a condition of the stay) have to file a motion with the court to alter the terms or duration of the stay. Unlike a consent judgment, the judge could grant the motion without finding changed circumstances.

A final distinction between a consent judgment and a stay involves the sanctions for noncompliance with the agreement. Ultimately the value of the decree, as Judge Wilkey notes, "depends on the court's willingness to enforce it should the agency wish to adopt other procedures consistent with the act."<sup>144</sup> If the agency could not repudiate or modify its position without incurring sanctions, its ability to exercise independent discretionary authority conferred by Congress would be seriously limited. Thus, the question of limitation of agency discretion hinges on sanctions for noncompliance with an agreement.

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139. As one court stated, "When a court has entered a consent judgment, it has made an adjudication." *Brunswick Corp. v. Chrysler Corp.*, 408 F.2d 335, 337 (7th Cir. 1969); *see also* *United States v. International Bldg. Co.*, 345 U.S. 502, 506 (1952) (judgment entered with consent of parties may involve determination of fact and law by courts); *United States v. Swift & Co.*, 286 U.S. 106, 112 (1932) (consent decree is definitive adjudication).

140. *See infra* note 232 and accompanying text.

141. As one commentator has noted:

All courts, federal and state, have a broad and inherent power to control their own processes to prevent abuse, oppression, or unnecessary hardship, and to do substantial justice. Included within this broad power is a general power to stay an action pending before it, as incidental to control over causes on the court's docket, when reasonably exercised in light of all competing interests.

1A J. MOORE & B. RINGLE, *MOORE'S FEDERAL PRACTICE* § 0.204 (1983) (footnotes omitted); *see also* *FED. R. CIV. P.* 6(b); *FED. R. APP. P.* 26(b).

142. *See* *System Fed'n No. 91, Ry. Employees' Dept. AFL-CIO v. Wright*, 364 U.S. 642, 653 (1961) (consent decree forbidding employer railroad from discriminating against nonunion employees modified after legislation prohibiting union shop agreements amended to permit such agreements); *United States v. Swift & Co.*, 286 U.S. at 117-18 (consent decree dissolving monopolistic combination of meat packers not modified to include wholesaling of groceries because no proof that reasons for restraint had vanished).

143. *Natural Resources Defense Council, Inc. v. Gorsuch*, 16 Env't Rep. Cas. (BNA) at 2089.

144. *Citizens*, 718 F.2d at 1131 n.4.

### 3. Sanctions for Noncompliance

There is a potentially critical difference between sanctions for noncompliance with a consent judgment and sanctions for noncompliance with an agreement embodied in a stay of litigation. The terms of a consent judgment, issued as an order of the court, can be enforced through the contempt power of the court.<sup>145</sup> This can be a major limitation on the agency's ability to change its mind about the provisions of a settlement agreement.<sup>146</sup> On the other hand, noncompliance with a settlement agreement that forms the basis for a stay would presumably only dissolve the stay and accelerate the underlying lawsuit. In such a case the agency is back in its presettlement position, and the agreement itself should not be seen as a significant limitation on the agency's ability to change its mind.

Since the settlement agreement is in the form of a contract among the parties, the question is whether the other parties could bring an action against the agency for breach of the agreement.<sup>147</sup> If specific performance is available to enforce the underlying contractual settlement agreement, the distinction between a consent judgment and a stay seems minor.

Judge Wilkey cites an earlier District of Columbia Circuit case involving a voluntary settlement agreement that the court said raised "potentially serious constitutional questions about the power of the Executive Branch to restrict its exercise of discretion by contract with a private party."<sup>148</sup> In *National Audubon Society, Inc. v. Watt*,<sup>149</sup> the court was asked to decide whether to enforce a voluntary agreement between the Audubon Society and the Secretary of the Interior, designed to resolve the Audubon Society's challenge to the government's plans to construct a water diversion project.<sup>150</sup> The agreement provided, among other things, that litigation would be suspended and that the government would

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145. 18 U.S.C. § 401 (1982). This contempt power is available even in the context of negotiated consent decrees. See *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 533 F. Supp. 869, 880 (E.D. Pa.) (noncompliance with consent decree on state automobile emissions program made party subject to contempt power), *cert. denied*, 458 U.S. 1125 (1982); *Wagner v. Warnasch*, 156 Tex. 334, 339, 295 S.W.2d 890, 893 (1956) (noncompliance with consent judgment regarding erection of cattle guard made party subject to contempt order).

146. The threat of contempt for noncompliance with a consent judgment of this type may be more apparent than real. A court probably would not find an agency in contempt if the agency asserted that the reason for its noncompliance was a change in its view of its statutory obligations. Judge Flannery indicated his willingness to modify the decree under such circumstances. *Natural Resources Defense Council, Inc. v. Train*, 8 Env't Rep. Cas. (BNA) at 2089. The remedy for contempt also is largely within the discretion of the court. See *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 551 F. Supp. 827 (E.D. Pa.), *cert. denied*, 458 U.S. 1125 (1982). If the sole basis for concluding that such decrees are unconstitutional is the threat of contempt for noncompliance, a court presumably would exercise its power constitutionally. Still, a district court recently held the Administrator of the EPA in contempt of court for failure to complete a rulemaking required by court order. *Sierra Club v. Ruckelshaus*, 21 Env't Rep. Cas. (BNA) 2153, 2157 (N.D. Cal. 1984).

147. Courts often have referred to the contract nature of settlement agreements. See *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975) (consent decree prohibiting Continental from acquiring other bakeries to be construed for enforcement purposes as contract); *Armour & Co.*, 402 U.S. at 682 (consent decree prohibiting direct or indirect dealing in certain commodities must be construed as written and scope discovered within its four corners); cf. *Donald F. Duncan, Inc. v. Royal Tops Mfg. Co.*, 343 F.2d 655, 659 (7th Cir. 1965) (consent decree regarding trademark not enforceable against nonparty to agreement). Enforcement between the parties as a contract may be available. See *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984); *ITT*, 420 U.S. at 238. Of course special problems arise if the settlement agreement, as a contract, is sought to be enforced against the government.

148. *Citizens*, 718 F.2d at 1130 n.2 (quoting *National Audubon Soc'y, Inc. v. Watt*, 678 F.2d at 301).

149. 678 F.2d 299 (D.C. Cir. 1982).

150. *Id.* at 301.

not continue on the project until two environmental studies were conducted and Congress took certain action.<sup>151</sup> Five years later, under a new administration, the government argued that the agreement was no longer binding.<sup>152</sup>

The court declined to decide whether the agreement was enforceable and concluded that by its own terms the agreement had been satisfied.<sup>153</sup> However, the court worried that the agreement had limited government discretion. Judge Skelly Wright noted that "[t]hese issues, although extremely interesting, are novel and far reaching. We are not aware of any appellate cases determining the enforceability of contracts between the government and a private party by which the government promises to restrict its exercise of policymaking discretion."<sup>154</sup> The court alluded to "general principles drawn from dicta"<sup>155</sup> in cases involving constitutional prohibitions on state laws impairing the obligations of contract;<sup>156</sup> the ability of one administration to change a policy adopted by predecessors;<sup>157</sup> limitations on the judiciary to direct the Executive in the exercise of its discretion;<sup>158</sup> and the binding effect of contracts made by one administration on its successor.<sup>159</sup> The court stated that "these broad principles might point to different results in different contexts, depending on the legal rights of the private party, the type of policy-making discretion involved, and the extent to which, and for how long, the government's discretion is curtailed."<sup>160</sup>

Similar concerns about the power of the government to restrict its discretion by contract were expressed in *Alliance Against Repression v. City of Chicago*.<sup>161</sup> In that case, several government agencies, including the FBI and CIA, had entered into a consent decree that purported to limit the situations in which the government could investigate potentially subversive organizations in the Chicago area. After adopting the consent decree, the parties disputed the extent of those limitations. The district court enjoined application of portions of the FBI's national investigation guidelines because they violated the consent decree.<sup>162</sup> On rehearing en banc, the court of appeals reversed, saying the issue involved "the proper standards for interpreting an equity decree that restricts the executive branch of the federal government in the performance of its constitutional responsibilities."<sup>163</sup> The court acknowledged that the decree should be construed as a contract, and that the intent of the parties should be drawn from the four cor-

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151. *Id.*

152. *Id.*

153. *Id.* at 306.

154. *Id.* at 305 n.12 (dictum).

155. *Id.*

156. U.S. CONST. art. I, § 10, cl. 1.

157. See *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206, 217 (1930) (ruling by Secretary of Interior that Indian entitled to annuity was made in exercise of continuing administrative authority and thus subject to change by successor); *West v. Standard Oil Co.*, 278 U.S. 200, 220-21 (1929) (unauthorized adjudication by Secretary of Interior regarding state's mineral rights could be reopened by successor administration).

158. See generally Nagel, *supra* note 132.

159. Cf. *Lynch v. United States*, 292 U.S. 571, 587 (1934) (war risk insurance policies are contracts of United States and not subject to repeal by Congress); *Sinking Fund Cases*, 99 U.S. 700, 730 (1879) (Sinking Fund to assist construction of railroad and telegraph line reasonable regulation and warranted under authority of Congress).

160. 678 F.2d at 305 n.12.

161. 733 F.2d 1187 (7th Cir.), *reh'g en banc*, 742 F.2d 1007 (7th Cir. 1984).

162. 561 F. Supp. 575 (N.D. Ill. 1983).

163. 742 F.2d at 1009.

ners of the agreement.<sup>164</sup> The court focused primarily on the public safety consequences of construing the agreement to restrict the FBI's ability to investigate potential terrorist activity:

We doubt that in agreeing to the consent decree the Justice Department tied its hands to such an extent; for if it did, it was trifling with public safety of the people of Chicago, and maybe even violating the President's constitutional obligation to "take care that the Laws be faithfully executed."<sup>165</sup>

To avoid this result, the court interpreted the agreement as merely a restatement of otherwise applicable constitutional requirements.<sup>166</sup> Although it did not invalidate an agreement that restricted government discretion,<sup>167</sup> *Alliance* suggests that courts will stretch to construe an agreement in order to avoid infringing on constitutionally mandated discretion.<sup>168</sup>

If, however, the limitation on agency discretion actually arises from the sanction for noncompliance, then this issue can largely be resolved by proper drafting of a settlement agreement. Just as court implementation of an agreement through a stay should have limited impact on agency discretion, since the consequence of violation is merely resumption of the lawsuit, so too may the parties provide in the agreement that their remedy for noncompliance is simply resumption of the underlying lawsuit. Such a provision would eliminate any question of impermissible contractual limitations on agency discretion.

#### C. EXCLUSION OF PARTIES FROM SETTLEMENT NEGOTIATIONS

Settlement negotiations between the government and affected parties are conducted pursuant to litigation, and as such they are neither publicized nor open to the public. Secret meetings raise troublesome but not unanswerable concerns about the potential for abuse of the settlement process. Although only parties to the lawsuit participate in development of the settlement agreement, all interested parties have an opportunity to comment on the proposed rule before adoption. Unless the agency's vested interest in adopting the proposal unchanged invali-

164. *Id.* at 1011. The dissent is more explicit about the court's reliance on contract principles: "The majority recites, but fails to apply the universally recognized principle that consent decrees are to be treated like contracts." *Id.* at 1021 (Cudahy, J., dissenting).

165. *Id.* at 1014.

166. The dissent characterizes the majority opinion as holding that the disputed portions of the consent decree meant "only that the FBI would decline to conduct an investigation in violation of the Constitution." *Id.* at 1020.

167. The majority states that the only recourse the government would have if it entered a "foolish decree" was to seek modification of it. *Id.*

168. Although the majority states that it should not "misread" an agreement to avoid a result, it also states:

But it is one thing to misread a decree and another to draw back from concluding that a coequal branch of government "improvidently" surrendered its constitutional obligations and exposed the people of the nation's third largest city—exposed everyone in this country, for there is no way to keep a Chicago-nurtured terrorist organization in Chicago, any more than the Nazi Party could be confined to Munich—to the dangers posed by embryonic terrorist groups that are immunized from FBI investigation. *If the consent decree will bear an alternative interpretation it ought to be given one.*

*Id.* (emphasis added).

dates the process, the opportunity for comment should eliminate many concerns about secrecy.

The practice of holding private discussions between agencies and affected parties as part of the preparation of a proposed regulation is not new. Informal prerulemaking discussion with interested parties was commonly used before adoption of the APA,<sup>169</sup> and agencies today often hold informal meetings as part of the rulemaking process.<sup>170</sup> Moreover, the APA does not limit an agency's ability to engage in private prerulemaking discussions.<sup>171</sup>

Although regulations developed through privately negotiated settlement agreements may be valid, Congress and courts have, in other contexts, been uneasy about nonpublic contacts between a government agency and affected parties. In some situations, federal statutes limit private discussions between federal agencies and private parties during the rulemaking process.<sup>172</sup> The Federal Advisory Committee Act, for example, establishes limitations on private meetings by "advisory committees" which are broadly defined to include groups established or used by an agency to provide advice or recommendations.<sup>173</sup> In reviewing the purposes of the Act, one court noted that "Congress was concerned with the proliferation of unknown and sometimes secret 'interest groups' or 'tools' employed to promote or endorse agency policies . . . [and] established openness to public scrutiny as the keystone of the Advisory Committee Act."<sup>174</sup> The Act stipulates that advisory committees must provide public notice of their meetings, open the meetings to the public, and prepare detailed minutes.<sup>175</sup>

Congress has also recognized and has sought to limit the potential for abuse in privately negotiated consent decrees in antitrust litigation. The Tunney Act<sup>176</sup> was adopted in response to serious concerns that antitrust consent decrees were

169. See ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 186, 76th Cong., 3d Sess. 103 (1941) (discussing historical practice of consulting economic and other community groups).

170. See *Home Box Office v. FCC*, 567 F.2d 9, 57 (D.C. Cir.) (per curiam) ("informal contacts between agencies and the public are the 'bread and butter' of the process of administration"), *cert. denied*, 434 U.S. 829 (1977). Agency rules often encourage these informal contacts. See, e.g., 21 C.F.R. § 10.65(d) (1984) (FDA rule allowing private meetings as of right); see also *Sierra Club v. Costle*, 657 F.2d 298, 401 (D.C. Cir. 1981) (citing benefits of informal contacts among agencies, Congress, and public, and referring to commentators who recognize importance of informal contacts to information gathering by agencies).

171. See *Sierra Club*, 657 F.2d at 400 (noting no decision limiting discussions before public comment); *Home Box Office*, 567 F.2d at 57 (distinguishing treatment of contacts with public made before notice of proposed rulemaking with treatment of contacts made after).

172. These statutes include, among others, the Freedom of Information Act, 5 U.S.C. § 552 (1982); the Government in the Sunshine Act, 5 U.S.C. § 552b (1982); and the Federal Advisory Committee Act, 5 U.S.C. app. §§ 1-15 (1982). Although these statutes vary in scope and application, each reflects a policy of hostility to secret government decision making. See *Pacific Legal Found. v. Council on Envtl. Quality*, 636 F.2d 1259, 1266 (D.C. Cir. 1980) (limiting Council's ability to hold closed meetings pursuant to 5 U.S.C. § 552b).

173. 5 U.S.C. app. §§ 1-15 (1982). See generally W. RODGERS, ENVIRONMENTAL LAW § 1.11 (1977) (discussing Advisory Committee Act); Cardozo, *The Federal Advisory Committee Act in Operation*, 33 AD. L. REV. 1 (1981) (Act concerned only with advisory committees containing at least some members who are not government employees).

174. *Gates v. Schlesinger*, 366 F. Supp. 797, 799-800 (D.D.C. 1973).

175. 5 U.S.C. app. § 10 (1982).

176. 15 U.S.C. § 16 (1982). See *United States v. AT&T*, 522 F. Supp. 131, 148-49 (D.D.C. 1982) (general discussion of background of Tunney Act); H.R. REP. NO. 1463, 93d Cong., 2d Sess. 6 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6535. Rulemaking settlement agreements differ significantly from antitrust consent decrees, because rulemaking agreements in most cases are not immediately implemented and provide an opportunity for later public comment.

developed in "excessive secrecy" and failed in many cases to remedy adequately the alleged antitrust violations.<sup>177</sup> The Act provides that antitrust settlements must be published for public comment before their approval by the court,<sup>178</sup> and the court is expressly given the responsibility to ensure that the proposed consent decree is in the "public interest."<sup>179</sup> These requirements are designed to assure "the integrity of and public confidence in procedures relating to settlement via consent decrees."<sup>180</sup>

Courts also have imposed limitations on private discussions with agencies outside the public comment period of rulemaking.<sup>181</sup> Limits on these "ex parte" contacts were in part developed to prevent the appearance of bias or unfair pressure and to ensure that the public would be able to scrutinize and respond to any material used in developing the rule.<sup>182</sup> These contact limitations, however, were never extended to prerulemaking contacts, and the Court of Appeals for the District of Columbia—primarily responsible for the development of these limitations—has restricted their scope, especially in the area of informal rulemaking where general policy making is involved.<sup>183</sup>

None of the statutory or court-developed limitations discussed above specifically applies to settlement negotiations, but many of the concerns that produced these limitations also extend to settlement negotiations. For example, even though the public can comment on proposals after the private negotiations, much of the content of the proposed rule as well as agency commitment to promulgation of a rule will be developed in private talks. Presumably, no record of the settlement discussions will be made public; the agency's public rationale for its decision will be developed after the fact, if developed at all. Those who do not participate in negotiations may be at a disadvantage in influencing the agency's decision with their comments. Viewed in this light, Judge Wilkey's concern about limitations on citizens' ability to monitor agency action may not be misplaced. Ways to minimize this concern, including public notice of proposed settlement negotiations, are discussed below.<sup>184</sup>

#### D. IMMEDIATE IMPLEMENTATION OF REGULATORY GUIDANCE

Pursuant to several settlement agreements, the EPA has agreed to take legal positions and publish regulatory guidance documents without first engaging in rulemaking. These commitments have ranged from specifying a deadline for

177. *United States v. AT&T*, 552 F. Supp. at 148.

178. 15 U.S.C. § 16(b)-(d), (g) (1982).

179. *Id.* § 16(e).

180. H.R. REP. NO. 1463, 93d Cong., 2d Sess. 6 (1974), reprinted in 1974 U.S. CODE CONG. & AD. NEWS 6535, 6536.

181. See generally Nathanson, *Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings*, 30 AD. L. REV. 377 (1978); Note, *Ex parte Communication During Informal Rulemaking*, 14 COLUM. J.L. & SOC. PROBS. 269 (1979) (discussing D.C. Circuit cases imposing limits on ex parte communications).

182. See *Home Box Office*, 567 F.2d at 55 (great potential for bias in private rulemaking presentations).

183. See *Sierra Club*, 657 F.2d at 402 ("Later decisions of this court, however, have declined to apply *Home Box Office* to informal rulemaking of the general policy sort . . ."); *Action for Children's Television v. FCC*, 564 F.2d 458, 470 (D.C. Cir. 1977) (FCC role in determining broadcast policy subject to review only if agency has failed to use reasoned exercise of discretion).

184. See *infra* notes 211 to 231 and accompanying text.

complying with regulatory standards<sup>185</sup> to issuing detailed interpretations of regulations.<sup>186</sup> In a number of cases, parties have agreed that the settlement provisions would be treated as final and effective before completion of the required rulemaking.<sup>187</sup>

Although the propriety of settlement agreements depends in large part on the agency's later compliance with rulemaking provisions, the fact that some elements of the agreement are immediately implemented does not necessarily make the agreement improper. In part, notice and comment procedures ensure that there is no violation of the requirements of the APA, but the APA does not require notice and comment for all agency actions. The informal rulemaking procedures of section 553 extend only to certain types of "legislative" rules.<sup>188</sup> Agency positions that do not rise to the level of rules or that would be classified as "interpretive rules" are exempt from the informal rulemaking process.<sup>189</sup> One must analyze each case separately to determine if a particular agency position is exempt from the rulemaking process. Legislative rules adopted without employing the APA rulemaking requirements would be invalid.

Employing subsequent notice and comment procedures is not only important for technical compliance with the APA. As discussed above, potential for abuse exists in a system that allows the government to negotiate positions that are effective without public scrutiny. Negotiated regulatory positions are not necessarily published in the Federal Register,<sup>190</sup> and the public might not be aware of their existence. There is no formal opportunity for public scrutiny of an agency's

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185. Steel Agreement, *supra* note 21, at 4.

186. RCRA Agreement, *supra* note 17, at 4.

187. Virtually all of the effluent guidelines settlement agreements provide that the parties will treat the negotiated regulations as final among themselves before final promulgation by the Agency. *See* Petroleum Refining Agreement, *supra* note 19, at 5 (each provision treated as duly promulgated rule after execution of settlement agreement); Porcelain Agreement, *supra* note 19, at 4 (same); Mining Agreement, *supra* note 29, at 5 (same); Steel Agreement, *supra* note 21, at 4 (same). Essentially this means that the industry parties will not contest inclusion of any negotiated limitations in a pollution control permit even though, in the absence of final national promulgated limitations, they would otherwise be free to do so. (Nationally promulgated effluent limitations may be challenged only in U.S. Circuit Court of Appeals within 90 days after promulgation. 33 U.S.C. § 1369(b)(1) (1982)). These provisions, which limit the possibility of evidentiary hearings on the effluent limitations, are a major element of the settlement agreements. Presumably, they in no way establish the negotiated limitations as binding on nonparties to the agreement until they are in fact promulgated. *But see infra* notes 204 to 210 and accompanying text (discussing binding effect of agreements on nonparties).

188. The APA defines "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ." 5 U.S.C. § 551(4) (1982). The notice and comment provisions of § 553 apply to rules other than "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice . . . ." *Id.* § 553(b).

189. Some agency actions are considered preliminary to the adoption of rules and are not subject to the requirements of informal rulemaking. *See* *Environmental Defense Fund v. Costle*, 636 F.2d 1229, 1256 n.94 (D.C. Cir. 1977) (modifications of *Flannery Decree* not "rules" subject to informal rulemaking proceedings in part because were preliminary steps to development of proposed rules); *Pacific Gas & Elec. Co. v. Federal Power Comm'n*, 506 F.2d 33, 45 (D.C. Cir. 1974) (Federal Power Commission order curtailing natural gas supplies general statement of policy not subject to APA); *cf. Pickus v. Board of Parole*, 507 F.2d 1101, 1111 (D.C. Cir. 1976) (promulgation of parole board rules subject to APA requirements). One commentator noted that "[t]he legislative history of the APA throws no light on what Congress meant by 'interpretative,' and the case law interpreting the APA's term is sparse and unsatisfactory." K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 229 (1977).

190. The Dredge & Fill Agreement provides, for example, that the Army Corps of Engineers issue a "Regulatory Guidance Letter" addressed to "Corps Division and District Engineers." *Dredge & Fill Agreement, supra* note 2, at 2.

action. Judge Wilkey noted that “[t]he abuses to which this device can be put are limited only by the almost inexhaustible imaginations of litigants.”<sup>191</sup>

#### IV. CONTROL OF THE SETTLEMENT PROCESS

Whatever the legal significance of the secrecy and vested interest promoted by the settlement process, these concerns suggest the potential for abuse inherent in settlement agreements. Some limitations on the parties are required to minimize the possibility of such abuse and to ensure that the settlement process will be upheld. These relate both to the form of the agreement drafted by the parties and to the supervision of the process by the courts.

##### A. FORM OF THE SETTLEMENT AGREEMENT

Problems in the settlement process, including the Agency’s disincentive to act in good faith in second round rulemaking, can be minimized by proper drafting of the agreement. Experience at the EPA suggests that the following elements should, in virtually all cases, be included in a final settlement agreement.

##### 1. Linkage of Issues in the Agreement

Challenges to first round regulations and later negotiations generally involve more than one issue.<sup>192</sup> In negotiating a settlement agreement, however, the parties will often prefer a comprehensive settlement of all issues rather than piecemeal resolution of individual problems. A comprehensive settlement achieves a major objective of settlement negotiations—completely avoiding litigation.<sup>193</sup> It also allows the parties greater leverage in negotiations by offering the possibility of trading one issue for another.<sup>194</sup>

Whatever the merits of a comprehensive settlement, a real problem is raised if the settlement links all of these issues with a provision that allows the petitioners to challenge the final regulations on all issues if the agency changes its position on one issue. This possibility arises because most settlement agreements provide that the parties must dismiss their action only if the agency adopts the negotiated proposals substantially unchanged.<sup>195</sup> If the agency agrees to propose ten negotiated proposals but adopts as final only nine of those proposals, the settlement agreement could be construed as allowing the plaintiffs to challenge all ten regulations. If a change in one regulation raises the possibility that all of the regulations will be subject to litigation, there is even greater disincentive to deal in good faith with problems raised during second round rulemaking.

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191. *Citizens*, 718 F.2d at 1136 (Wilkey, J., dissenting). Judge Wilkey imagines possible abuses, suggesting, for example, that the government could use immediately effective “procedural” agreements to give industry advance notice of on-site investigation. *Id.*

192. In challenges to EPA landfill regulations under RCRA, over 150 issues were identified by the parties. Greenwood Interview, *supra* note 82. Even in narrower and more technical challenges to effluent limitations guidelines, settlement agreements usually contain distinct provisions on different aspects of the regulations. See Mining Agreement, *supra* note 29.

193. Although in many cases, parties reserved issues for later litigation, see NPDES Agreement, *supra* note 17, the perceived objective was to resolve the litigation completely if possible.

194. See Miller, *supra* note 2, at 10,095; Cohen, *supra* note 2, at 881; cf. *Citizens*, 718 F.2d at 1124-25 (consent decrees save time, expense, and litigation; parties each give up something they might have won through litigation process).

195. See *supra* text accompanying note 20 (discussing NPDES settlement agreement).



This problem of linkage is not as unlikely as it may sound. The provisions of past agreements have apparently linked all of the issues,<sup>196</sup> and, although problems have developed, the EPA is apparently attempting to avoid linkage now.<sup>197</sup> This issue arose in *National Association of Metal Finishers v. EPA*,<sup>198</sup> in which industrial plaintiffs challenged an entire set of regulations developed by settlement agreement because the Agency did not promulgate some elements of the negotiated package.<sup>199</sup> The court, relying on the terms of the agreement, allowed this challenge.<sup>200</sup> Had the Agency realized it would be reopening the entire set of regulations to challenge by changing portions of the agreement, it might have been less inclined to change its mind.

To minimize the danger of subjecting the entire set of regulations to litigation, the settlement agreement should provide that if the agency fails to promulgate a negotiated regulation substantially as proposed, the parties are free to challenge only that particular regulation. Each rule should be insulated so that an agency can make a good faith decision as to its final content, unaffected by the consequences for other issues. Preclusion of linkage, although possibly contrary to what plaintiffs might prefer, should be required by a court to ensure that later rulemaking on a specific issue will be free from extraneous considerations relating to other aspects of the settlement agreement.

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196. The Steel Agreement, for example, provides:

If, after EPA has taken final action under this Agreement, each individual provision of the final steel industry regulation . . . or each preamble section is not substantially the same as or alters the meaning of the language set forth in Exhibits B and C . . . the petitioners reserve the right to proceed further with this litigation and to *seek judicial review of any provision of the steel industry regulation or preamble section*.

Steel Agreement, *supra* note 21, at 3-4 (emphasis added).

197. For example, paragraph 12 of the RCRA Agreement specifies which issues may be challenged if the EPA is in "noncompliance" by not adopting as final the negotiated regulations. It concludes, "If such noncompliance occurs with respect to any other provision of this Agreement, the undersigned petitioners reserve the right to proceed *only with respect to those matters that are the subject of or are necessarily related to such noncompliance*." RCRA Agreement, *supra* note 17, at 7 (emphasis added). The use in the agreement of the term "noncompliance" is an odd choice, since the EPA never agreed to promulgate as final the negotiated regulations. The NPDES Agreement states in paragraph 3 that

if any final regulation or preamble is not substantially the same as or alters the meaning of the language set forth in Exhibit C, or if EPA decides to leave any regulation or preamble unchanged and not revised as set forth in Exhibit C, the NPDES petitioners reserve the right to proceed further with litigation and/or to *seek judicial review of such regulation*.

NPDES Agreement, *supra* note 17, at 2-3 (emphasis added). Presumably "such" regulation that petitioners may challenge is only the particular regulation that is not in accordance with the agreement.

198. 719 F.2d 624 (3d Cir. 1983), *rev'd on other grounds*, 105 S. Ct. 1102 (1985).

199. *Id.* at 636. This settlement agreement involved aspects of the EPA regulations under the Clean Water Act regarding pretreatment of industrial discharges into municipal sewage systems. *Id.* at 633-35; see Cohen, *supra* note 2, at 880-81 (discussing negotiations leading to the settlement).

200. 719 F.2d at 661. The court concluded that the industry petitioners had "offered to exchange their right to contest the 1979 standards if the Administrator, inter alia, would both publish the suggested language in the preamble and abide by that language." *Id.* Since the court found that the Agency's action violated certain aspects of the agreement, including the failure to publish the suggested language, it held that petitioners were "free to challenge the standards." *Id.*

In a footnote the court wrote, "EPA argues that if we permit them to challenge the standards, 'NAMF and IIPCC [industry petitioners] will have obtained a very good bargain indeed.' We trust that the Administrator made the . . . [changes inconsistent with portions of the agreement] in order to fulfill his public duties under the Act." *Id.* at 661 n.61 (citations omitted). That may be true, but petitioners did receive a "good bargain" by obtaining changes negotiated with the EPA as well as a free hand to challenge them.

## 2. Implementation of the Agreement

As discussed above, the form of implementation of the agreement may have significant consequences. The basic question is how to implement an agreement that gives private parties some control over future agency conduct, while continuing to give the agency an opportunity to change its position on discretionary matters. To accomplish this, settlement agreements should be used as the basis for a request to stay litigation, and the parties should ask that continuation of the stay be contingent on the agency's fulfillment of all specific requirements of the agreement. As a contract matter, the agreement should specifically provide that the sole remedy for noncompliance by the government will be resumption of litigation of the underlying lawsuit. This minimizes the possibility that courts will limit the exercise of agency discretion by the threat of contempt of court for noncompliance and provides some incentive for agency compliance with the agreement.

Such an agreement obviously gives far less assurance to the private parties that the government will comply. There are, however, several reasons why this type of agreement would still be useful to them. First, the prospect of resumption of litigation, the primary reason for entering the settlement agreement, remains a strong incentive for the agency to comply. Second, a major aspect of these agreements is the commitment by the agency to take some action.<sup>201</sup> Like scheduling agreements, they place pressure on the agency to take actions that might otherwise have been deferred.<sup>202</sup> By insisting that the stay be expressly contingent on the agency's timely compliance with all of the provisions of the agreement, parties can maintain the threat of immediate litigation of the challenged regulations, unless the agency submits a motion to modify the stay.<sup>203</sup> Finally, a stay effectively implements all of the significant aspects of the agreement. Even settlement agreements implemented as judgments do not mandate a specific content of the final regulation. After complying with the procedural elements of the agreement, the agency is, in any case, free to modify the substantive decision, and parties are only marginally better served by an agreement that gives them greater powers to force the agency to comply with those procedural elements.

## 3. Binding Effect of the Settlement Agreement

To the extent that the parties can contract legitimately with the government through these settlement agreements, the parties should be bound by their terms. The government should be able to enforce against a signing party a commitment to dismiss the litigation if the government has otherwise satisfied the contract.

The effect of these agreements on nonparties must still be determined. Regulations might be modified based on an agreement to dismiss litigation, only for a

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201. For example, the RCRA Agreement provides that the petitioners may proceed with the underlying litigation if "EPA fails to take any action required under this Agreement as expeditiously as possible . . . ." RCRA Agreement, *supra* note 17, at 7.

202. See Banks Interview, *supra* note 48 (discussing effect of consent judgments on timing of EPA actions).

203. At the time of the modification of the *Flannery Decree* the intervenors sought a provision providing that no portion of the agreement other than that relating to deadlines be enforceable by contempt of court. *Natural Resources Defense Council, Inc. v. Costle*, 12 Env't Rep. Cas. (BNA) 1833, 1840 (D.D.C. 1979). The court declined to limit its authority in this way. *Id.*

lawsuit to be filed on the second round regulations by, for example, members of a trade association who were not individual parties to the settlement. Although some trade associations say that their actions bind their members,<sup>204</sup> others have expressly declined to do so.<sup>205</sup>

In final judgments, individuals are normally bound only if they are parties to the action or are in privity with parties.<sup>206</sup> In the case of large associations, it may be difficult to get a specific agreement by all members to comply with the settlement. Although in some cases, members of trade associations have been found to be subject to judgments entered against the association,<sup>207</sup> the possibility exists that an individual member could challenge the negotiated compromise.

One technique the EPA has used to minimize this problem is to insert a provision in the settlement agreement requiring trade associations to notify all of their members about the terms of the agreement.<sup>208</sup> Comments from members can be solicited this way, and no individual company will be able to claim lack of knowledge of the agreement in seeking to challenge the second round regulations. The government may be able to assert that the person is estopped from contesting the validity of the agreement.<sup>209</sup> Even if the agency could not prevail on a motion for dismissal of a subsequent challenge to the regulation, the industry challenger may not be viewed favorably, because it failed to raise its objections during the settlement process.

Also, an agency might seek, as part of the settlement agreement, a provision that would require the trade associations either to intervene or to file an amicus brief in support of the government's negotiated regulation. Although this does not preclude the possibility of a legal challenge, it would isolate the petitioner and possibly strengthen the government's case.<sup>210</sup>

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204. The Mining Agreement, for example, provides that "NCA [National Coal Association] has notified all of its members . . . of the terms of this Agreement. NCA has also notified its members that NCA and EPA are entering into this Agreement on the understanding that NCA and its members would, among other things, immediately comply with the agreement and not challenge the final regulations if promulgated consistent with the agreement." Mining Agreement, *supra* note 29, at 6-7.

205. The Petroleum Refining Agreement provides:

The EPA and NRDC [Natural Resources Defense Council] expect and believe that when API [American Petroleum Institute] executes this Settlement Agreement all API members will be bound by the terms and conditions of this Agreement. API believes that the binding effect of this Agreement is a legal issue about which API expresses no opinion. Nonetheless, API and all members of its Litigation Steering Committee agree to be bound by this Agreement.

Petroleum Refining Agreement, *supra* note 19, at 7.

206. *See Industrial Credit Co. v. Berg*, 388 F.2d 835, 841 (8th Cir. 1968) (person in privity with party to lawsuit bound by judgment); *Smith v. United States*, 369 F.2d 49, 53-54 (8th Cir. 1966) (parties bound by judgment if adversaries in original action; irrelevant that appellant not original appellant but joined as defendant); *cf. NLRB v. Lannom Mfg. Co.*, 226 F.2d 194 (6th Cir. 1955) (injunction not res judicata in new proceeding against employer where employer not party to action and injunction did not run against him), *cert. denied*, 355 U.S. 822 (1957).

207. *See Aluminum Co. of Am. v. Admiral Merchants Motor Freight, Inc.*, 486 F.2d 717, 720-21 (7th Cir.) (unnamed plaintiffs who were members of same association as named plaintiffs were in privity), *cert. denied*, 414 U.S. 1113 (1973); *Proctor & Gamble v. Byers Transp. Co.*, 355 F. Supp. 547, 557-58 (W.D. Mo. 1973) (citing such factors as overlap of representation, joint interests of members and association, and broad applicability of judgment to members as grounds for finding existence of privity).

208. *See Mining Agreement, supra* note 29, at 6.

209. *See Aluminum Co. of Am. v. Burlington Truck Lines, Inc.*, 342 F. Supp. 166, 171-72 (N.D. Ill. 1972) (carriers estopped from contesting validity of refund order where represented by single association and waived objection to order).

210. One slim possibility is that the agency could seek certification of the petitioners as a class. *See*

#### 4. Record Support for the Agreement

As noted above, the substance of a negotiated proposal is often the result of compromise with little support in the record. This obviously makes it difficult for the agency to explain or justify its adoption of the final regulation. One technique the EPA has used to minimize this problem is to require in the agreement that the parties submit comments supporting the proposed regulation during the second round rulemaking. This bolsters the record and makes it easier for an agency to justify adopting the proposed regulation. It also limits the parties' ability to renege on the agreement by challenging the final regulation. If their comments express nothing but support for the regulation, they may be prevented from raising issues they did not address during the rulemaking. Finally, it further isolates any potential member of a trade association who may try later to challenge the final regulation.

#### B. JUDICIAL SUPERVISION OF THE SETTLEMENT PROCESS

Some control of the settlement process resides with the court. Since the court is in many ways an active participant in the settlement agreement, it should take steps to ensure that the settlement process is not abused.

##### 1. Notice to Interested Parties

When the government engages in rulemaking, it must publish notice of the proposed rule in the Federal Register.<sup>211</sup> No such notice requirement exists, however, when an agency engages in negotiations to resolve a lawsuit.<sup>212</sup> As

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FED. R. CIV. P. 23. See generally Parsons & Starr, *Environmental Litigation and Defendant Class Actions: The Unrealized Viability of Rule 23*, 4 ENVTL. L.Q. 881 (1975); Note, *Defendant Class Actions*, 91 HARV. L. REV. 630 (1978) (defendant class actions expand scope of collateral estoppel to nonparties). Despite problems of representation, certification of defendant classes has been authorized in several contexts. See *In re Intel Sec. Litig.*, 89 F.R.D. 104, 114, 127 (N.D. Cal. 1981) (purchasers entitled to certification of defendant classes of underwriters who allegedly made debenture offerings pursuant to registration statements and prospectus containing material representations or omissions); *In re GAP Stores Sec. Litig.*, 79 F.R.D. 283, 295-302, 308 (N.D. Cal. 1978) (defendant class certified under Securities Act section conferring cause of action on purchaser of security issued under registration statement containing material misstatement or omission). But see *Guarantee Ins. Agency v. Mid-Continental Realty Corp.*, 57 F.R.D. 555 (N.D. Ill. 1972) (membership in class limited to those who purchased stock in reliance on prospectus rather than all who purchased without disclosure of material fact).

Most of the relevant statutes provide for original review of EPA regulations in a United States court of appeals. See, e.g., 42 U.S.C. § 7607(b) (1982); 33 U.S.C. § 1369(b) (1982). Interesting questions arise as to the use of class action mechanisms in original jurisdiction in the court of appeals where, for example, the federal rules do not explicitly provide for class actions. In this context the government is the respondent in an action brought by industry or environmental petitioners. Presumably some form of counterclaim by the government seeking a declaratory judgment would be necessary to convert petitioners into the defendant for purpose of class certification.

211. The APA requires that "general notice of proposed rulemaking shall be published in the Federal Register . . ." 5 U.S.C. § 553(b) (1982). Actual notice may also be sufficient. *Id.* Publication in the Federal Register is also held to be constructive notice of the final rule. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. at 385.

212. Some courts, however, have indicated that due process requires notice to parties directly affected by consent decrees before approval. See *Cunningham v. English*, 269 F.2d 539, 541 (D.C. Cir.) (notice required for all members of union in suit brought by local against parent union), *cert. denied*, 361 U.S. 905 (1959). In *Natural Resources Defense Council, Inc. v. Costle*, 12 Env't Rep. Cas. (BNA) 1833 (1979), the court held that notice was not required in the context of a settlement agreement that did not directly and immediately affect the parties. *Id.* at 1838-40. Since the settlement agreement required the EPA to initiate rulemaking proceedings for certain pollutants and industries, the intervenors would have an opportunity to participate in the promulgation of a final regulation. *Id.* at 1839.

Judge Wilkey noted in dissent in *Citizens*:

Those third parties who wish to know of such consent decrees would be faced with the nearly impossible task of monitoring all of the nation's district courts. Even then, if the filing of the suit and the consent decree coincide closely in time, notice would amount only to learning that the binding decree is a *fait accompli*.<sup>213</sup>

Notice of negotiations may be important to an interest group trying to influence the outcome of a regulation, since most significant decisions will be made during settlement negotiations in the second round rulemaking process. Without proper notice, even people who know of the lawsuit may not be aware of the existence and scope of negotiations.

It is difficult to determine whether lack of notice has affected participation in negotiations. Trade associations and major industries can ensure that they have notice of developments that may affect them. So can major environmental groups, such as Natural Resources Defense Council (NRDC) and Environmental Defense Fund (EDF). It is unclear whether the lack of participation in settlement litigation by other environmental groups or smaller individual industries results from a lack of notice or lack of interest.<sup>214</sup> Smaller groups should not believe that major national organizations will always represent their interests.<sup>215</sup>

In some cases the court might require the government to publish notice of its intention to negotiate a challenge to regulations. This would give interested parties an opportunity to intervene in the lawsuit in a timely manner. Publishing notice of prospective settlement negotiations may also benefit the original parties. A deadline for intervention specified in the notice could help the courts determine timeliness for intervention under rule 24 of the Federal Rules of Civil Procedure.<sup>216</sup> Although a per se rule requiring notice of negotiations in all challenges to rulemaking may be a good idea, courts may prefer to limit the requirement to those cases in which a limited number of parties are involved in the negotiations or where wide-ranging interests are at stake.

## 2. Intervention

If an agency's flexibility to respond to comments of interested parties is limited after settlement negotiations, participation in the settlement talks is obviously important to parties that want to protect their special interest. These parties may not have filed a challenge to the first round regulation because they were satisfied with its content or were willing to let another party resolve the legal issues in the original regulation. Failure to file an initial challenge does not indi-

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213. 718 F.2d at 1136 (Wilkey, J., dissenting).

214. Cf. Banks Interview, *supra* note 48 (indicating that NRDC did not participate in some negotiations, because of lack of funding or lack of expert staff members).

215. See *Natural Resources Defense Council, Inc. v. Costle*, 561 F.2d 904, 913 (D.C. Cir. 1977) (lower court erred in concluding that parties in suit would adequately represent nonparties' interest in regulations of particular industries).

216. Under rule 24(a) of the Federal Rules of Civil Procedure, only timely motions for intervention as of right will be granted. FED. R. CIV. P. 24(a). Determination of whether a motion to intervene is timely is "to be determined from all the circumstances." *NAACP v. New York*, 413 U.S. 345, 366 (1973). See *Hodgson v. UMW*, 473 F.2d 118, 129 (D.C. Cir. 1972) (timeliness factors may include amount of time passed since commencement of litigation, purposes of intervention, and probability of prejudice from belated intervention).

cate a lack of interest in participating in negotiations.<sup>217</sup>

A party's ability to participate in a lawsuit depends on the court's interpretation of its interests under rule 24 of the Federal Rules of Civil Procedure. That rule provides, among other things, that a party may intervene as of right

when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.<sup>218</sup>

Thus, the key elements in determining whether to grant a party's request to intervene are whether its interests will be affected and whether those interests are being adequately represented by existing parties.

In *Natural Resources Defense Council, Inc. v. Costle*,<sup>219</sup> the Court of Appeals for the District of Columbia dealt with a party's right to intervene in litigation being resolved by settlement agreement. There, the settlement agreement had been developed by the EPA, environmental groups, and a number of industrial companies and trade associations that had initially been granted leave to intervene. Before the district court approved the settlement, industrial companies moved to intervene.<sup>220</sup> The district court denied intervention after determining that the requests were not timely, that the interests of the parties would not be impaired because they would have an adequate opportunity to participate when regulations were proposed, and that their interests were adequately represented by the EPA and the existing industry intervenors.<sup>221</sup>

The Court of Appeals reversed and allowed intervention. In addition to finding that the motions were timely, the court in *Natural Resources Defense Council, Inc. v. Costle* addressed two other significant issues concerning petitions for intervention in ongoing settlement negotiations—impairment of interest and adequacy of representation. The government argued that the interests of the excluded parties would not be impaired, since they would have an opportunity to comment on any regulation the agency proposed in response to the settlement agreement.<sup>222</sup> Rejecting this, the court held that under rule 24(a)(2), the test is whether denial of intervention works a "practical impairment" of interests.<sup>223</sup> The court found that denying the intervenors the right to participate in several aspects of the settlement, including decisions not to regulate an industry or a pollutant and proceedings to modify the timetable for action, would as a practical matter have a direct impact on them.<sup>224</sup> Later opportunity to challenge the regulation would not lessen the harm of excluding them from participation.<sup>225</sup>

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217. In the litigation of the porcelain enameling effluent limitations, only the government and industry representatives participated in negotiations. See Porcelain Agreement, *supra* note 19. In part, this reflects the limited resources of the major environmental groups, which must pick and choose the litigation in which they wish to participate. Banks Interview, *supra* note 48.

218. FED. R. CIV. P. 24(a)(2).

219. 561 F.2d 904 (D.C. Cir. 1977).

220. *Id.* at 907.

221. *Id.*

222. *Id.* at 909.

223. *Id.*

224. *Id.* at 910.

225. *Id.* at 909-11.

Applying the standard articulated by the Supreme Court in *Trbovich v. United Mine Workers of America*,<sup>226</sup> the court found that the intervenors "'met the minimal burden' of showing that existing representation 'may be' inadequate to protect their interest[s]."<sup>227</sup> In the absence of specific examples in the record illustrating how the intervenors' interests might diverge from the EPA's, the court hypothesized factual issues over which they might disagree.<sup>228</sup> The court also found that even if the interests were the same, the intervenors were likely to mount a more vigorous defense than the EPA because the former had a greater stake in the content of the final regulations.<sup>229</sup> The court also found that representation by existing industry parties might not adequately protect the prospective intervenors from other industries.<sup>230</sup> Even a party in the same industry as a prospective intervenor might not, the court held, have identical interests.<sup>231</sup>

Although the issues in *Natural Resources Defense Council, Inc. v. Train* involved participation in postsettlement agreement activity, the question of intervention in negotiations leading to agreement on second round regulations should encompass the same considerations. The court should consider the possibility of inconsistent interests between existing parties and potential intervenors and the practical constraints on an agency's use of the comment period on the second round regulations to address those interests. Although a liberal right of intervention may make negotiations somewhat more difficult, the settlement should not be achieved at the expense of exclusion of interested parties.

### 3. Judicial Approval

Courts are partners in settlement agreements, unlike other forms of negotiated regulations. In the case of settlements implemented through a consent judgment, the court has effectively made an adjudication, and it has the authority to assess independently whether the content of the agreement is in the public interest.<sup>232</sup> Even when a settlement agreement is implemented through a stay, the court has exercised its discretion to grant the parties' motion.

A court's role in reviewing the propriety of a settlement agreement is limited. In many cases, the issues are technical, involving scientific and engineering de-

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226. 404 U.S. 528 (1972).

227. 561 F.2d at 911.

228. *Id.* at 912.

229. *Id.* at 912-13.

230. *Id.* at 913.

231. *Id.*

232. Congress mandates such a review for the approval of antitrust consent judgments. *See supra* notes 176 to 180 and accompanying text (discussing the Tunney Act). But courts generally have the authority to determine if consent decrees are fair. One court stated that "[e]ntry of such a judgment is a judicial act which deserves more than a court's rubber stamp on the agency's action." *United States v. Ketchikan Pulp Co.*, 430 F. Supp. 83, 86 (D. Ala. 1977). In exercising this authority, another court stated, "prior to approving a consent decree a court must satisfy itself of the settlement's 'overall fairness to beneficiaries and consistency with the public interest.'" *United States v. Trucking Employers, Inc.*, 561 F.2d 313, 317 (D.C. Cir. 1977) (quoting *United States v. Allegheny Ludlum Indus.*, 517 F.2d 826, 850 (5th Cir. 1975)). *See also* *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1014 (7th Cir. 1980) (in settlement court need not inquire into precise legal rights of parties nor reach merits but only determine if settlement is fair, adequate, reasonable, and appropriate). *Ketchikan*, 430 F. Supp. at 86 (in consent decree court should determine whether decree protects public and accords with dictates of Congress).

tails, and a court has no basis for exercising independent judgment.<sup>233</sup> In most cases the settlements do not embody final changes in position; the obligation to undergo rulemaking before adopting revised regulations ensures that there will be additional public scrutiny.

Nonetheless, a court in this situation need not be a rubber stamp for positions negotiated between a public agency and affected parties. Private negotiations can produce compromises that are not necessarily in the public interest.<sup>234</sup> To avoid collusive settlements, a court should require some justification before it implements the settlement agreement. The court might consider two procedures. First, in most cases, it should require the agency to submit a written explanation of its change in position from the first round final regulation. This is a minimal step to ensure that the court is familiar with both the provisions of the agreement and the compromises the agency has made. The parties' knowledge that their positions will be subject to scrutiny can only be healthy for the process. Second, the court may in some cases require public comment on the proposed settlement agreement itself. In approving the *Flannery Decree*, the court took this unusual step.<sup>235</sup> Although the comment period in that case was limited, it gave the public the right to question the terms of the agreement. As noted above, the Department of Justice requires public comment before court approval of antitrust and pollution control consent judgments.<sup>236</sup>

Unlike enforcement or antitrust consent judgments, however, settlement agreements involving challenges to regulations will generally entail public comment on the proposed second round regulation. Thus, comment on the settlement agreement itself is of less importance and would presumably be used only in unusual circumstances. Nonetheless, because of the practical effect of the settlement agreement on the agency's flexibility the court should ensure that the agency has adequately justified its position before it, in effect, ratifies the agreement.

#### 4. Judicial Review

True judicial scrutiny of a negotiated settlement will come, if it comes at all, when a party seeks judicial review of the final, second round regulation. Presumably such challenges will be rare, since most interested parties will have participated in the settlement process. However, in those cases where parties have not joined in the agreement or new parties are challenging the content of the

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233. This problem arises in court approval of the settlement of complex enforcement cases. As one court observed, "the court's time, talents and resources for intensive scrutiny" of an antitrust consent decree are "severely limited." *United States v. CIBA Corp.*, 50 F.R.D. 507, 514 (S.D.N.Y. 1970).

234. See *Cascade Natural Gas Corp. v. El Paso Natural Gas Corp.*, 386 U.S. 129, 142 (1967) (lower courts' acceptance of private settlement agreement not in accord with Supreme Court's previous mandate to divest). Note, *The ITT Dividend: Reform of the Department of Justice Consent Decree Procedures*, 73 COLUM. L. REV. 594, 595 (1973) (deficiencies in consent decree process and need for legislative reform underscored by ITT antitrust settlement).

235. *Natural Resources Defense Council, Inc. v. Train*, 8 Env't Rep. Cas. (BNA) at 2121.

236. Consent Judgments in Actions to Enjoin Discharges of Pollutants, 28 C.F.R. § 50.7 (1983); Procedures for Receipt and Consideration of Written Comments Submitted under the Antitrust Procedures and Penalties Act, 28 C.F.R. § 50.13 (1983); see *United States v. AT&T*, 552 F. Supp. 131, 147 (D.D.C. 1982) (Justice Department solicited comments in settlement agreement on which court issued memo identifying issues for adjudication).



final regulation, the court will be called on to review the validity of the agency's decision.

The APA provides an "arbitrary and capricious" standard of review for informal rulemaking.<sup>237</sup> The content of this standard is at best elusive. One court noted:

We must accord the agency considerable, but not too much deference; it is entitled to exercise its discretion, but only so far and no further; and its decision need not be ideal or even, perhaps, correct so long as not "arbitrary" or "capricious" and so long as the agency gave at least minimal consideration to the relevant facts as contained in the record.<sup>238</sup>

Although there is debate as to whether the "arbitrary and capricious" standard differs from other articulated standards of review, such as the "substantial evidence" standard associated with review of adjudications,<sup>239</sup> it is thought to reflect a less stringent level of judicial scrutiny of agency decisions.<sup>240</sup>

Even if it is impossible to define precisely the standard of review a court is to employ, a court clearly should grant substantial deference to the agency's judgment.<sup>241</sup> The reasons for this deference have been articulated many times. In part it rests on the agency's technical expertise and familiarity with the area. In part it reflects the agency's experience in interpreting the statutes it administers. In part it is based on a view that an agency needs flexibility to deal with new and difficult problems.<sup>242</sup>

Not all cases apply the minimal scrutiny associated with the "arbitrary and capricious" standard or the deference to agency judgment associated with judicial review.<sup>243</sup> In situations where the basis for judicial deference is less compel-

237. 5 U.S.C. § 706(2)(a) (1982); see *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) (record short of formal findings needed to apply arbitrary and capricious standard of review); see generally J. O'REILLY, *supra* note 6, § 15.01.

238. *American Petroleum Inst.*, 661 F.2d at 349.

239. See *Associated Indus. v. Department of Labor*, 487 F.2d 342, 349-50 (2d Cir. 1973) (questioning whether distinction between arbitrary and capricious and substantial evidence test merely semantic).

240. See *Consumers Union v. Consumer Prod. Safety Comm'n*, 491 F.2d 810, 812 (2d Cir. 1974) (record need not be as complete under arbitrary and capricious standard as under substantial evidence standard).

241. See *National Soft Drink Ass'n v. Block*, 721 F.2d 1348, 1353 (D.C. Cir. 1983) ("hornbook law" that deference must be afforded to expertise of agency and court must avoid substituting its opinion for that of administrator); *Loyola Univ. v. FCC*, 670 F.2d 1222, 1226 (D.C. Cir. 1982) (same); *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir. 1976) (same), *cert. denied*, 426 U.S. 941 (1976); see also O'Reilly, *Deference Makes a Difference: A Study of Impacts of the Bumpers Judicial Review Amendment*, 49 U. CINN. L. REV. 739 (1980) (analyzing amendment to require that agency decisions be substantially supported by record); Woodward & Levin, *In Defense of Deference*, 31 AD. L. REV. 329 (1979) (judicial deference to agency interpretation of statute premised on agency's practical experience).

242. See *International Bd. of Teamsters v. Daniel*, 439 U.S. 551, 566 n.20 (agency's consistent, long-standing interpretation given considerable weight) (1979); *Wilderness Soc'y v. Morton*, 479 F.2d 842 (D.C. Cir.) (court should defer to agency interpretation because of involvement in passing legislation and congressional acquiescence), *cert. denied*, 411 U.S. 917 (1973).

243. Flexibility in exercise of these standards is generally acknowledged. As the Supreme Court noted, "Some scope of discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489 (1951); see also Kaufman, *Judicial Review of Agency Action: A Judge's Understanding*, 45 N.Y.U. L. REV. 201 (1970) (providing informal pragmatic view of judicial approach to review of agency action); McGowan, *Congress, the Courts and Control of Delegated Power*, 77 COLUM. L. REV. 119 (1977) (searching for new ways to control exercise of delegated rulemaking).

ling, courts will give increased scrutiny to agency actions. Certainly regarding questions of law, courts are less willing to defer to agency interpretations.<sup>244</sup> Even when reviewing agency decisions based on factual matters, some courts have employed a so-called "hard look" approach, under which they will scrutinize the record strictly for support of the agency's decision.<sup>245</sup> Finally, courts have focused on the nature of the procedures to determine the appropriate standard of review.<sup>246</sup> In some circumstances, that suggest administrative irregularities, such as a change in procedures or a reversal of longstanding interpretation, courts are less likely to defer to the agency's decision.<sup>247</sup> Thus, there is ample room within the accepted standard of review of informal rulemaking to allow a court to give agency rules a "hard look" with more limited deference to the agency's determination.

This stricter form of scrutiny may be appropriate when reviewing challenges to rules developed through settlement agreements.<sup>248</sup> The rationales associated

244. See *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n*, 390 U.S. 261, 272-23 (1968) (no deference to commission's interpretation of statute when it is deemed inconsistent with statutory mandate). But see *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 105 S. Ct. 1102, 1107-08 (1985) (agency interpretation rational enough to preclude court from substituting judgment where legislative history and purpose did not reveal contrary congressional intent); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778, 2782-83 (1984) (agency's interpretation of statute must be upheld if it is possibly legitimate).

245. See *National Lime Ass'n v. EPA*, 627 F.2d 416, 451 n.126 (D.C. Cir. 1980) (noting that "hard look" connotes rigorous judicial review, court remands case for agency to provide enough data to show systematic approach to problem); cf. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (court will uphold agency findings where satisfied agency has taken "hard look" at issues with use of reasons and standards), cert. denied, 403 U.S. 923 (1971). See also Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974). The "hard look" doctrine may represent an expansion of the traditional interpretation of a court's role in reviewing regulations under the APA. The significance of the Supreme Court's ruling in *Vermont Yankee* is unclear. See *supra* note 89.

246. For example, in *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330 (D.C. Cir. 1968), the court stated that in reviewing regulations developed pursuant to informal rulemaking, "[t]he paramount objective is to see whether the agency, given an essentially legislative task to perform, has carried it out in a manner calculated to negate the dangers of arbitrariness and irrationality in the formulation of rules for general application in future." *Id.* at 338.

247. See *National Conservative Political Action Comm. v. Federal Election Comm.* 626 F.2d 953, 959 (D.C. Cir. 1980) (FEC regulation invalid where it failed to follow usual publication procedures on which plaintiff relied).

248. Professor Harter has suggested that in negotiated regulations "a stringent standard of review would be inappropriate." Harter, *supra* note 2, at 103. See also Stewart, *Regulation, Innovation and Administrative Law: A Conceptual Framework*, 69 CALIF. L. REV. 1256, 1348 (1981) (arguing that courts should not heighten scrutiny of negotiated regulations because of objections that could have been raised during negotiations). Harter's concern is that parties will have no incentive to participate if the consensus could be undone by a challenge from a party who had not participated. He asserts that deference to the product of consensus is appropriate since, among other things, the "negotiation process guarantees that the concerns of interested parties are addressed, thereby eliminating the need to review the entire factual basis of the agreement." Harter, *supra* note 2, at 107.

In Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?*, 10 COLUM. J. ENV. L. 1 (1985), Judge Wald of the D.C. Circuit responds to Professor Harter's suggestion. Judge Wald notes that Professor Harter would still have the courts review negotiated regulations to determine if they were within the agency's jurisdiction and whether a regulation "actually reflects a consensus among interested parties." Harter, *supra* note 2, at 103. Commenting on the legal issues involved in an assessment of "agency jurisdiction" and the difficulties of assessing both the achievement of consensus and the participation of "interested" parties, she concludes that "[o]n balance, then, I am not at all sure that courts would become substantially less involved in negotiated regulations under Professor Harter's judicial review standard. Inevitably, each phrase in the proposed new standard of judicial review opens up its own Pandora's box." Wald, *supra* at 23.

As Judge Wald notes in her article, Professor Harter's suggestion is premised on a view of rulemaking in which the legitimacy of rulemaking is conferred by an agency's reconciliation of the "political and

with deference are not as compelling in the context of negotiated compromises with affected parties. Such regulations do not reflect longstanding agency interpretations; in fact, they reflect a reversal of earlier positions adopted in the first round rule. The process of developing regulations through settlement agreement raises questions as to the good faith application of agency judgment. Even the purely factual and technical elements of agency rules are more suspect when developed by compromise with affected parties.

Thus, one final tool that courts might employ in supervising the outcome of the settlement agreement is the use of a more stringent standard of review. Essentially, courts should be more reluctant to defer to agency judgments where those judgments have been made through private negotiations. Although such a "hard look" may threaten negotiated regulations with little factual or legal basis, this result may be entirely appropriate where affected parties include people who have not agreed to the substance of privately negotiated rules.

## V. CONCLUSION

The very basis for informal rulemaking under the APA is participation by an informed public and independent judgment by a government agency responsible for implementing congressional intent. The use of settlement agreements to negotiate the content of regulations raises a troubling paradox. On one hand, enforceable agreements that contain the content of regulations may be developed in private among affected parties and negotiated with an agency that may be compromising public interest to avoid litigation. This is something not normally contemplated in the process of rulemaking. On the other hand, regulatory judgments based in part on the prospect of litigation are hardly novel, and the process of negotiations with affected parties can produce reasonable regulations without the full expense and uncertainty of litigation.

Rulemaking by settlement agreement, although potentially subject to abuse, has been used effectively to implement rulemaking responsibilities. As long as the process is recognized and subject to suitable controls by the courts, it should be viewed as a part of the normal and accepted process of informal rulemaking.

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practical interests as expressed by interest group representatives." *Id.* Although consensus and reconciliation are certainly objectives to be promoted, the procedures for achieving these objectives, as discussed above, lend themselves to abuse. Experience with antitrust consent decrees, for example, suggests that such abuse can be minimized by adequate judicial review of the process.

In the context of informal rulemaking by settlement agreement, a stringent standard of review seems appropriate. The context of the settlement provides ample incentive for the parties to participate, but it also provides a disincentive for the agency to be fully responsive to public comments. Thus, the procedures themselves suggest the possibility of arbitrariness and irrationality, and, when regulations are challenged, a more searching review is appropriate.