



Testimony

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Waste Management, and Regulatory
Oversight, Committee on Environment
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ENVIRONMENTAL LITIGATION

Information on Cases against EPA and FWS and on Deadline Suits on EPA Rulemaking

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GAO Highlights

Highlights of [GAO-15-803T](#), a testimony before the Subcommittee on Superfund, Waste Management, and Regulatory Oversight, Committee on Environment and Public Works, U.S. Senate

Why GAO Did This Study

Environmental statutes, such as the Clean Air Act and Clean Water Act, allow citizens to file suit against EPA to challenge certain agency actions, such as issuing regulations or rules. Such laws also require EPA to take certain actions, such as issuing rules, to implement provisions of the law within certain statutorily designated time frames. Citizens can sue EPA to compel the agency to take required actions, such as issuing a rule on time, in lawsuits often called deadline suits. EPA can negotiate a settlement to issue a rule by an agreed upon deadline.

Where EPA is named as a defendant, Justice provides EPA's legal defense. If successful, plaintiffs may be paid for certain attorney fees and costs. Payments are made from Treasury's Judgment Fund or EPA's appropriations.

Under the Endangered Species Act, FWS also faces lawsuits over its regulations and actions to carry out the act. As with EPA, Justice defends suits against FWS in court.

This testimony is based on GAO reports issued from August 2011 through December 2014 about litigation directed at EPA and FWS. It focuses on (1) information on cases and associated costs, as available, for EPA and FWS and (2) information on the impact of deadline cases on EPA rulemaking.

GAO did not make recommendations in the reports on which this testimony is based and is not making any in this testimony.

View [GAO-15-803T](#). For more information, contact J. Alfredo Gómez at (202) 512-3841 or gomezj@gao.gov.

August 4, 2015

ENVIRONMENTAL LITIGATION

Information on Cases against EPA and FWS, and on Deadline Suits on EPA Rulemaking

What GAO Found

As GAO reported in August 2011, the Environmental Protection Agency (EPA) faces legal challenges implementing the nation's key environmental laws. The number of environmental litigation cases brought against EPA each year for fiscal years 1995 through 2010 varied with no discernible trend. Data available from the Department of Justice, the Department of the Treasury, and EPA show that the costs associated with such cases against EPA have also varied from year to year with no discernible trend. Specifically,

- Justice staff defended EPA on an average of about 155 such cases each year from fiscal years 1995 through 2010, for a total of about 2,500 cases during that time. Most cases were filed under the Clean Air Act (59 percent of cases) and the Clean Water Act (20 percent of cases).
- According to stakeholders GAO interviewed, a number of factors—particularly a change in presidential administrations, new regulations or amendments to laws or EPA's not meeting statutorily required deadlines—affected environmental litigation.
- Justice spent at least \$46.9 million, averaging \$3.6 million annually, to defend EPA in court from fiscal years 1998 through 2010. In addition, owing to statutory requirements to pay certain successful plaintiffs for attorney fees and costs, the Treasury paid about \$15.5 million from fiscal years 2003 through 2010—averaging about \$2 million per fiscal year—to plaintiffs in environmental cases. EPA paid approximately \$1.5 million from fiscal years 2006 through 2010—averaging about \$305,000 per fiscal year—to plaintiffs for environmental litigation claims. (All amounts are in constant 2015 dollars.)

As one of the primary agencies responsible for implementing the Endangered Species Act, the U.S. Fish and Wildlife Service (FWS) faces litigation over its regulations and actions to carry out provisions of the act. In April 2012, GAO reported that FWS did not use a data system to track cases and associated fees and costs it paid. As a result, information regarding cases against FWS and associated costs was limited, with FWS data showing that the agency paid about \$1.6 million in 26 cases from fiscal years 2004 through 2010.

As GAO reported in December 2014, of the 32 major rules that EPA stated it promulgated from May 31, 2008 to June 1, 2013, nine were issued following seven settlements in deadline lawsuits, all under the Clean Air Act. The terms of the settlements in these deadline suits established a schedule to issue a statutorily required rule(s) or to issue a rule(s) unless EPA determined that doing so was not appropriate or necessary pursuant to the relevant statutory provision. None of the seven settlements included terms that finalized the substantive outcome of a rule. The impact of settlements in deadline suits on EPA's rulemaking priorities was limited primarily to one office within EPA—the Office of Air Quality Planning and Standards (OAQPS)—because most deadline suits are based on provisions of the Clean Air Act for which that office is responsible. These provisions have recurring deadlines requiring EPA to set standards and to periodically review—and revise as necessary—those standards. OAQPS sets these standards through the rulemaking process. OAQPS officials said that deadline suits affect the timing and order in which rules are issued.

Chairman Rounds, Ranking Member Markey, and Members of the Subcommittee:

I am pleased to be here today as you consider the impact of litigation on the Environmental Protection Agency (EPA) and U.S. Fish and Wildlife Service (FWS). As the primary federal agency charged with implementing many of the nation's environmental laws, EPA often faces the prospect of litigation over its regulations and other actions. For example, several environmental statutes have provisions that allow citizens—including individuals, states, companies, and associations—to file suit against EPA challenging certain agency actions, such as making regulations or permitting decisions. In addition, some laws have provisions that allow citizens to file lawsuits to compel EPA to take statutorily required actions, such as issuing a rule, if it has not already done so with the statutorily required time frames. These are often called deadline suits.¹ Where EPA is named as the defendant in lawsuits, the Department of Justice (Justice), which is generally responsible for defending federal agencies in court, provides EPA's legal defense, and EPA provides technical expertise. Within Justice, the Environment and Natural Resources Division handles most of the defense work on EPA environmental litigation cases from its Washington, D.C., office, but some of the 94 U.S. Attorneys' Offices, particularly those in the New York City area, also handle a small number of cases and may work on some cases managed by the Environment and Natural Resources Division.

As one of the primary federal agencies responsible for implementing the Endangered Species Act, FWS also faces litigation over its regulations and actions to carry out provisions of the act. As with EPA, Justice defends suits against FWS in court.

My statement today focuses on (1) information on cases and associated costs as available for EPA and FWS, and (2) the impact of deadline suits on EPA's rulemaking.² This testimony is based on reports we issued from

¹For the purposes of this testimony, we use the term deadline suit to mean a lawsuit in which an individual or entity sues because EPA has allegedly failed to perform any nondiscretionary act or duty by a deadline established in law. A nondiscretionary act or duty is an act or duty required by law.

²GAO has ongoing work examining deadline suits against FWS

August 2011 to December 2014.³ Most of this work was about EPA. To conduct our work, we obtained and analyzed historical data from two components within Justice—the Environment and Natural Resources Division and the Executive Office for U.S. Attorneys. We gathered data from the Environment and Natural Resources Division’s Case Management System database that tracks basic information on cases, including lead plaintiffs’ names, filing and disposition dates, and relevant statutes. To examine the extent to which settlements in deadline suits have impacted EPA’s rulemaking priorities, we obtained from EPA’s Office of General Counsel data on deadline suits it had settled from January 2001 through July 2014 and the EPA office(s) responsible for implementing the terms of the settlements. We interviewed individuals from academia, an environmental group, industry, and a state official from Oklahoma, to obtain their perspectives on deadline suits.⁴ We also collected information from FWS on cases where attorney fees were sought. More details on the scope and methodology for this work can be found in each of our issued reports. The work upon which this statement is based was conducted in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

To carry out its responsibilities under the nation’s environmental laws, EPA conducts an array of activities, such as promulgating regulations; issuing and denying permits; approving state programs; and issuing enforcement orders, plans, and other documents. Many of these activities

³GAO, *Environmental Litigation: Cases against EPA and Associated Costs Over Time*, [GAO-11-650](#) (Washington D.C.: Aug. 1, 2011); *Limited Data Available on USDA and Interior Attorney Fee Claims and Payments*, [GAO-12-417R](#) (Washington, D.C.: Apr. 12, 2012); and *Environmental Litigation: Impact of Deadline Suits on EPA’s Rulemaking Is Limited*, [GAO-15-34](#) (Washington, D.C.: Dec. 15, 2014).

⁴ We chose these individuals because they had experience or knowledge related to deadline suits and could provide the perspective of different stakeholder groups. The views of these individuals cannot be generalized to those individuals or groups we did not interview.

may be subject to legal challenge.⁵ Also, laws such as the Clean Air Act and Clean Water Act require EPA to take certain actions, such as issuing rules, to implement provisions of the law within certain statutorily designated time frames, and EPA is subject to legal challenge for not taking the mandatory actions by the required deadline. If the legal challenge is a deadline suit, EPA works with Justice to consider several factors in determining whether or not to settle the deadline suit and the terms of any settlement.

Environmental Statutes and Lawsuits against EPA

Statutes establishing programs administered by EPA, and under which the agency may be sued, include 10 of the nation's most prominent environmental laws, such as the Clean Air Act; Clean Water Act; Comprehensive Environmental Response, Compensation, and Liability Act (better known as the Superfund law); Emergency Planning and Community Right-to-Know Act; Federal Insecticide, Fungicide, and Rodenticide Act and related provisions of the Federal Food, Drug, and Cosmetic Act; Resource Conservation and Recovery Act; Safe Drinking Water Act; and Toxic Substances Control Act.⁶

Generally, the federal government has immunity from lawsuits, but federal laws authorize three types of suits related to EPA's implementation of environmental laws.⁷ First, most of the major environmental statutes include "citizen suit" provisions authorizing citizens—including individuals, associations, businesses, and state and local governments—to sue EPA

⁵Actions that may be challenged in court generally fall into several categories: rulemakings, permit decisions and other approvals, enforcement actions, and other actions. In a rulemaking, EPA publishes a proposed regulation for public review and comment and then issues a final regulation. Generally, challenges may be brought after EPA has issued its final rule. In a permit decision, EPA processes an application according to relevant procedures, which typically provide for a draft permit and opportunity for the applicant and interested public to comment before the agency's issuance or denial of a final permit. Generally, only final permit decisions, including the process by which a decision was made, may be challenged.

⁶Some of these laws specifically authorize suits against EPA, while the Administrative Procedure Act, which is the federal law generally governing how federal agencies may propose and establish regulations, authorizes judicial review of certain federal agency actions. See, [GAO-11-650](#).

⁷These environmental laws typically also authorize suits against other federal agencies for violations. For example, a citizen could file a lawsuit against a federal agency for operating a hazardous waste facility without a Resource Conservation and Recovery Act permit.

when the agency fails to perform an action mandated by law. These suits include deadline suits. Second, the major environmental statutes typically include judicial review provisions authorizing citizens to challenge certain EPA actions, such as promulgating regulations or issuing permits. Third, the Administrative Procedure Act⁸ authorizes challenges to certain agency actions that are considered final actions, such as rulemakings and decisions on permit applications. As a result, even if a particular environmental statute does not authorize a challenge against EPA for a final decision or regulation, the Administrative Procedure Act may do so.

A lawsuit challenging EPA's failure to act may begin when the aggrieved party sends EPA a notice of intent to sue, if required, and a lawsuit challenging a final EPA action begins when a complaint is filed in court.⁹ Before EPA takes final action, the public or affected parties generally have opportunities to provide comments and information to the agency. In addition, administrative appeals procedures are available—and in many cases required¹⁰—to challenge EPA's final action without filing a lawsuit in a court.¹¹ For example, citizens can appeal an EPA air emission permit to the agency's Environmental Appeals Board. These administrative processes provide aggrieved parties with a forum that may be faster and less costly than a court.

If a party decides to pursue a case, the litigation process generally involves the filing of a complaint; formal initiation of the litigation; motions to the court before trial, such as asking for dismissal of the case; and hearings and court decisions. If successful, plaintiffs may be paid for certain attorney fees and costs. Payments are made from Treasury's Judgment Fund or EPA's appropriations. Throughout this process, the parties to the litigation can decide to reach a settlement. Negotiations

⁸Administrative Procedure Act, 60 Stat. 237 (1946), codified as amended at 5 U.S.C. § 551 (2011).

⁹Generally, the environmental statutes' citizen suit provisions require a prospective plaintiff to first send EPA a formal notice of intent to sue. Conversely, neither these statutes' judicial review provisions nor the Administrative Procedure Act impose a notice requirement.

¹⁰In general, a party must first exhaust all available administrative appeals before initiating a judicial suit.

¹¹For example, EPA's Environmental Appeals Board can decide disputes such as appeals from permit decisions, civil penalty decisions, and other administrative decisions.

between the aggrieved party and EPA may occur anytime after the agency action, at any point during active litigation, and even after judgment.

The Endangered Species Act and Lawsuits against FWS

FWS's mission is to work with others to conserve, protect, and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people. FWS is responsible for administering the Endangered Species Act for freshwater and land species. Under the act, FWS works to implement its requirements, such as consulting with federal agencies to determine if actions may affect listed species or habitats identified as critical to the species' survival, and acting on applications for permits required when non-federal activities will result in take of threatened or endangered species. The act authorizes parties to file challenges to government actions affecting threatened and endangered species. These lawsuits can include deadline suits as well as other types of lawsuits.

EPA and Justice Consider Several Factors in Deciding Whether to Settle Deadline Suits

EPA has primary regulatory authority that allows citizens to file a deadline suit for laws including the following: the Superfund law; Clean Air Act, Clean Water Act, Emergency Planning and Community Right-to-Know Act, Safe Drinking Water Act, Resource Conservation and Recovery Act, and Toxic Substances Control Act. According to EPA and Justice officials, when a deadline suit is filed, the agencies work together to determine how to respond to the lawsuit, including whether or not to negotiate a settlement with the plaintiff to issue a rule by an agreed upon deadline or allow the lawsuit to proceed. In making this decision, EPA and Justice consider several factors to determine which course of action is in the best interest of the government. According to EPA and Justice officials, these factors include (1) the cost of litigation, (2) the likelihood that EPA will win the case if it goes to trial, and (3) whether EPA and Justice believe they can negotiate a settlement that will provide EPA with sufficient time to complete a final rule if required to do so.

EPA and Justice officials have often chosen to settle deadline suits when EPA has failed to fulfill a mandatory duty because it is very unlikely that the government will win the lawsuit. In many such cases, the only dispute is over the appropriate remedy (i.e., fixing a new date by which EPA should act). Additionally, in such cases, officials may believe that negotiating a settlement is the course of action most likely to create sufficient time for EPA to complete the rulemaking if it is required to issue

a rule. EPA and Justice have an agreement under which both must concur in the settlement of any case in which Justice represents EPA.¹²

In negotiating the terms of settlements, EPA and Justice are guided by, among other things, a 1986 Justice memorandum—referred to as the Meese memorandum—the underlying concepts of which were codified in the Code of Federal Regulations in 1991.¹³ The regulation provides that any proposed settlement must be approved by the Deputy Attorney General or Associate Attorney General, as appropriate, when the proposed settlement converts an otherwise discretionary authority of the agency to promulgate, revise, or rescind regulations into a mandatory duty.¹⁴ Thus, in general, this policy restricts Justice from entering into a settlement if it commits EPA to take an otherwise discretionary action, such as including specific substantive content in the final rule, unless an exception to this restriction is granted by the Deputy Attorney General or Associate Attorney General of the United States. According to EPA and Justice officials, as of December 2014, to their knowledge, EPA has been granted only one exception to the general restriction on creating mandatory duties through settlements—a 2008 settlement in a suit

¹²Memorandum of Understanding between the Department of Justice and the Environmental Protection Agency (June 15, 1977).

¹³See 28 C.F.R. §§ 0.160-0.163.

¹⁴The Meese memorandum and the regulation treat the distinction between consent decrees and settlement agreements differently. The Meese memorandum draws a distinction between the executive branch's authority to enter into consent decrees, which are negotiated agreements that are formally entered as court orders and thus enforceable by the court, and settlement agreements, which are similar in form to consent decrees but not entered as court orders. According to the memorandum, Justice should not enter into a consent decree that converts into a mandatory duty the otherwise discretionary authority of that agency to promulgate, revise, or rescind regulations. Regarding settlement agreements, the memorandum states that Justice should not enter into a settlement agreement that interferes with the agency's authority to revise, amend, or promulgate regulations through the procedures set forth in the Administrative Procedure Act. The related regulation does not make a distinction between consent decrees and settlement agreements. It requires that all proposed settlements that convert into a mandatory duty the otherwise discretionary authority of that agency to promulgate, revise, or rescind regulations be referred to the Deputy Attorney General or the Associate Attorney General of the United States. Finally, a 1999 Justice memorandum—referred to as the Moss memo—concludes that the distinction that the Meese memorandum draws between consent decrees and settlement agreements is not of legal significance for purposes of determining the legal limits on discretion-limiting settlements except, possibly, in rare cases.

related to water quality criteria for pathogens and pathogen indicators.¹⁵ The Meese memorandum also provides that Justice should not enter into a settlement agreement that interferes with the agency's authority to revise, amend, or promulgate regulations through the procedures set forth in the Administrative Procedure Act.¹⁶ As such, EPA officials stated that they have not, and would not agree to settlements in a deadline suit that finalizes the substantive outcome of the rulemaking or declare the substance of the final rule.

The Number of Environmental Litigation Cases against EPA and Their Associated Costs Varied with No Discernible Trend, and Information on FWS Lawsuits Is Limited

As discussed in our August 2011 report,¹⁷ the number of environmental litigation cases brought against EPA each year from fiscal year 1995 through fiscal year 2010 varied with no discernible trend. Similarly, data available from Justice, the Department of the Treasury, and EPA show that the costs associated with environmental litigation cases against EPA have varied from year to year for fiscal years 1998 through 2010, averaging at least \$3.6 million per year with no discernible trend. Information regarding lawsuits against FWS is limited, with FWS data showing that the agency paid about \$1.6 million in 26 cases from fiscal years 2004 through 2010.

¹⁵See *Natural Resources Defense Council et al. vs. Johnson et al.*, No. CV06-04843 PSG (JTL) (C.D.Cal. 2008). In this settlement, EPA agreed to complete two epidemiological studies not expressly required by section 104(v) of the Clean Water Act after a court ruled that EPA had not satisfied the requirements of that section.

¹⁶See 5 U.S.C. § 553.

¹⁷[GAO-11-650](#).

The Number of Environmental Litigation Cases against EPA Showed No Discernible Trend over 16 Years, and Stakeholders Stated that Various Factors Affected Yearly Numbers

In August 2011, we reported that there were no aggregated data on environmental litigation or associated costs reported by federal agencies.¹⁸ The key agencies involved—Justice, EPA and Treasury—maintained certain data on individual cases in decentralized databases. In particular, each of Justice’s litigation components maintained a separate case management system to gather information related to individual cases. We were able to merge cases from two systems for purposes of our work.¹⁹

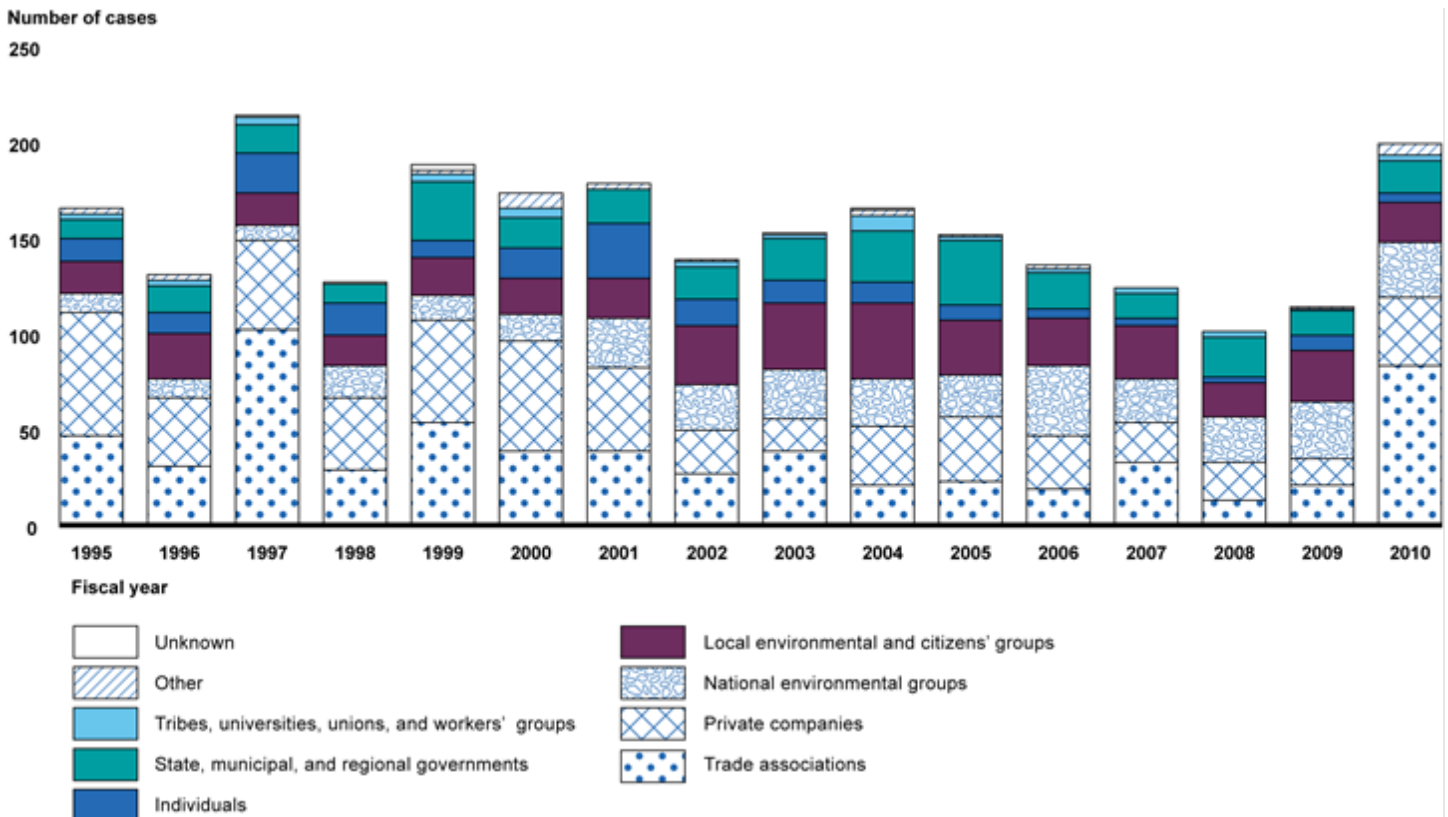
The average number of new cases filed against EPA each year was 155, ranging from a low of 102 new cases filed in fiscal year 2008 to a high of 216 cases filed in fiscal year 1997 (see fig. 1). In all, Justice defended EPA in nearly 2,500 cases from fiscal year 1995 through fiscal year 2010. The greatest number of cases was filed in fiscal year 1997, which, according to a Justice official, may be explained by the fact that EPA revised its national ambient air quality standards for ozone and particulate matter in 1997, which may have caused some groups to sue. In addition, according to the same official, in 1997 EPA implemented a “credible evidence” rule, which also was the subject of additional lawsuits.²⁰ The fewest cases against EPA (102) were filed in fiscal year 2008, and Justice officials were unable to pinpoint any specific reasons for the decline. In fiscal years 2009 and 2010, the caseload increased. A Justice official said that it is difficult to know why the number of cases might increase because litigants sue for different reasons, and some time might elapse between an EPA action and a group’s decision to sue.

¹⁸[GAO-11-650](#).

¹⁹[GAO-11-650](#).

²⁰EPA’s “credible evidence” rule, 62 Fed. Reg. 8314 (Feb. 24, 1997), allows any credible evidence to be used in enforcement actions related to operating permits under Clean Air Act emissions standards. Trade associations representing various industry groups, including car manufacturers, lumber companies, steel producers, petroleum companies, and mining companies challenged the rule in federal court. Twenty-five petitions were filed in the D.C. Court of Appeals, which consolidated them. See *Clean Air Implementation Project v. Environmental Protection Agency*, 150 F.3d 1200 (D.C. Cir. 1998).

Figure 1: Environmental Cases Filed against EPA, Fiscal Year 1995 through Fiscal Year 2010

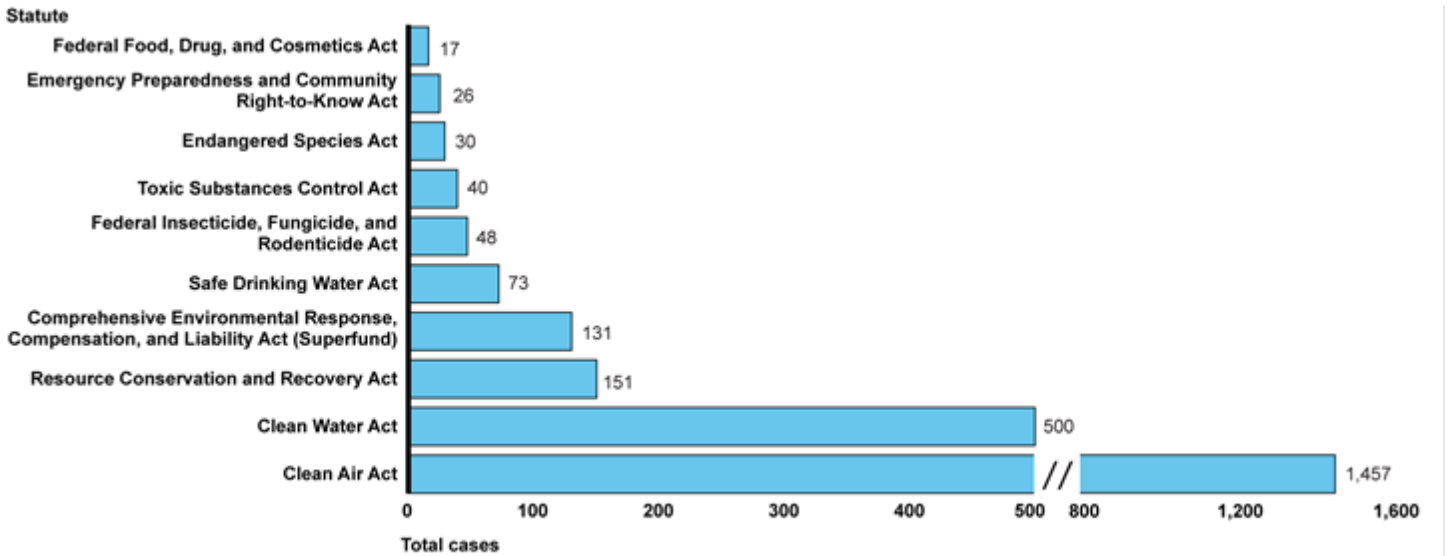


Source: GAO analysis of Justice data. | GAO-15-803T

As shown in figure 2, most cases against EPA were brought under the Clean Air Act, which represented about 59 percent of the approximately 2,500 cases that were filed during the 16-year period of our August 2011 report (i.e., fiscal year 1995 through fiscal year 2010).²¹ Cases filed under the Clean Water Act represented the next largest group of cases (20 percent), and the Resource Conservation and Recovery Act represented the third largest group of cases (6 percent).

²¹GAO-11-650.

Figure 2: Environmental Cases Filed against EPA by Statute, Fiscal Year 1995 through Fiscal Year 2010



Source: GAO analysis of data from Justice's Environment and Natural Resources Division. | GAO-15-803T

The lead plaintiffs filing cases against EPA during the 16-year period of our August 2011 report fit into several categories. The largest category comprised trade associations (25 percent), followed by private companies (23 percent), local environmental groups and citizens' groups (16 percent), and national environmental groups (14 percent). Individuals, states and territories, municipal and regional government entities, unions and workers' groups, tribes, universities, and a small number of others we could not identify made up the remaining plaintiffs (see table 1).²²

²²See [GAO-11-650](#) for more information about our methodology of developing these categories and classifying cases.

Table 1: Share of Cases by Lead Plaintiff Type, Fiscal Year 1995 through Fiscal Year 2010

Plaintiff types	Number of cases	Percentage
Trade associations	622	25
Private companies	566	23
Local environmental and citizens' groups	388	16
National environmental groups	338	14
States, territories, municipalities, and regional government entities	297	12
Individuals	185	7
Unions, workers' groups, universities, and tribes	46	2
Other	33	1
Unknown	7	1a
Total	2,482	100

Source: GAO. | [GAO-15-803T](#)

^aLess than 1 percent.

According to the stakeholders we interviewed for our August 2011 report,²³ a number of factors—particularly a change in presidential administration, the passage of regulations or amendments to laws, and EPA's failure to meet statutory deadlines—affect plaintiffs' decisions to bring litigation against EPA. Stakeholders did not identify any single factor driving litigation, but instead, attributed litigation to a combination of different factors. According to most of the stakeholders we interviewed, a new presidential administration is an important factor in groups' decisions to bring suits against EPA. Some stakeholders suggested that a new administration viewed as favoring less enforcement could spur lawsuits from environmental groups in response, or industry groups could sue to delay or prevent the outgoing administration's actions. Other stakeholders suggested that if an administration is viewed as favoring greater enforcement of rules, industry may respond to increased activity by bringing suit against EPA to delay or prevent the administration's actions, and certain environmental groups may bring suit with the aim of ensuring that required agency actions are completed during an administration they perceive as having views similar to the groups' own. Most of the stakeholders interviewed also said that the development of new EPA

²³[GAO-11-650](#).

regulations or the passage of amendments to environmental statutes may lead parties to file suit against the new regulations or against EPA's implementation of those amendments. One stakeholder noted that an industry interested in a particular issue may become involved in litigation related to the development of regulations because it wishes to be part of the regulatory process and negotiations that result in a mutually acceptable rule.

Available Data Indicated that Costs Associated with Environmental Litigation against EPA, including Payments to Plaintiffs, Have Varied over the Past 10 Years with No Discernible Trend

Data available for our August 2011 report from Justice, Treasury, and EPA show that the costs associated with environmental litigation cases against EPA have varied from year to year with no discernible trend.²⁴ Justice's Environment and Natural Resources Division spent a total of about \$46.9 million to defend EPA in these cases from fiscal year 1998 through fiscal year 2010, averaging at least \$3.6 million per year.²⁵ Some cost data from Justice were not available, however, in part because Justice's Environment and Natural Resources Division and the U.S. Attorneys' Offices did not have a standard approach for maintaining key data for environmental litigation cases.²⁶ For example, while the Environment and Natural Resources Division tracked attorney hours by case, the U.S. Attorneys' Offices did not. In addition, owing to statutory requirements to pay certain successful plaintiffs for attorney fees and costs, Treasury paid a total of about \$15.5 million to prevailing plaintiffs for attorney fees and costs related to these cases for fiscal years 2003 through 2010, averaging about \$2 million per year. EPA paid a total of \$1.5 million from fiscal year 2006 through fiscal year 2010 in attorney fees and costs, averaging about \$305,000 per year.

²⁴[GAO-11-650](#).

²⁵All figures are in constant 2015 dollars.

²⁶ Justice officials said, however, that they do not plan to change their approach to managing the data because they use the data in each system to manage individual cases, not to identify and summarize agencywide data on cases or trends. Because the two Justice components are not regularly required to merge and report their data in a systematic way, we did not make a recommendation regarding these data or systems.

Information Regarding Lawsuits against FWS Is Limited

In April 2012, we reported that the FWS did not use a data system for cases brought against FWS to track attorney fees and costs paid by the Endangered Species Program but that the agency tracked this information in its Washington office using a spreadsheet.²⁷ FWS officials gathered information on those cases paid by the Washington office and supplemented the information with four endangered species cases identified by the agency's regional offices. However, not all regional offices tracked attorney fee payments, so the data may not be complete for fiscal years 2004 through 2010. That is, FWS officials were not sure that they had provided the complete universe of cases. FWS data show that FWS paid about \$1.6 million in the 26 cases from fiscal years 2004 through 2010.

²⁷[GAO-12-417R](#).

Settlements in EPA Deadline Suits Established a Schedule for Issuing Rules, and according to EPA Officials, These Settlements Primarily Impacted a Single EPA Office

In December 2014,²⁸ we reported that the terms of settlements in deadline suits that resulted in EPA issuing major rules²⁹ from May 31, 2008, through June 1, 2013, established a schedule for issuing rules.³⁰ Specifically, the settlements were to either promulgate a statutorily required rule or make a determination that doing so is not appropriate or necessary pursuant to the relevant statutory provision. EPA received public comments on all but one of the draft settlements in these suits. According to EPA officials we interviewed for our December 2014 report,³¹ settlements in deadline suits primarily affected a single office within EPA because most deadline suits are based on provisions of the Clean Air Act for which that office is responsible.

²⁸ [GAO-15-34](#).

²⁹ Under the Congressional Review Act, all rules, including those issued by EPA, are classified as either a major rule or a nonmajor rule. The Congressional Review Act defines a “major” rule as one that has resulted in or is likely to result in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets. 5 U.S.C. § 804(2).

³⁰ This testimony examines deadline suits that seek to compel EPA to either (1) issue a statutorily required rule when that rule has a deadline in law or (2) issue a statutorily required rule or make a determination that issuing such a rule is not appropriate or necessary pursuant to the relevant statutory provision, when issuing that rule or making that determination has a deadline in law. However, there are other types of nondiscretionary duties for which EPA can be sued. For example, in general, if a provision in law requires an agency to take an action, such as respond to a petition, but does not specify a date or set amount of time after the occurrence of an event by which the action must be taken, then a lawsuit to compel such an action is often referred to as an unreasonable delay suit. In addition to deadline and unreasonable delay suits, EPA can also be sued on other grounds. For example, a final rule issued by EPA may be challenged in court. As a result, a court may order EPA, or EPA may agree in a settlement, to issue a new rule. We did not include suits other than deadline suits in this testimony.

³¹ [GAO-15-34](#).

Settlements in Deadline Suits Established a Schedule for Issuing Rules, and EPA Received Public Comments on Drafts of Most Settlements in Deadline Suits

In our December 2014 report,³² we found that EPA issued 32 major rules from May 31, 2008, through June 1, 2013. According to EPA officials, the agency issued 9 of these rules following settlements in seven deadline suits. They were all Clean Air Act rules. Two of the settlements established a schedule to complete 1 or more rules, and five settlements established a schedule to complete 1 or more rules or make a determination that such a rule was not appropriate or necessary in accordance with the relevant statute. Some of the schedules included interim deadlines for conducting rulemaking tasks, such as publishing a notice of proposed rulemaking in the Federal Register.³³

In addition to schedules, the seven settlements also included, among other things, provisions that allowed deadlines to be modified (including the deadline to issue the final rule) and specified that nothing in the settlement can be construed to limit or modify any discretion accorded EPA by the Clean Air Act or by general principles of administrative law. Consistent with Justice's 1986 Meese memorandum, none of the settlements we reviewed included terms that required EPA to take an otherwise discretionary action or prescribed a specific substantive outcome of the final rule.

The Clean Air Act requires EPA, at least 30 days before a settlement under the act is final or filed with the court, to publish a notice in the Federal Register intended to afford persons not named as parties or interveners to the matter or action a reasonable opportunity to comment in writing.³⁴ EPA or Justice, as appropriate, must then review the comments and may withdraw or withhold consent to the proposed settlement if the comments disclose facts or considerations that indicate consent to the settlement is inappropriate, improper, inadequate, or inconsistent with Clean Air Act requirements.³⁵ The other major environmental laws with provisions that allow citizens to file deadline suits do not have a notice and comment requirement for proposed

³²[GAO-15-34](#).

³³Even where interim rulemaking steps are not expressly set forth in a settlement, EPA officials stated that they go through the necessary rulemaking procedures such as notice and comment.

³⁴See 42 U.S.C. § 7413(g).

³⁵See *id.*

settlements.³⁶ According to an EPA official, with the exception of the agency's pesticide program, EPA generally does not ask for public comments on defensive settlements (i.e., settlements on cases in which EPA is being sued) if the agency is not required to do so by statute.³⁷

Of the 32 major rules that EPA issued from May 31, 2008 to June 1, 2013, 9 rules following seven settlements in deadline suits were Clean Air Act rules. For each settlement, EPA published a notice in the Federal Register providing the public the opportunity to comment on a draft of the settlement. EPA received from 1 to 19 public comments on six of the draft settlements. No comments were received on one of the draft settlements. Based on EPA summaries of the comments, the comments concerned the reasonableness of the deadlines contained in the settlements or supported or objected to the settlements. For example, some comments supported the deadline or asserted that the deadlines should be accelerated, and other comments stated that EPA would have difficulty meeting the deadlines. EPA determined that none of the comments on any of the draft settlements disclosed facts or considerations that indicated that consent to the settlement in question would be inappropriate, improper, inadequate, or inconsistent with the act.

According to EPA Officials, Settlements in Deadline Suits Primarily Affected Rulemaking Priorities in a Single EPA Office

According to EPA officials interviewed for our December 2014 report, settlements in deadline suits primarily affected a single office within EPA—the Office of Air Quality Planning and Standards (OAQPS)—because most deadline suits were based on provisions of the Clean Air Act for which that office is responsible.³⁸ According to EPA's Office of General Counsel, provisions in the Clean Air Act that authorize the

³⁶The Administrative Procedure Act and EPA regulations require notice and comment of proposed agency rulemaking, whether or not it may have been the subject of a settlement. 5 U.S.C. § 553(b), (c); 40 C.F.R. § 25.10. This includes the right of interested persons to be given an opportunity to participate in the rulemaking by the submission of written data, views, and arguments. According to Justice officials, settlements are structured to preserve public participation in any ensuing rulemaking proceeding and to not predetermine the outcome of that proceeding.

³⁷According to the EPA official, the pesticides program has a regular practice of posting on its website proposed settlements associated with the program's issues. The program posts these documents because the program has a well-defined and knowledgeable community of stakeholders that is likely to be affected by the settlements.

³⁸OAQPS is an office within EPA's Office of Air and Radiation.

National Ambient Air Quality Standards program and Air Toxics program account for most deadline suits. These provisions have recurring deadlines requiring EPA to set standards and to periodically review—and revise as appropriate or necessary—those standards. OAQPS sets these standards through the rulemaking process. For example, the Clean Air Act requires EPA to review and revise as appropriate National Ambient Air Quality Standards every 5 years and to review and revise as necessary technology standards for numerous air toxics generally every 8 years.

The effect of settlements in deadline suits on EPA’s rulemaking priorities is limited to timing and order. OAQPS officials said that deadline suits affect the timing and order in which rules are issued by the National Ambient Air Quality Standards program and the Air Toxics program, but not which rules are issued. The officials also noted that the effect of deadline suits on the two programs differs because of the different characteristics of the programs.

In conclusion, environmental statutes allow litigation to check the authority of federal agencies as they carry out—or fail to carry out—their duties. Available data did not show discernible trends in the number of cases or costs associated with the litigation against EPA and there was limited information on FWS. Information on deadline suits showed that the effect of settlements in deadline suits was primarily on one office and limited to the timing and order in which rules were issued.

Chairman Rounds, Ranking Member Markey, and Members of the Subcommittee, this concludes my prepared statement. I would be pleased to answer any questions you may have at this time.

GAO Contact and Staff Acknowledgments

If you or your staff members have any questions about this testimony, please contact me at (202) 512-3841 or gomezj@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this testimony. Susan Iott (Assistant Director), Charlie Egan, Cindy Gilbert, Rich Johnson, Tracey King, Marya Link, Maria Strudwick, and Kiki Theodoropoulos made key contributions to this testimony.

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