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Consent Decrees and the EPA: Are They Really Enforceable Against the Agency?

I. Introduction

In recent years, a number of suits have been brought against administrative agencies to compel actions mandated by their enabling statutes.¹ While some of these cases have been settled by litigation,² others have been settled by negotiation.³ Considerations of economy militate strongly in favor of the negotiated settlement and settlement agreements have received the imprimatur of both Congress⁴ and the courts.⁵ A settlement agreement can be made judicially enforceable through incorporation of its terms into a consent decree. When the defendant is an administrative agency, however, the issuance of such a consent decree may strain traditional attitudes concerning

1. The Administrative Procedure Act includes within its provisions for judicial review the power to "compel agency action unlawfully withheld or unreasonably delayed." Administrative Procedure Act § 10(e), 5 U.S.C. § 706(1) (1982).

2. See, e.g., *Natural Resources Defense Council, Inc. v. Train*, 519 F.2d 287 (D.C. Cir. 1975); *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692 (D.C. Cir. 1975). See generally Hall, *The Evolution and Implementation of EPA's Regulatory Program to Control the Discharge of Toxic Pollutants to the Nation's Waters*, 10 Nat. Resources Law. 515 (1977).

3. See, e.g., *Neighborhood Preservation Coalition v. Claytor*, 553 F.Supp. 919 (E.D. Pa 1982) (Dept. of Transportation); *Natural Resources Defense Council, Inc. v. Train*, 8 Env't Rep. Cas. (BNA) 2120 (D.D.C. 1976).

4. The Administrative Procedure Act shows an express preference for negotiated settlements over litigation stating in relevant part:

[T]he agency shall give all interested parties opportunities for (1)...offers of settlement...and (2) to the extent that parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with section 566 and 557 of this title.

Administrative Procedure Act § 5, 5 U.S.C. § 554(c) (1982).

5. *Airline Stewards and Stewardesses Ass'n Local 550 v. American Airlines, Inc.*, 573 F.2d 960 (7th Cir.), cert. denied, 439 U.S. 876 (1978); *Autera v. Robinson*, 419 F.2d 1197 (D.C. Cir. 1969).

separation of powers and judicial deference to agency expertise. This situation arose in a recent decision of the Court of Appeals for the District of Columbia: *Citizens for a Better Environment v. Gorsuch*.⁶

In *Citizens for a Better Environment*, a consent decree mandating Environmental Protection Agency (EPA) action in the development and promulgation of regulations under the Clean Water Act (CWA)⁷ was challenged by industry-intervenors. The decree required EPA actions which the court could not have imposed in the absence of the agency's consent. These requirements were alleged to constitute an impermissible infringement on administrative discretion.⁸ During the litigation, the intervenors also had claimed that EPA should be required to comply with Administrative Procedure Act (APA) provisions for public notice and comment prior to finalization of the agreement.⁹ Although the court upheld the propriety of the decree and the lack of procedural formalities, much of its argument relied upon the fact that the initial formulation of the agreement was an exercise of agency discretion.¹⁰

This note discusses two issues concerning the fundamental relationship between the courts and administrative agencies in the context of *Citizens for a Better Environment*. The utilization of a consent decree in the settlement of this litigation is significant to both issues.

6. *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117 (D.C. Cir. 1983).

7. 33 U.S.C. §§ 1251-1376 (Supp. V 1981) (amending and renaming Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976)).

8. This issue was originally raised by the D.C. Circuit, *sua sponte*, in an earlier appeal of this case. *Environmental Defense Fund v. Costel*, 636 F. 2d 1229 1258 (D.C. Cir. 1980).

9. *Environmental Defense Fund v. Costel*, 636 F.2d 1229, 1238 (D.C. Cir. 1980); *Natural Resources Defense Council, Inc. v. Costle*, 12 Env't Rep. Cas. (BNA) 1833 (D.D.C. 1979); *Natural Resources Defense Council, Inc. v. Train*, 8 Env't Rep. Cas. (BNA) 2120 (D.D.C. 1976).

10. Agency participation was significant in the court's discussion of the extent of judicial intrusion in the finding that "*Vermont Yankee's* concern for 'judicially conceived notions of administrative fair play' [was] inapposite"; and in finding that the decree does not improperly impose a particular course of action since EPA's participation in the settlement agreement was voluntary. *Citizens for a*

The first issue focuses on the consent decree as a tool. Courts are frequently faced with the task of balancing traditional deference to agency discretion with the requirements of public participation and procedural due process. This task is further complicated when policy considerations in favor of negotiated settlements are introduced. How this complication is resolved will reflect on the continuing utility of consent decrees in settling litigation brought against administrative agencies.

The second issue involves the requirement of public participation in agency actions. The extent to which public participation in agency rulemaking is required is defined by the APA,¹¹ and has been clarified by various courts.¹² In the cases preceding *Citizens for a Better Environment*, however, the courts found that these requirements were inapplicable since they did not characterize the settlement agreement as rulemaking.¹³ Substantive questions concerning the procedural adequacy of this approach are considered. An alternative approach to encourage negotiated settlements without this potential defect is also discussed.

II. Citizens for a Better Environment

Between 1973 and 1975 several suits were filed¹⁴ which challenged EPA's methods for regulation of toxic pollutants under the Federal Water Pollution Control Act (FWPCA).¹⁵ These actions were consolidated and a detailed negotiated settlement imposing substantial obligations on the EPA

Better Env't, 718 F.2d 1117, 1128-29 (D.C. Cir. 1983).

11. Administrative Procedure Act § 4, 5 U.S.C. § 553 (1982).

12. See, e.g., *American Trucking Associations, Inc. v. ICC*, 659 F.2d 452 (5th Cir. 1981), cert. denied, 103 S. Ct. 1272 (1983); *Guardian Fed. Sav. and Loan Ass'n v. Federal Sav. and Loan Ins. Corp.*, 589 F.2d 658 (D.C. Cir. 1978); *Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33 (D.C. Cir. 1974).

13. *Environmental Defense Fund v. Costle*, 636 F.2d 1229, 1255 (D.C. Cir. 1980); *Natural Resources Defense Council, Inc. v. Costle*, 12 Env't Rep. Cas. (BNA) 1833, 1839 (D.D.C. 1979).

14. *Natural Resources Defense Council, Inc. v. Gorsuch*, 16 Env't Rep. Cas. (BNA) 2084, 2086 (D.D.C. 1982).

15. 33 U.S.C. §§ 1251-1376 (Supp. V 1981).

was reached.¹⁶ Representatives of various regulated industries intervened in the case, alleging that notice and comment procedures should have been followed in the

16. The complete text of the settlement agreement is included in the decision in *Natural Resources Defense Council, Inc. v. Train*, 8 Env't Rep. Cas. (BNA) 2120 (D.D.C. 1976). The terms of the agreement included:

1. requirements that the EPA develop and promulgate regulations to establish effluent limitations and guidelines for classes and categories of point sources applying a best available technology economically feasible standard. Various criteria to be met by these regulations were also specified and a deadline for achievement or results established.
2. requirements for the promulgation of regulations establishing national performance standards for classes and categories of new point sources which would reflect the greatest effluent reduction achievable using the best available demonstrated control technology. If practical, these standards should permit no discharge of pollutants.
3. requirements for the development and promulgation of regulations to establish pretreatment standards for the introduction of pollutants into publicly owned treatment works for those pollutants found to be unsuitable to or incompatible with treatment by such treatment works.
4. a list of 65 priority pollutants for which the promulgation of effluent limitations and guidelines and pretreatment standards was required.
5. requirements for the promulgation of regulations limiting effluents from all point sources categories listed in the agreement.
6. the requirement that effluent limitations, pretreatment standards and new source performance standards must apply to at least 95% of the point sources within each of the listed categories.
7. a schedule for the engagement of contractors to study the various listed categories of point sources and for the subsequent publication of proposed and final regulations in the *Federal Register*. The studies were to be undertaken in the order of priority set forth in the agreement unless the Administrator deems that the goals and purposes of the act would be better served by changing the prioritization.
8. provisions for excluding, for point source category, a specific pollutant upon a finding that i) equal or more stringent protection is already provided by an existing regulation, ii) the pollutant is present in the discharge of a point source only to the extent that it is present in the intake waters, or iii) the pollutant is either not present or present only in trace amounts which are neither causing, nor likely to cause toxic effects. Provisions were also included for the exclusion of point source categories from pretreatment standards i) if 95% of all sources within a category introduce only pollutants susceptible to treatment or ii) if the toxicity of pollutants introduced to the treatment works is so insignificant as to not justify a pretreatment regulation.
9. a provision for reports to the plaintiff environmental groups.
10. a requirement that all regulations promulgated pursuant to the agreement would be enforced to the full extent of the Administrator's authority as expeditiously as possible.
11. the requirement that EPA compile and publish the known health effects of the listed pollutants along with recommended maximum permissible concentrations consistent with the protection of aquatic life, human health, and recreational activities.

formulation of the agreement. Over these objections, the settlement agreement was incorporated into a consent decree issued by the district court. The court stated that "[t]he agreement merely requires the EPA to initiate rulemaking proceedings," and indicated that the intervenors would have the opportunity to challenge regulations proposed pursuant to the decree through normal rulemaking procedures.¹⁷

In 1978, following amendments to the FWPCA which incorporated several aspects of the consent decree,¹⁸ the Natural Resources Defense Council (NRDC) moved to have EPA found in contempt for failure to comply with the deadlines set forth in the decree. This dispute was settled again by negotiation and a modified agreement was presented to the court.¹⁹ Meanwhile, the industrial intervenors moved to have the decree vacated on the

12. that more stringent effluent limitations and guidelines would be established for any listed pollutants where the ordinary standards would be insufficient to assure protection of public water supplies, agricultural and industrial uses, the protection of aquatic life forms, and to allow recreational activities in and on the water. The Administrator was also required to establish a program with the objective and capability of determining whether more stringent effluent limitations, guidelines and standards are necessary under this paragraph.

13. the requirement for promulgation of regulations concerning pretreatment standards for pollutants found to be unsuceptible to or incompatible with publicly owned treatment works. These standards would be based on the best practicable control technology currently available and a schedule for compliance was set forth.

14. the requirement that the Administrator propose standards and promulgate regulations pursuant to § 307(a) for DDT, endrin, aldrin/dieldrin, toxaphene, benzidine, and polychlorinated biphenyls. Deadlines for the proposal and promulgation of these regulations were established.

17. *Natural Resources Defense Council, Inc. v. Train*, 8 Env't Rep. Cas. (BNA) 2120, 2121 (D.D.C. 1976).

18. In particular, the 1977 amendments adopted the industry-by-industry, "best available technology economically achievable" approach of the agreement and certain critical factors to be considered in establishing a standard (e.g. toxicity degradability and persistence). It also incorporated the list of pollutants included in the agreement as specifically requiring attention. Clean Water Act of 1977, Pub. L. No. 95-217, § 53 (a), 91 Stat. 1589 (codified as amended at 33 U.S.C. § 1317 (Supp. V 1981)).

19. *Natural Resources Defense Council, Inc. v. Costle*, 12 Env't Rep. Cas. (BNA) 1833 (D.D.C. 1979).

grounds that the decree was superseded by the 1977 amendments, that the lawsuits underlying the agreement were moot,²⁰ and that the modifications to the settlement were a violation of the public notice and comment requirements of the APA.²¹ The court denied the intervenors' motion and entered the modified decree.²²

On appeal, the decision of the district court was affirmed as to each of the intervenors' three arguments.²³ In support of this holding, the D.C. Circuit Court examined the 1977 amendments to the FWPCA and the discussions that accompanied their enactment. It found that Congress had been silent as to an intention to supersede the agreement²⁴ and that the proper inference to be drawn from the legislative history was "that Congress expected the settlement agreement to remain in effect."²⁵ On the issue of mootness, the court held that the district court did not err in upholding the agreement on the basis of the two cases which were not moot.²⁶

Concerning the final contention of the intervenors, the court held that the modifications were not "rules" within the meaning of the APA. Rather, the modifications should

20. *Id.* at 1837-38. NRDC conceded that two of the original cases had been mooted by the 1977 amendments and the court assumed this to be the case in framing its decision.

21. Intervenors failed to raise objections on notice and comment grounds to the original settlement agreement, so the scope of this objection was limited to the modifications. *Environmental Defense Fund v. Costle*, 636 F.2d 1229, 1255 n.9 (D.C. Cir. 1980).

22. The modifications to the agreement extend the deadlines for EPA promulgation of the regulations required under the original agreement; broaden EPA's powers to exclude not only pollutants but entire categories or sub-categories of point sources; extend the time for the development of pretreatment standards for incompatible pollutants not specifically mentioned in the agreement and require a program to study and identify other pollutants which are either unsusceptible to or incompatible with publicly owned treatment works; and set forth more specific criteria for the imposition of more stringent health-based standards than were included in the original agreement.

23. *Environmental Defense Fund v. Costle*, 636 F.2d 1229 (D.C. Cir. 1980).

24. *Id.* at 1242.

25. *Id.* at 1244.

26. *See supra* note 20.

be considered as requirements to "initiate preliminary investigations as a first step toward determining whether or not to promulgate regulations."²⁷ The intervenors also alleged that the modifications imposed substantial obligations upon the agency. Starting from this premise, the court raised, *sua sponte*, the issue of whether the consent decree "impermissibly infringes on the discretion Congress committed to the Administrator to make certain decisions under the statute."²⁸ The case was remanded to the district court for consideration of this issue.

On remand, the district court emphasized that the issue was "'impermissible' infringement of the Administrator's discretion, not just an infringement" since, "any judicial decision compelling agency action infringes to some degree on an agency's discretion."²⁹ Four factors were extracted from prior case law as necessary to validate a court's use of its equitable powers to effectuate a remedial statute.³⁰ First, there must be a finding of unlawful or impermissible agency activity. The court found that "the aggregate record of the EPA with regard to the regulation of toxic pollutants can be considered equivalent to administrative action unlawfully withheld."³¹ Second, the court must not fashion a decree which dictates the substantive results of agency action. The modifications to the decree were found to be "process-oriented" and therefore permissible.³² The final two factors

27. *Environmental Defense Fund v. Costle*, 636 F.2d 1229, 1255 (D.C. Cir. 1980).

28. *Id.* at 1259.

29. *Natural Resources Defense Council, Inc. v. Gorsuch*, 16 Env't Rep. Cas. (BNA) 2084, 2087 (D.D.C. 1982).

30. *Id.* at 2087-89. Most of the cases relied upon did not involve consent decrees. Rather they were cases of court fashioned equitable decrees enforceable against an unwilling agency.

31. *Id.* at 2088. Contrary to this view, the Department of Justice, writing on behalf of EPA, maintained that "entry of a settlement agreement does not constitute an admission of liability." Brief for Federal Appellees Anne M. Gorsuch at 13, n.10, *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117 (D.C. Cir. 1983).

32. The apparent conflict of this statement with the Supreme Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, was not addressed by the district court. 435 U.S. 519 (1978). See *supra* note 10.

relate to the participation of the parties in the formulation of the decree and the court's willingness to entertain subsequent motions for modification. In approving this decree, the court stressed the extensive participation of the agency³³ and the resulting decrease in judicial intrusion. In addition, the court not only expressed its willingness to modify the decree, it in fact did so on several occasions.³⁴ Since each of the four factors was satisfied, and since the court viewed the 1977 amendments to the CWA as an implicit ratification of the agreement, the court upheld the validity of the decree. This decision was appealed by the industry-intervenors.

The D.C. Circuit, in a split decision, affirmed the lower court's ruling. Much of the opinion rests on the singular fact that, in this case, EPA consented to the decree.³⁵ The court stated that, because of EPA participation in the formulation of the decree, "the Decree do[es] not represent judicial intrusion into the Agency's affairs to the same extent [it] would if the Decree were 'a creature of judicial cloth.'"³⁶ This rationale was used to find that the proscriptions of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* against the imposition of procedural requirements³⁷ were inapposite since the agreement was "the work of the agency itself."³⁸ Similarly, cases limiting the power of the court in areas of "internal management matters" or where it was the intention of Congress to leave

33. *Natural Resources Defense Council, Inc. v. Gorsuch*, 16 Env't Rep. Cas. (BNA) 2084, 2087 (D.D.C. 1982).

34. *Natural Resources Defense Council, Inc. v. Costle*, 12 Env't Rep. Cas. (BNA) 1833 (D.D.C. 1979); *Citizens for a Better Env't*, 718 F.2d, 1117, 1122 n.6 (D.C. Cir. 1983).

35. See *supra* note 10.

36. *Citizens for a Better Env't*, 718 F.2d 1117, 1128 (D.C. Cir. 1983) (citing *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 141 (1981)).

37. In *Vermont Yankee* the Supreme Court reiterated some of the limits on judicial review, stating that a court should "not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best.'" 435 U.S. 519, 549 (1978).

38. *Citizens for a Better Env't*, 718 F.2d 1117, 1128 (D.C. Cir. 1983).

matters covered in a court order to agency discretion were deemed inapplicable because EPA had voluntarily entered into the settlement agreement.³⁹

III. Discussion

A. *Negotiated Settlements and Consent Decrees*

The negotiated settlement of disputes involving administrative agencies is clearly a favored course. The Administrative Procedure Act expressly prefers negotiation to litigation⁴⁰ and the courts have applauded the savings of time and money to be gained by this practice.⁴¹ In more traditional circumstances where the agency is cast in the role of plaintiff, rather than defendant, the number of cases settled by negotiation is quite large.⁴² These negotiations incorporate the agency's conception of the public interest and the technical and economic practicalities of a given situation and present a clear exercise of administrative discretion which the courts have readily enforced.⁴³

Similar considerations of economy and a desire to reduce

39. *Id.* at 1129. (Referring to *National Ass'n of Postal Supervisors v. United States Postal Serv.*, 602 F.2d 420 (D.C. Cir. 1979); *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692 (D.C. Cir. 1975)).

40. *See supra* note 4.

41. *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1974); *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971).

42. Numerous cases for anti-trust violations are settled through negotiation by the FTC. The Department of Justice is required to publish notice of these settlements in the *Federal Register* prior to their approval. Similar requirements have been imposed for settlement of cases brought against alleged polluters by EPA. 28 C.F.R. § 50.7 (1983). Since the promulgation of 28 C.F.R. § 50.7 in mid-1980, in excess of 240 consent decrees have been proposed in cases of this type (as determined by LEXIS search of the *Federal Register* for references to 28 C.F.R. § 50.7). *See also* Rikleen, *Negotiating Superfund Settlement Agreements*, 10 *Env'tl Affairs* 697 (1982).

43. In the area of antitrust, concern that courts were merely "rubberstamping" agency settlements led Congress to enact the Antitrust Procedures and Penalties Act which required courts to consider each settlement in terms of the public interest. *See generally* Branfman, *Antitrust Consent Decrees—A Review and Evaluation of the First Seven Years Under the Antitrust Procedures and Penalties Act*, 27 *Antitrust Bull.* 303 (1982).

the risks of litigation are relevant to the situation where an agency is the defendant. If an agency chooses to negotiate a settlement agreement this is in itself an act of discretion. The question is, does a court have the power to enforce this choice at a later time when the agency may prefer a different course of action. In *Citizens for a Better Environment*, the view propounded by the appellant industries and accepted by the dissent was that the court's power in this respect was properly limited to approval of those provisions which it could have imposed upon the agency had the case gone to trial.⁴⁴ In this context, the observation of Judge Wilkey in his dissent is worth noting. He suggests that "[t]he value of the consent decree...depends on the court's willingness to enforce it should the agency wish to adopt other procedures consistent with the act. The consent decree has no practical significance so long as the agency remains willing to follow voluntarily its provisions."⁴⁵

The majority noted that NRDC and EPA do not contest the assertion that some provisions of the decree are not statutorily mandated,⁴⁶ but concluded that the acquiescence of the agency compensated for any overbreadth in the terms of the settlement agreement and made it proper for the court to issue the order.⁴⁷ It is the presence of these provisions, which would be beyond the power of the court to impose in the absence of agency consent, in concert with the possibility of eventual nonacquiescence by the agency which give rise to some of the problems in *Citizens for a Better Environment*. If the courts apply different standards to determine the propriety of initially entering a consent decree from those used when enforcement becomes necessary, the efficacy of consent decrees in encouraging negotiated settlements will be reduced. A plaintiff may be unwilling to surrender his rights

44. *Citizens for a Better Env't*, 718 F.2d 1117, 1131 (D.C. Cir. 1983) (Wilkey, J., dissenting).

45. *Id.* at 1131 n.4.

46. *Id.* at 1124.

47. *See supra* note 10.

to a promising litigation in exchange for a negotiated settlement that is not binding upon the agency.⁴⁸ A court should remain aware of the parties' expectations if a court order is entered and take steps to insure its enforceability.

These concerns about enforceability are relevant at two stages in the litigation. At the outset, the deference traditionally given to exercises of administrative discretion must not be allowed to negate requirements for public participation in agency actions merely because a negotiated settlement is involved. Otherwise, such a procedural defect might form the basis for later unenforceability of the decree. The court must also be willing to enforce the decree against an agency which would prefer an alternative course of action. Otherwise, the consent decree might become little more than a sham, with courts acting as agency tools in the avoidance or deferral of litigation.

B. *Public Participation in Agency Activities*

The second issue in *Citizens for a Better Environment* involves the need for public participation in agency activities. Public policy is concerned with the continuing accountability of agencies for their actions. Congress and the courts have recognized this fact and have developed restraints upon agencies to insure public participation in agency functions.⁴⁹ As an exercise of agency discretion, a

48. In *Plaintiffs' Memorandum Regarding Matters Raised at the April 30, 1976 Status Conference*, May 7, 1976 NRDC noted that "[p]laintiffs' willingness to sign this Agreement rather than to litigate the lawsuits is fundamentally premised upon the understanding that the Court is prepared to exercise its full powers to ensure the effective and timely implementation of the Agreement and to enforce compliance with its term (sic) and conditions." Brief for Appellees, *Natural Resources Defense Council, Inc. at 8, Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117 (D.C. Cir. 1983).

49. For its part, Congress has enacted the APA which includes provisions that "give interested persons an opportunity to participate in the rule making through the submission of written data, views, or arguments." Administrative Procedure Act § 4, 5 U.S.C. § 553(c) (1982). In addition, the APA sets forth standards for judicial review of agency action. Administrative Procedure Act § 10(e), 5 U.S.C. § 706 (1982). In applying these standards, the courts have recognized the need for agency independence but have overturned agency decisions for a failure to meet

consent decree should be no less susceptible to these restraints than other rulemaking or adjudicatory proceedings. Judicial approval of a settlement agreement without consideration of these limits, in their entirety, could permit an agency to circumvent legislative intent and would be contrary to the expectations of Congress.⁵⁰

The settlement decree negotiated in *Citizens for a Better Environment* exemplifies how excessive deference to agency discretion can lead to an avoidance of requirements for public participation.⁵¹ The APA defines a rule as "the whole or a 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...."⁵² This definition is broad and could be construed to "encompass virtually any utterance by an agency."⁵³ In recognition of the potential limitations on agency efficiency, Congress included specific circumstances where the notice and comment provisions of section 553 would not apply. These exceptions cover "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice."⁵⁴ Numerous cases have tested the limits of these exceptions⁵⁵ which have, in general, been

the APA requirements, including a failure to observe required procedural measures. *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224 (1973); *American Bus Ass'n v. United States*, 627 F.2d 525 (D.C. Cir. 1980). *But see* *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

50. The Senate Committee considering the APA placed upon the courts a "duty...to prevent avoidance of the requirements of the bill by any manner or form of indirection." *American Bus Ass'n v. United States*, 627 F.2d 525, 528 (D.D.C. 1980) (citing S. Doc. No. 248, 79th Cong., 2d Sess. 19, 217 (1946)).

51. The D.C. Circuit has noted that "although...due deference should be paid to an agency, ...the deference...cannot be allowed to slip into judicial inertia." *Diplomat Lakewood, Inc. v. Harris*, 613 F.2d 1009 (D.C. Cir. 1979). A precise definition of excessive deference may, however, be difficult to establish.

52. Administrative Procedure Act § 2, 5 U.S.C. § 551(4) (1982).

53. *Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33, 37 (D.C. Cir. 1974).

54. Administrative Procedure Act § 4, 5 U.S.C. § 553(b) (A) (1982).

55. *See, e.g.,* *Chamber of Commerce of The United States v. Occupational Health and Safety Admin.*, 636 F.2d 464 (D.C. Cir. 1980); *Guardian Fed. Sav. &*

narrow since "[t]he salutary effect of the Act's public comment procedures cannot be gainsaid, so only reluctantly should courts recognize exemptions therefrom."⁵⁶

In deciding whether compliance with APA notice and comment requirements was necessary, the courts looked beyond the broad definition of a "rule" and its statutory exceptions and found that "Congress[had not]intended the definition of 'rule' to reach modification of judicial settlements such as that in the present case,"⁵⁷ or that "the modifications are not 'rules' within the meaning of the APA for which EPA was required to comply with the statute's notice and comment provisions."⁵⁸ The settlement agreement was deemed to be too "preliminary to the rulemaking process" to constitute rulemaking.⁵⁹ Instead, the regulations ultimately proposed and promulgated could be challenged by the regulated parties.⁶⁰ Thus, the agency

Loan Ass'n v. Federal Sav. & Loan Ins. Corp., 589 F.2d 658 (D.C. Cir. 1978); *National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688 (2d Cir. 1975), *cert. denied*, 423 U.S. 827 (1975).

56. *Humana of South Carolina v. Califano*, 590 F.2d 1070, 1082 (D.C. Cir. 1978).

57. *Natural Resources Defense Council, Inc. v. Costle*, 12 Env't Rep. Cas. (BNA) 1833, 1839 (D.D.C. 1979).

58. *Environmental Defense Fund v. Costle*, 636 F.2d 1229, 1255 (D.C. Cir. 1980). The context of this statement implies that the court does not consider the modifications to be rules, rather than that they are rules exempt under the Administrative Procedure Act. 5 U.S.C. § 553(b)(A) (1982). The district court did hold hearings on the proposed agreement and "allowed interested parties to file comments." *Environmental Defense Fund v. Costle*, 636 F.2d 1229, 1235 (D.D.C. (1979)). The method used for giving notice of these hearings and whether it afforded "all interested parties...an opportunity to participate" is not clear. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764-65 (1969). In any event, these hearings were conducted after the agreement was substantially complete. As noted in *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, "[t]he constitutional infirmity...created by the failure...to accord...notice and an opportunity for hearing, is not cured by the fact that the district court later accorded a hearing on the due process claim in the context of approving the consent decree." 616 F.2d 1006, 1020 (7th Cir. 1980) (Pell, J., dissenting).

59. *Natural Resources Defense Council, Inc. v. Costle*, 12 Env't Rep. Cas. (BNA) 1833, 1839 (D.D.C. 1979).

60. *Id.*

was not limited by these procedural requirements in the formulation of the agreement.

Two specific procedural questions can be raised based on these dismissals of the intervenors' claims. First, were the requirements of the agreement as preliminary as the district court viewed them; and second, does the ability to challenge the rules eventually promulgated offset the detrimental effects of limited participation in the formulation of the settlement agreement.

The first procedural question concerns the preliminary nature of the settlement agreement. In support of its finding that the agreement merely required the initiation of rulemaking proceedings, the district court stated that "paragraph eight of the settlement agreement expressly provides that the EPA may delete pollutants or point sources when, in its discretion, regulation would not be necessary."⁶¹ An inspection of paragraph eight shows, however, that while it does permit the exclusion of pollutants or point sources from regulation, the circumstances under which this exclusion is appropriate are carefully delineated. It is important to remember that there is a difference "between rules, however discretionary in form, that effectively circumscribe administrative choice, and rules that contemplate that the administrator will exercise an informed discretion in the various cases that arise."⁶² The terms of this agreement do not leave the administrator the full range of options potentially available and thus should not fall within the exclusion to the notice and comment requirements of the APA.⁶³

Intervenors also challenged the modifications to the

61. *Natural Resources Defense Council, Inc. v. Train*, 8 Env't Rep. Cas. (BNA) 2120, 2122 (D.D.C. 1976).

62. *Guardian Fed. Sav. & Loan Ass'n v. Federal Sav. & Loan Ins. Corp.*, 589 F.2d 658, 667 (D.C. Cir. 1978) (discussing the requirements for a rule to meet the general statement of policy exemption).

63. A court may not fashion a decree to require an agency to use certain options of the total range of options available to it. *Watt v. Energy Action Educational Foundation*, 454 U.S. 151 (1981).

agreement.⁶⁴ Both the district court and the D.C. Circuit viewed the modifications as being actions too preliminary to constitute rulemaking.⁶⁵ The circuit court also noted that had EPA adopted the regulatory programs required by the agreement "outside the context of a judicial proceeding" it would not have been subject to notice and comment requirements.⁶⁶ Decisions of the administrator on the conduct of investigatory programs would ordinarily be exempt from the notice and comment requirements as "rules of agency... procedure or practice."⁶⁷ This is especially true where the rules are formulated "primarily to facilitate the development of relevant information"⁶⁸ and act as "mere aids to the exercise of the agency's independent discretion."⁶⁹ Under ordinary circumstances, however,

64. In considering the modifications to the agreement, the district court noted four substantive changes. One of these involved extension of the deadlines for promulgation of regulations. Changes were also made in paragraph eight which permit the Administrator to exclude whole categories or subcategories of point sources from regulation. As in the original agreement, however, such exclusions can only be made under specific circumstances. See *Modification of Settlement Agreement*, para. 5, *Natural Resources Defense Council, Inc. v. Costle*, 12 Env't Rep. Cas. (BNA) 1833, 1842 (D.D.C. 1979). The third change is characterized by the court as "provid[ing] EPA with additional time and flexibility to develop pretreatment standards for incompatible pollutants beyond the 65 pollutants specifically mentioned in the Agreement." *Id.* at 1839. This increase in flexibility is achieved by limiting the required regulations to unlisted pollutants which are deemed to "pose a significant threat." Another change is also added to this section, however, which requires EPA to undertake a study to identify other pollutants which are incompatible with the treatment works or which are not susceptible to treatment. In addition to specifying a date for completion of this study, the new paragraph also sets forth details on the technical methods to be used. *Modification of Settlement Agreement*, para. 3, *id.* at 1841. Finally, the modification "clarifies paragraph 12 of the Agreement by specifying in more detail the investigatory steps EPA *must* take to determine when and if effluent limitations more stringent than the technology based-limitations...are necessary...." (emphasis added). *Id.* at 1839.

65. *Environmental Defense Fund v. Costle*, 636 F.2d 1229, 1255 (D.C. Cir. 1980); *Natural Resources Defense Council, Inc. v. Costle*, 12 Env't Rep. Cas. (BNA) 1833, 1839 (D.D.C. 1979).

66. *Environmental Defense Fund v. Costle*, 636 F.2d 1229, 1256 (D.C. Cir. 1980).

67. *Administrative Procedure Act* § 4, 5 U.S.C. § 553(b) (A) (1982).

68. *American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538 (1970).

69. *Id.* at 539.

these rules are formulated as matters of internal policy and have not been incorporated into a court order and given the force of law.

The terms of the settlement agreement and the subsequent modifications exceed these descriptions of preliminary agency actions on procedure and practice. Far from being the day to day decisions of internal management,⁷⁰ the agreement sets forth specific methods and formalized criteria for the administrator to use in assessing the need for regulation. These rules will control the nature of the data collected and its subsequent interpretation, and will have a significant influence on the substantive decisions reached.⁷¹ Where the content of the rule "is likely to have considerable impact on ultimate agency decisions," it should not be exempt from the public participation provisions of the APA.⁷²

The second procedural question concerns the adequacy of the right to challenge the eventual regulations as an alternative to participation in the original formulation of the settlement agreement.⁷³ The fairness of agency actions,

70. The D.C. Circuit Court characterized the terms of the agreement as being similar to determinations the agency is "constantly making...concerning how it will gather information for future rulemaking, which pollutants or industries should be given special attention, and how limited agency resources are to be allocated," and noted that the imposition of notice and comment requirements on such decisions was "untenable." *Environmental Defense Fund v. Costle*, 636 F.2d 1229, 1256 (D.C. Cir. 1980). These day to day decisions can be distinguished from the terms of the consent decree, however, by the simple fact that they are not enforceable by a court order.

71. In requiring notice and comment procedures for the establishment of emission tests under the Clean Air Act, the court in *Donner Hanna Coke Corp. v. Costle*, noted that "the method of determining compliance...can affect the level of performance required by the standard, even though the standard itself has not changed." 464 F.Supp. 1295, 1304 (W.D.N.Y. 1979).

72. *Pickus v. United States Board of Parole*, 507 F.2d 1107, 1114 (D.C. Cir. 1974).

73. Circumstances have provided an example of just how inadequate this alternative may be. Paragraph 14 of the Settlement Agreement provided for regulations to be promulgated to establish standards for certain specified pollutants in accordance with § 307(a) of the FWPCA. These regulations were promulgated in accordance with the notice and comment procedures of the APA and subsequently challenged by the regulated parties. *Hercules, Inc. v. EPA*, 598

whether rulemaking or adjudication, should meet the requirements of due process.⁷⁴ Since agency regulations are reviewed with a presumption of regularity,⁷⁵ parties challenging a regulation face substantial obstacles to the changing of the regulation.⁷⁶ This difficulty may be exacerbated by the use of methodologies for the collection and evaluation of data which were established by agreement with parties adverse to those challenging the regulation.⁷⁷ The risk of erroneous deprivation of a party's rights is a factor in assessing how much due process should be given to a third party whose interests are affected by a

F.2d 91 (D.C. Cir. 1978). In upholding the validity of the regulations the court used a "substantial evidence" test and noted that in reviewing a numerical standard the proper question is "whether the agency's numbers are within a 'zone of reasonableness,' not whether its numbers are precisely right." The party attempting to have the standard modified or revoked bears the burden of establishing, by a preponderance of the evidence, that the standard established is not supported by substantial evidence. *Id.* at 107.

Considering the general policy of deferring to agency expertise in matters requiring technical sophistication, this burden of proof may be essentially impossible to meet. Even if it can be met, however, it will be only at the cost of additional research programs conducted with the express goal of refuting data collected by the agency. In the case of studies required by the consent decree in *Citizens for a Better Env't*, the methodologies for data collection and interpretation have been defined by negotiation between the agency and various environmental groups. The exclusion of the regulated industries from these negotiations until they were essentially completed paves the way for the selection of criteria which are biased toward particular results and which can only be countered by massive quantities of data presenting a different result. The end result is duplicative, result-oriented research rather than well designed studies leading to a realistic assessment of the hazards and costs associated with pollution and pollution control.

74. *Hoffman-LaRoche, Inc. v. Kleindienst*, 478 F.2d 1, 12 (3d Cir. 1973).

75. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971); *Environmental Defense Fund v. Costle*, 657 F.2d 275 (D.C. Cir. 1981).

76. A showing of "substantial prejudice" caused by agency action might be the basis for a claim that intervenors were denied due process. *Ka Fung Chan v. Immigration & Naturalization Serv.*, 634 F.2d 248, 258 (5th Cir. 1981); *Arthur Murray Dance Studio of Washington, Inc. v. Federal Trade Comm'n*, 458 F.2d 622, 624 (5th Cir. 1972).

77. This is true both in the situation of *Citizens for a Better Env't* and in the reverse situation of an environmental group challenging regulations developed from data collected pursuant to an agreement between an agency and a regulated industry.

consent decree.⁷⁸ This risk is reduced where alternative remedies are available. A finding that the available alternatives are inadequate and that, therefore, insufficient due process has been accorded, may lead to the consent decree being later held unenforceable.

C. *An Alternative to Consent Decrees*

The basis for incorporation of the settlement agreement in *Citizens for a Better Environment* into a court order was the desire to have the agreement enforceable. A consent decree is not the only means to this end. In exchange for a stay of litigation, the agency could have promulgated regulations incorporating the terms of the settlement agreement.⁷⁹ The issuance, after proper notice and comment, of these regulations would have bound the agency not to change course "arbitrarily or capriciously."⁸⁰ This course of action would have maximized "public participation in rulemaking as [a] means of assuring that an agency's decisions are both informed and responsive."⁸¹

IV. Conclusion

This analysis of the consent decree in *Citizens for a Better Environment*, reveals a mixed result. The theoretical benefits to be gained from a negotiated settlement are indisputable. Nevertheless, actual experience in this case suggests that a different method might have proved more effective. While it is true that the agency and the plaintiff environmental groups have avoided the risks of an

78. *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 469 F.Supp. 838, 861 (N.D. Ill. 1979), *aff'd*, 616 F.2d 1006 (7th Cir. 1980).

79. This approach is proposed by Judge Wilkey in his dissent. *Citizens for a Better Env't*, 718 F.2d 1117, 1135 (D.C. Cir. 1983).

80. *Id.* (dissenting opinion, citing *Motor Vehicle Manufacturers Ass'n v. State Farm Mut. Auto. Ins. Co.*, 103 S. Ct. 2856, 2865 (1983)). While this alternative does not supply absolute enforceability, neither does the consent decree which may always be modified in light of changed circumstances.

81. *American Bus. Ass'n v. United States*, 627 F.2d 525, 528 (D.C. Cir. 1980).

unfavorable outcome, it hardly can be said that substantial savings of time or money have resulted from reduced litigation. Further, no benefits will result if the decree proves to be unenforceable due to a procedural defect.

In determining whether to approve a settlement agreement, a court should not be unduly swayed by extensive agency participation in its formulation. Rather, if the terms of the agreement are in excess of what the court could impose following a trial, it should insure that the proper formalities have been conducted to make the agreement enforceable on its own. If the court then enters an order, that order will not suffer from the infirmities of an improper procedural history. The participation of an agency and one or more self-appointed guardians of the public interest should not be allowed to substitute for the flow of information from all interested parties that Congress envisioned when it enacted the APA. Permitting only the parties to a lawsuit to participate in the formulation of mandatory schemes for data collection and interpretation will only act to encourage litigation against the agencies. A failure to observe procedural requirements may also invalidate negotiated settlements and lead to further litigation. Thus, a consent decree improvidently issued actually acts contrary to the public interest by denying "the degree of openness, explanation and participatory democracy required by the APA,"⁸² and by leading to economic waste.

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82. *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027 (D.C. Cir. 1978).