



December 2014

ENVIRONMENTAL LITIGATION

Impact of Deadline Suits on EPA's Rulemaking Is Limited

GAO Highlights

Highlights of [GAO-15-34](#), a report to congressional requesters

Why GAO Did This Study

Laws, such as the Clean Air Act, require EPA to issue rules by specific deadlines. Citizens can sue EPA for not issuing rules on time. These lawsuits are sometimes known as deadline suits. EPA sometimes negotiates a settlement to issue a rule by an agreed upon deadline. Some have expressed concern that the public is not involved in the negotiations and that settlements affect EPA rulemaking priorities. GAO was asked to review EPA settlements in deadline suits. This report examines (1) key environmental laws that allow deadline suits and the factors EPA and DOJ consider in determining whether to settle these suits, (2) the terms of settlements that led EPA to issue major rules in the last 5 years and the extent to which the public commented on the settlements, and (3) the extent to which settlements in deadline suits have affected EPA's rulemaking priorities.

GAO identified key laws allowing deadline suits through legal research and interviewed agency officials to understand the factors considered in determining whether to settle these suits. EPA identified the major rules it issued following settlements and GAO examined the text of those settlements. GAO examined EPA documentation to determine the extent to which the public commented on the settlements. Through data from EPA's Office of General Counsel and discussions with officials, GAO determined the extent to which settlements affected EPA's rulemaking priorities.

What GAO Recommends

GAO is not making any recommendations in this report. DOJ and EPA concur with GAO's findings.

View [GAO-15-34](#). For more information, contact J. Alfredo Gómez at (202) 512-3841 or gomezj@gao.gov.

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What GAO Found

GAO identified seven key environmental laws that allow citizens to file a deadline suit against the Environmental Protection Agency (EPA) (see table) and EPA and the Department of Justice (DOJ) consider several factors in determining whether or not to settle these suits. The seven key environmental laws include, among others, the Clean Air Act and the Clean Water Act. EPA works with DOJ—which represents EPA in litigation—to decide whether to settle a deadline suit. EPA and DOJ officials stated that the factors they consider 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 DOJ believe they can negotiate a settlement that will provide EPA with sufficient time to complete a final rule if required to do so.

Of the total number of major rules EPA 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 Clean Air Act requires EPA to solicit public comments on drafts of settlements. The nine major rules were Clean Air Act rules, and EPA solicited public comments on all of the drafts. EPA received between 1 and 19 comments on six of the settlements and no comments on one settlement. EPA determined that none of the comments disclosed facts or other considerations compelling it to withdraw or withhold consent for the settlement.

The effect of settlements in deadline suits on EPA's rulemaking priorities is limited. According to EPA officials, settlements in deadline suits primarily affect a single 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 but not which rules are issued.

Key Environmental Laws That Allow Citizens to File Deadline Suits

Statute
Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. §§ 9601-9675)
Clean Air Act (42 U.S.C §§ 7401-7671q)
Clean Water Act (33 U.S.C. §§ 1251-1388)
Emergency Planning and Community Right-to-Know Act (42 U.S.C. §§ 11001-11050)
Safe Drinking Water Act (42 U.S.C. §§ 300f-300j-26)
Resource Conservation and Recovery Act (42 U.S.C. §§ 6901-6992k)
Toxic Substances Control Act (15 U.S.C. §§ 2601-2697)

Source: GAO. | GAO-15-34

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Abbreviations

APA	Administrative Procedures Act
CFR	Code of Federal Regulations
CRA	Congressional Review Act
DOJ	Department of Justice
EPA	Environmental Protection Agency
EPCRA	Emergency Planning and Community Right-to-Know Act
MACT	Maximum Achievable Control Technology
NAAQS	National Ambient Air Quality Standards
NESHAP	National Emission Standards for Hazardous Air Pollutants
NO ₂	Nitrogen Dioxide
NOI	Notice of Intent to Sue
NSPS	New Source Performance Standards
OAQPS	Office of Air Quality Planning and Standards
OAR	Office of Air and Radiation
RTR	risk and technology review
SO ₂	Sulfur Dioxide
VOC	Volatile Organic Compounds

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December 15, 2014

The Honorable Fred Upton
Chairman
Committee on Energy and Commerce
House of Representatives

The Honorable Ed Whitfield
Chairman
Subcommittee on Energy and Power
Committee on Energy and Commerce
House of Representatives

The Honorable Tim Murphy
Chairman
Subcommittee on Oversight and Investigations
Committee on Energy and Commerce
House of Representatives

Laws such as the Clean Air Act and the Clean Water Act require the Environmental Protection Agency (EPA) to take certain actions, such as issuing rules, to implement provisions of the law within certain statutorily designated time frames. In addition, some laws have provisions that allow any person or entity (including individuals, associations, businesses, and state and local governments) to file lawsuits to compel EPA to take statutorily required actions, such as issuing a rule, if it has not already done so within a statutorily designated time frame. Such lawsuits are sometimes referred to as deadline suits. When faced with deadline suits, EPA and the Department of Justice (DOJ)—which represents EPA in litigation—typically negotiate a settlement with the person or entity filing the lawsuit.

Some members of Congress and certain sectors of the public have expressed concern that, in settling these lawsuits, EPA is committing itself to significant new rulemakings and that affected stakeholders, and the public are unable to participate in the negotiating process before a settlement is finalized. They have also expressed concern about the impact of these settlements on EPA's rulemaking priorities.

Under the Congressional Review Act (CRA), all rules, including those issued by EPA, are classified as either a major rule or a nonmajor rule. The CRA 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.¹

You asked us to review EPA's practices involving settlements in deadline suits that may compel EPA to issue a rule. This report examines (1) key environmental laws that allow citizens to file deadline suits that may compel EPA to conduct a rulemaking and the factors EPA and DOJ consider in determining whether or not to settle these lawsuits, (2) the terms of settlements in deadline suits that led EPA to promulgate major rules in the last 5 years and the extent to which the public commented on the terms of the settlements, and (3) the extent to which settlements in deadline suits have affected EPA's rulemaking priorities.

To address the first objective, we identified through legal research key environmental laws for which EPA has primary regulatory authority and the extent to which these laws allow citizens to file lawsuits that may compel agency rulemaking. We also interviewed EPA and DOJ officials to understand the factors EPA and DOJ consider in determining whether or not to settle deadline suits. To address the second objective, we accessed a database that GAO maintains to help implement the CRA to identify the major rules EPA issued from May 31, 2008 through June 1, 2013. We determined that the data were sufficiently reliable for the purpose of identifying major rules issued by EPA. EPA officials identified which of these rules EPA issued following a settlement in a deadline suit, and we obtained those settlements. We relied on EPA because neither EPA nor DOJ maintains a database that links settlements to rules, and there is no comprehensive public source of such information. We determined the extent to which the public commented on the terms of the settlements by examining EPA documentation on the number and content

¹5 U.S.C. § 804(2). The CRA requires agencies to submit final rules, along with supporting information, to Congress and GAO for review before they can take effect. GAO's primary role under CRA is to provide Congress with a report on each major rule containing GAO's assessment of whether the promulgating federal agency's submissions to GAO indicate that it has complied with the procedural steps required by various acts and executive orders governing the regulatory process. Congress then has an opportunity to review a major rule before it takes effect and to disapprove any rule to which it objects through the passage of a joint resolution with presentment to the President. 5 U.S.C. § 801.

of the public comments. To address the third objective, we examined the extent to which settlements have affected EPA rulemaking priorities by obtaining data from EPA's Office of General Counsel on deadline suits EPA settled from January 2001 through July 2014 and the EPA offices responsible for implementing the terms of the settlements. We determined that the data were sufficiently reliable for the purpose of this report. The data showed that one EPA office was responsible for promulgating most of rules following settlements in deadline suits. We spoke with officials from this office to determine the extent to which settlements in deadline suits affected the office's rulemaking priorities. We also spoke with EPA budget officials knowledgeable about how EPA allocates resources among its offices to determine the extent to which deadline suits affect the resources allocated to offices not subject to deadline suits. Appendix I discusses our objectives, scope, and methodology in greater detail.

We conducted this performance audit from September 2013 to December 2014 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

For the purposes of this report, 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. This report 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. For example, a deadline suit may involve a person suing EPA because EPA failed to issue a rule by a date established in statute. Similarly, a person may sue EPA because it missed a recurring deadline to review and revise, as

necessary or appropriate, an existing rule.² In August 2011, we reported that the number of new environmental litigation cases—of all types—filed against EPA each year from fiscal year 1995 through fiscal year 2010 averaged 155 cases per year.³

Before filing a deadline suit, a person generally must file a Notice of Intent to Sue (NOI) with EPA.⁴ Among other things, a NOI generally must identify the provision(s) of the law that requires EPA to perform an act or duty and a description of the action taken or not taken by EPA that is claimed to constitute a failure to comply with the provision.⁵ Sixty days after filing the NOI, the filer may initiate a deadline suit seeking a court order requiring EPA to complete the statutorily required action.⁶

A settlement takes the form of either a settlement agreement or a consent decree. For purposes of this report, the term settlement refers to both settlement agreements and consent decrees. Both are negotiated agreements between EPA and the plaintiff. A settlement agreement is not subject to court approval but can result in a stay of the lawsuit. If EPA fails to meet the terms of the settlement agreement, then the plaintiff can ask the court to lift the stay in order to proceed with the lawsuit. A consent decree is entered as a court order. If EPA fails to meet the terms of a consent decree, the court can enforce or modify the consent decree, including citing EPA for contempt of court.

²This report examines nondiscretionary duty suits in which the nondiscretionary duty is to issue a rule or make a determination not to issue a rule by 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 our review.

³GAO, *Environmental Litigation: Cases Against EPA and Associated Costs over Time*, GAO-11-650 (Washington, D.C.: Aug. 1, 2011).

⁴See, e.g., 42 U.S.C. § 7604(b)(2).

⁵See, e.g., 40 C.F.R. § 54.3(a). Although not statutorily required to publically post NOIs, in January 2013, EPA began to post NOIs at <http://www.epa.gov/ogc/noi.html>.

⁶See, e.g., 42 U.S.C. § 7604(a), (b)(2).

Unless a more specific statute governs, when EPA or any other federal agency promulgates a rule, whether or not in conjunction with a deadline suit, it generally follows procedures prescribed in the Administrative Procedures Act (APA).⁷ Among other things, the APA governs the process by which federal agencies develop and issue regulations. It includes requirements for publishing notices of proposed and final rules in the *Federal Register* and for providing opportunities for the public to comment on notices of proposed rulemaking. Many rules promulgated under the authority of the Clean Air Act do not follow the procedures prescribed in the APA, but rather follow similar but more specific procedures set forth in the act.⁸

Key Environmental Laws Allow Deadline Suits and EPA Considers Several Factors in Responding to Those Suits

GAO identified seven key environmental laws that allow individuals to file a deadline suit to compel EPA to issue a statutorily required rule, or perform a statutorily required review of a rule to determine whether to revise the rule. EPA works with DOJ to consider several factors in determining whether or not to settle the deadline suit and the terms of any settlement.

Key Environmental Laws Allow Citizens to File Deadline Suits to Compel EPA Rulemaking

GAO identified seven key environmental laws for which EPA has primary regulatory authority that allow citizens to file a deadline suit. Table 1 lists the seven laws.

⁷5 U.S.C. § 553.

⁸42 U.S.C. § 7607(d).

Table 1: Key Environmental Laws That Allow Citizens to File Deadline Suits

Statute	Citizen suit provision	General topic of the law
Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. §§ 9601-9675)	42 U.S.C. § 9659	Cleanup of hazardous substance releases
Clean Air Act (42 U.S.C. §§ 7401-7671q)	42 U.S.C. § 7604	Air quality
Clean Water Act (33 U.S.C. §§ 1251-1388)	33 U.S.C. § 1365	Water quality, including dredging, and filling of waters
Emergency Planning and Community Right-to-Know Act (42 U.S.C. §§ 11001-11050)	42 U.S.C. § 11046	Reporting releases of toxic chemicals
Safe Drinking Water Act (42 U.S.C. §§ 300f-300j-26)	42 U.S.C. § 300j-8	Water quality in public drinking water systems
Resource Conservation and Recovery Act (42 U.S.C. §§ 6901-6992k)	42 U.S.C. § 6972	Solid and hazardous waste storage, handling, treatment, and disposal
Toxic Substances Control Act (15 U.S.C. §§ 2601-2697)	15 U.S.C. § 2619	Toxic substances used in commerce

Source: GAO. | GAO-15-34

With the exception of the Emergency Planning and Community Right-to-Know Act (EPCRA), the key environmental laws allow citizens to file deadline suits to compel EPA to perform any act or duty required by the respective law, including issuing any required rules. For example, the provision in the Clean Air Act states: “[A]ny person may commence a civil action on his own behalf - ... against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.”⁹ The provision in EPCRA that allows citizens to file deadline suits is different from the other key environmental laws because citizen suits may only be filed to compel certain actions listed in the law.¹⁰

⁹42 U.S.C. § 7604(a)(2). Issuing a statutorily required rule is an example of a nondiscretionary act.

¹⁰See 42 U.S.C. § 11046(a)(1)(B).

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

Within EPA, the Office of General Counsel is responsible for handling deadline suits. It works with the appropriate program offices in EPA, such as the Office of Air and Radiation (OAR) or the Office of Water, when negotiating settlements for deadline suits. EPA's Office of General Counsel also coordinates with DOJ's Environmental and Natural Resources Division.

According to EPA and DOJ 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 or allow the lawsuit to proceed. In making this decision, EPA and DOJ consider several factors to determine which course of action is in the best interest of the government. According to EPA and DOJ 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 DOJ 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 DOJ officials told us that they often choose 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 DOJ have an agreement under which both must concur in the settlement of any case in which DOJ represents EPA.¹¹

In negotiating the terms of settlements, EPA and DOJ are guided by, among other things, a 1986 DOJ memorandum—referred to as the Meese memorandum—the underlying concepts of which were codified in the Code of Federal Regulations (CFR) in 1991.¹² 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

¹¹Memorandum of Understanding Between the Department of Justice and the Environmental Protection Agency (June 15, 1977).

¹²See 28 C.F.R. §§ 0.160-0.163.

duty.¹³ Thus, in general, this policy restricts DOJ 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 DOJ officials, 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 related to water quality criteria for pathogens and pathogen indicators.¹⁴ The Meese memo also provides that DOJ 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 APA.¹⁵ 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.

¹³The 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 a court order. According to the memorandum, DOJ 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 DOJ 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 Procedures Act (APA). 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 DOJ 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.

¹⁴See *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.

¹⁵See 5 U.S.C. § 553.

Settlements Resulting in Major Rules Included Rulemaking Schedules, and EPA Received Public Comments on Drafts of Most Settlements

The terms of settlements in deadline suits that resulted in EPA issuing major rules in the last 5 years established a schedule to either promulgate a statutorily required rule or to 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.

Settlements in Deadline Suits Established a Schedule for Issuing Rules

EPA issued 32 major rules from May 31, 2008 through June 1, 2013 (see app. II). According to EPA officials, the agency issued 9 of these rules following settlements in deadline suits. They were all Clean Air Act rules. The 9 rules stem from seven settlements. Two of the settlements established a schedule to complete 1 or more rules, and five 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*.¹⁶ Appendix III provides information on the schedules contained in each settlement.

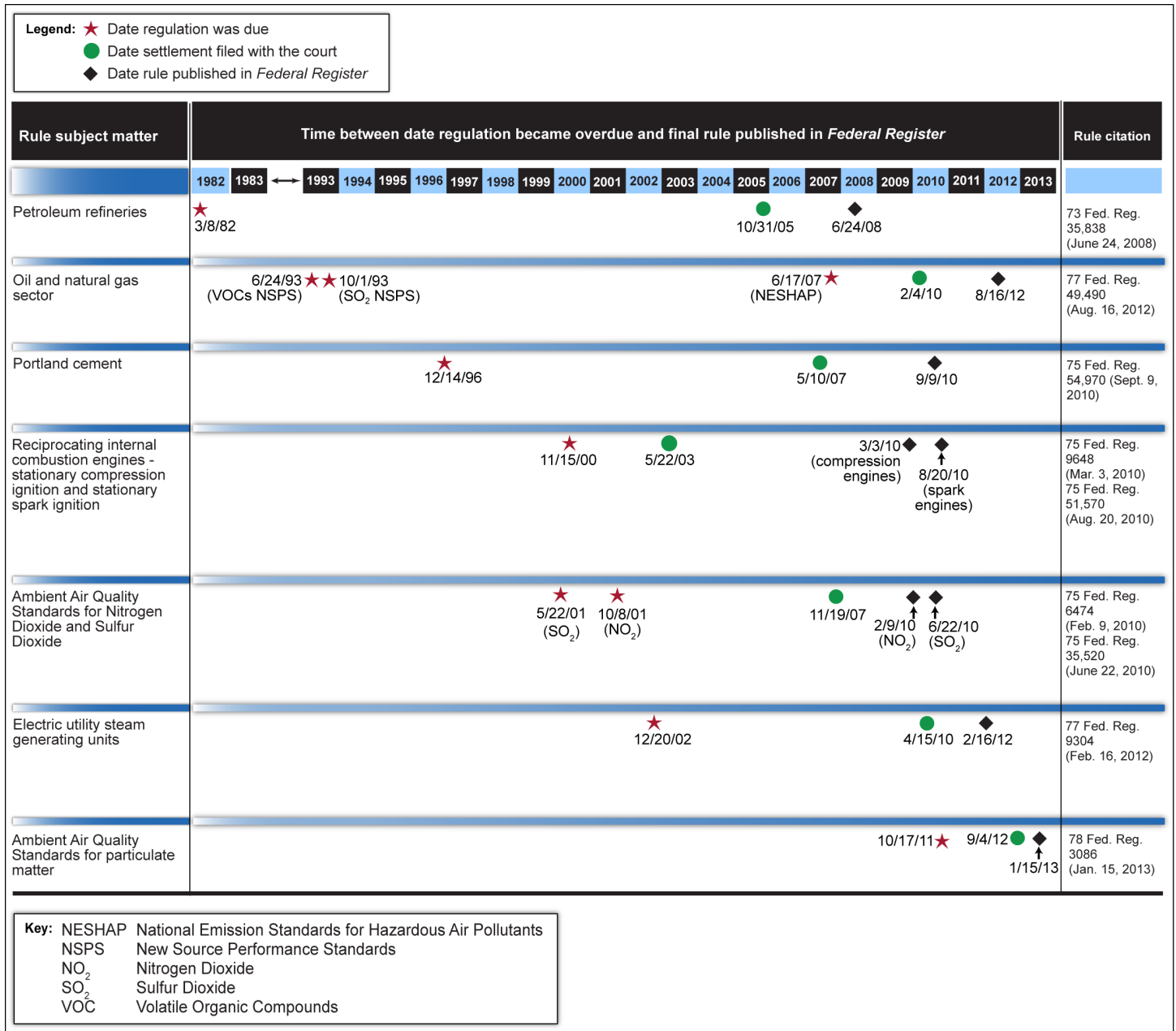
In addition to schedules, the seven settlements also included, among other things, provisions that allowed deadlines to be modified (including the deadline to issue the final rule) and specified that nothing in the settlement can be construed to limit or modify any discretion accorded EPA by the Clean Air Act or by general principles of administrative law. Consistent with DOJ'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 seven settlements, committing EPA to issue the 9 statutorily required rules, were finalized between about 10 months and more than 23 years after the applicable statutory deadlines. For each of the 9 rules, figure 1

¹⁶Even 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.

shows the date the regulation was due, the date the settlement was filed with the court, and the date the final rule was published in the *Federal Register*.

Figure 1: Time Line of Key Dates Associated with 9 Major Clean Air Act Rules EPA Issued from May 31, 2008 to June 1, 2013



Source: GAO. | GAO-15-34

EPA Received Public Comments on Drafts of Most Settlements in Deadline Suits

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.¹⁷ EPA or DOJ, 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.¹⁸ The other six key environmental laws with provisions that allow citizens to file deadline suits do not have a notice and comment requirement for proposed settlements.¹⁹ 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 if the agency is not required to do so by statute.²⁰

The 9 major rules EPA issued from May 31, 2008 to June 1, 2013 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 between one and 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, others comments stated that EPA would have difficulty meeting the deadlines. EPA determined that none of the

¹⁷See 42 U.S.C. § 7413(g).

¹⁸See *id.*

¹⁹The APA 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 DOJ officials, settlements are structured to preserve public participation in any ensuing rulemaking proceeding and to not predetermine the outcome of that proceeding.

²⁰According 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.

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. Table 2 shows the number of public comments EPA received on each draft settlement.

Table 2: The Number of Public Comments EPA Received on Draft Settlements That Resulted in EPA Issuing 9 Clean Air Act Major Rules from May 31, 2008 to June 1, 2013

Rules issued following settlements in deadline suits	Number of public comments received on draft settlements
Standards of Performance for Petroleum Refineries, 73 Fed. Reg. 35,838 (June 24, 2008)	1
Primary National Ambient Air Quality Standards for Nitrogen Dioxide, 75 Fed. Reg. 6474 (Feb. 9, 2010)	0
Primary National Ambient Air Quality Standard for Sulfur Dioxide, 75 Fed. Reg. 35,520 (June 22, 2010)	
National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines, 75 Fed. Reg. 9648 (Mar. 3, 2010)	5
National Emission Standards for Hazardous air Pollutants for Reciprocating Internal Combustion Engines, 75 Fed. Reg. 51,570 (Aug. 20, 2010)	
National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants, 75 Fed. Reg. 54,970 (Sept. 9, 2010)	1 group provided 2 comments
National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9304 (Feb. 16, 2012)	9
Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews, 77 Fed. Reg. 49,490 (Aug. 16, 2012)	1
National Ambient Air Quality Standards for Particulate Matter, 78 Fed. Reg. 3086 (Jan. 15, 2013)	19

Source: GAO. | GAO-15-34

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

According to EPA officials, settlements in deadline suits primarily affect a single 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.²¹ According to EPA’s Office of General Counsel, provisions in the Clean Air Act that authorize the National Ambient Air Quality Standards (NAAQS) 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 NAAQS 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. OAQPS officials said that deadline suits impact the timing and order in which rules are issued by the NAAQS program and the Air Toxics program, but not which rules are issued. The officials also noted that the impact of deadline suits on the two programs differs because of the different characteristics of the programs.

Regarding the NAAQS program, the Clean Air Act requires EPA to review and revise as appropriate the NAAQS standards for six pollutants—called criteria pollutants—at 5-year intervals.²² NAAQS standards limit the allowable concentrations of criteria pollutants in the ambient air. There is more than one standard for each criteria pollutant.²³ EPA establishes the required standards through the rulemaking process and recently conducted seven NAAQS reviews to review the standards and revise as appropriate. According to an OAQPS official, prior to 2003, EPA did not review NAAQS on a regular cycle. Beginning in 2003, EPA faced four deadline suits for failure to complete NAAQS reviews for the six criteria pollutants. EPA settled two of these suits and was subject to a court order

²¹OAQPS is an office within EPA’s Office of Air and Radiation.

²²42 U.S.C. § 7409(d). The six criteria pollutants are: carbon monoxide, lead, oxides of nitrogen, ozone, particulate matter, and oxides of sulfur.

²³The Clean Air Act requires EPA to set primary standards and secondary standards for each criteria pollutant. Primary standards protect public health and secondary standards protect the public welfare. 42 U.S.C § 7409(a), (b).

regarding the other two suits after it failed to successfully negotiate settlements with the plaintiffs. The settlements and court orders led EPA to perform the statutorily required reviews of the NAAQS standards for the six criteria pollutants and to promulgate seven rules—one for each NAAQS review.²⁴ The last of these seven rules was promulgated in April 2012.²⁵ According to officials, the deadline suits addressing the NAAQS standards did not affect which NAAQS standards were reviewed since EPA reviewed all of the standards. According to officials, the deadline suits did affect the timing and order in which EPA conducted the reviews to accommodate the time frames in the settlements and court orders. Additionally, according to officials, as a result of the experience in responding to the deadline suits, the agency is striving to maintain the 5-year statutory review cycle for criteria pollutants going forward. However, officials noted that it is difficult for EPA to complete its NAAQS reviews every 5 years. From April 2012 through September 2014, EPA has promulgated one rule following a NAAQS review after it settled a deadline suit and has missed the statutory deadline for reviewing the standards of two other criteria pollutants, one of which EPA is under court order to complete by October 2015 following a deadline suit.²⁶

Regarding the Air Toxics program, OAQPS officials said that the impact of deadline suits on the Air Toxics program is different from that of the impact on the NAAQS program because of the large number of rules that the Air Toxics program promulgates. For example, the Clean Air Act establishes a schedule under which EPA established 120 standards to reduce the emissions of 187 hazardous air pollutants.²⁷ These National

²⁴Because EPA decided to conduct a separate, coordinated review of the public welfare effects of oxides of sulfur and nitrogen rather than reviewing the public welfare effects of each at the same time it reviewed the respective public health effects, EPA promulgated 7 rules for the six criteria pollutants.

²⁵77 Fed. Reg. 20,218 (Apr. 3, 2012). This was not a major rule, as defined by the CRA.

²⁶EPA promulgated a rule revising standards for particulate matter in January 2013 following a court order and consent decree and is under a separate court order to complete a review of ozone by October 2015. See 78 Fed. Reg. 3086 (Jan. 15, 2013); *American Lung Assoc. and National Parks Conservation Assoc. v. EPA*, No. 12-cv-00243 (D.D.C. 2012); *Sierra Club v. EPA*, No. 4:13-cv-02809-YGR (N.D. Cal. 2012). The deadline to review the standards for lead and, if needed, promulgate a rule revising the standards was November 2013. See 73 Fed. Reg. 66,964 (Nov. 12, 2008) (revising the primary and secondary NAAQS for lead).

²⁷See 42 U.S.C. § 7412. For the purposes of this report, generally, we are counting each subpart of 40 C.F.R. part 63 as a NESHAP.

Emission Standards for Hazardous Air Pollutants (NESHAP) apply to certain categories of sources of these pollutants, such as cement manufacturing, municipal solid waste landfills, and semiconductor manufacturing. Generally, the act requires EPA, no less often than every 8 years, to review the standard, and revise as necessary. It makes any necessary revisions through the rulemaking process. The review must take into account developments in practices, processes, and control technologies.²⁸ For sources subject to Maximum Achievable Control Technology (MACT) standards promulgated pursuant to section 112(d)(2) of the Clean Air Act, EPA must also conduct a residual risk assessment within 8 years after the initial promulgation of the standard.²⁹ EPA refers to these two reviews together as the risk and technology review (RTR). As of October 2014, EPA has completed 28 RTRs (27 of these reviews following deadline suits) and has not completed 57 RTRs for which the statutory deadline has passed and 36 RTRs for which the statutory deadline has not passed.³⁰ Additionally, officials report that, currently, most of the resources available to complete RTRs are focused on a 2011 settlement. This settlement listed 27 NESHAPs for which RTRs were overdue. OAQPS officials said that they have been unable to meet all of the time frames contained in the 2011 settlement and, as a result, have negotiated amendments to the settlement extending the time frames. Officials said that they intend to complete all of the overdue RTRs but are focused on fulfilling the terms of the 2011 settlement and several other settlements to which EPA has entered into that address a smaller number of reviews. Additionally, in September 2013, EPA received a NOI concerning 43 additional NESHAPs for which a RTR is overdue. EPA officials said that they are engaged in settlement discussions over one of these reviews for which EPA has been sued.

²⁸42 U.S.C. § 7412(d)(6).

²⁹42 U.S.C. § 7412(f)(2)(A) (requiring EPA, within 8 years after promulgation of standards for each category or subcategory of sources, to promulgate standards for such category or subcategory if promulgation of such standards is required in order to provide an ample margin of safety to protect public health or to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect). Standards that apply only to area sources may not need to undergo a residual risk assessment, in which case these standards only receive a technology review every 8 years. See 42 U.S.C. § 7412(f)(5).

³⁰These numbers do not add to the total number of standards because for one standard, an RTR was conducted for some source categories but not for others. As a result, that standard is counted both as having a completed RTR and having an overdue RTR.

Additionally, we discussed with EPA budget officials the potential impact of budget allocation decisions associated with deadline suits on EPA offices that are not subject to deadline suits. According to the budget officials, EPA accounts for anticipated workload arising out of litigation in its budgeting cycle for affected programs but does not make changes in existing budget allocations specifically to address settlements in deadline suits. Thus, according to the official, the resources available to EPA offices not subject to these settlements are not directly impacted by the settlements.

Agency Comments

We provided a draft of this report to EPA and DOJ for review and comment. In written comments from EPA, reproduced in appendix IV, the agency generally concurs with our analysis and states that the report accurately describes EPA's approach to deadline suit litigation brought against it. EPA also provided technical comments, which we incorporated as appropriate. In addition, in an e-mail received November 24, 2014, the DOJ Audit Liaison stated that the DOJ concurs with our report and has no additional comments.

As agreed with your offices, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies to the appropriate congressional committees, the Attorney General, the Administrator of the EPA, and other interested parties. In addition, the report will be available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff members have any questions about this report, 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 report. GAO staff members who made major contributions to this report are listed in appendix V.



J. Alfredo Gómez
Director, Natural Resources and Environment

Appendix I: Objectives, Scope, and Methodology

The objectives of this report are to examine (1) key environmental laws that allow citizens to file deadline suits that may compel the Environmental Protection Agency (EPA) to conduct a rulemaking and the factors EPA and the Department of Justice (DOJ) consider in determining whether or not to settle these lawsuits, (2) the terms of settlements in deadline suits that led EPA to promulgate major rules in the last 5 years and the extent to which the public commented on the terms of the settlements, and (3) the extent to which settlements in deadline suits have affected EPA's rulemaking priorities.

To examine the key environmental laws that allow citizens to file deadline suits that may compel EPA to conduct a rulemaking, we identified through legal research nine key environmental laws for which EPA has primary regulatory authority. Through additional legal research, we determined that two of these laws do not include provisions that permit citizens to file deadline suits. These laws are the Federal Insecticide, Fungicide, and Rodenticide Act and related provisions of the Federal Food, Drug, and Cosmetic Act.¹ To understand the factors that EPA considers in determining whether or not to settle deadline suits, we held discussions with officials from EPA's Office of General Counsel and DOJ because both agencies are involved in making these determinations. We also discussed the processes and procedures that EPA follows when settling citizen deadline suits.

To examine the terms of settlements in deadline suits that led EPA to promulgate major rules in the last 5 years, we developed a list of major rules EPA issued from May 31, 2008 through June 1, 2013 by searching a database that GAO maintains to help implement the Congressional Review Act.² We determined that the data were sufficiently reliable for the

¹7 U.S.C. §§ 136-136y; 21 U.S.C. § 346a. The laws do not have provisions allowing citizens to sue EPA for failure to issue a statutorily required rule within statutorily required time frames, but the Administrative Procedures Act provides that a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. 5 U.S.C. § 702. In such a case, the court may compel agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706.

²The 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).

purpose of identifying major rules issued by EPA. EPA officials then identified which major rules EPA issued following a settlement in a deadline suit. We relied on EPA because neither EPA nor DOJ maintains a database that links settlements to rules, and there is no comprehensive public source of such information. For the purposes of this report, 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. This report only 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. We did not review other types of suits against EPA.³ We obtained the settlements by accessing court records through the Public Access to Court Electronic Records. We then analyzed the content of each settlement and summarized the results.

To examine the extent to which the public commented on the terms of the settlements, we obtained from EPA legal memoranda summarizing the number and content of public comments EPA received on drafts of the settlements. Because each of the major rules issued following settlements in deadline suits were Clean Air Act rules, EPA solicited public comments on drafts of the settlements as required by the Clean Air Act. The act also requires EPA or DOJ to consider any public comments provided on settlements and authorizes them to 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 the Clean Air Act requirements. EPA made these determinations and documented its decisions in legal

³This report examines nondiscretionary duty suits in which the nondiscretionary duty is to issue a rule or make a determination not to issue a rule by 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.

memoranda that it provided to us. We analyzed the contents of these memoranda to determine the extent and nature of the public comments EPA received on draft settlements.

To examine the extent to which settlements in deadline suits have affected 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.⁴ We assessed the reliability of the data by interviewing agency officials knowledgeable about the data. We determined that the data were sufficiently reliable for the purposes of this report. The data showed that one office was responsible for implementing the terms of most of the settlements. We spoke with officials from this office to understand the extent to which settlements in deadline suits had affected the timing and order of the rules they promulgated, as well as which rules they promulgated. We also spoke with EPA budget officials to understand the extent to which settlements in deadline suits affected budget allocation decisions for EPA offices not subject to settlements in deadline suits.

We also interviewed individuals from academia, an environmental group, industry, and a state official from Oklahoma, to obtain their perspectives on deadline suits. We chose these individuals because they had experience or knowledge related to deadline suits and could provide the perspective of different stakeholder groups. For example, one interviewee provided legal representation for an environmental group that filed a deadline suit, and another interviewee authored a report critical of how EPA responds when faced with a deadline suits. The views of these individuals cannot be generalized to those with whom we did not speak.

We conducted this performance audit from September 2013 to December 2014 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.

⁴We excluded from our analysis settlements in deadline suits for which a regional office was responsible for issuing the required rules because these rules are regional in scope.

Appendix II: Major Rules Issued by EPA from May 31, 2008 to June 1, 2013

The Environmental Protection Agency (EPA) issued 32 major rules from May 31, 2008 to June 1, 2013. According to EPA officials, the agency issued 9 of these rules following settlements in deadline suits and issued 5 of the 32 rules to comply with court orders following deadline suits in which plaintiffs and EPA were unable to reach a settlement. The remaining 18 rules, according to agency officials, were not associated with a deadline suit. Table 3 lists the 32 major rules EPA issued from May 31, 2008 to June 1, 2013.

Table 3: Major Rules Issued by EPA from May 31, 2008 to June 1, 2013

Rules issued following settlements in deadline suits	
Rule title	Law
Standards of Performance for Petroleum Refineries, 73 Fed. Reg. 35,838 (June 24, 2008)	Clean Air Act
Primary National Ambient Air Quality Standards for Nitrogen Dioxide, 75 Fed. Reg. 6474 (Feb. 9, 2010)	Clean Air Act
National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines, 75 Fed. Reg. 9648 (Mar. 3, 2010)	Clean Air Act
Primary National Ambient Air Quality Standard for Sulfur Dioxide, 75 Fed. Reg. 35,520 (June 22, 2010)	Clean Air Act
National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines, 75 Fed. Reg. 51,570 (Aug. 20, 2010)	Clean Air Act
National Emission Standards for Hazardous Air Pollutants From the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants, 75 Fed. Reg. 54,970 (Sept. 9, 2010)	Clean Air Act
National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9304 (Feb. 16, 2012)	Clean Air Act
Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews, 77 Fed. Reg. 49,490 (Aug. 16, 2012)	Clean Air Act
National Ambient Air Quality Standards for Particulate Matter, 78 Fed. Reg. 3086 (Jan. 15, 2013) ^a	Clean Air Act
Rules issued following court orders in deadline suits	
Rule title	Law
National Ambient Air Quality Standards for Lead, 73 Fed. Reg. 66,964 (Nov. 12, 2008)	Clean Air Act
Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category, 74 Fed. Reg. 62,996 (Dec. 1, 2009)	Clean Water Act
National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers, 76 Fed. Reg. 15,554 (Mar. 21, 2011)	Clean Air Act
National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters, 76 Fed. Reg. 15,608 (Mar. 21, 2011)	Clean Air Act
Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units, 76 Fed. Reg. 15,704 (Mar. 21, 2011)	Clean Air Act

**Appendix II: Major Rules Issued by EPA from
May 31, 2008 to June 1, 2013**

Rules issued not associated with a deadline suit	
Rule title	Law
Lead; Amendment to the Opt-out and Recordkeeping Provisions in the Renovation, Repair, and Painting Program, 75 Fed. Reg. 24,802 (May 6, 2010)	Toxic Substance Control Act
Standards of Performance for Petroleum Refineries; Standards of Performance for Petroleum Refineries for Which Construction, Reconstruction, or Modification Commenced After May 14, 2007, 77 Fed. Reg. 56,422 (Sept. 12, 2012)	Clean Air Act
National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines; New Source Performance Standards for Stationary Internal Combustion Engines 78 Fed. Reg. 6674 (Jan. 30, 2013)	Clean Air Act
Control of Emissions From Nonroad Spark-Ignition Engines and Equipment, 73 Fed. Reg. 59,034 (Oct. 8, 2008)	Clean Air Act
Revisions to the Definition of Solid Waste, 73 Fed. Reg. 64,668 (Oct. 30, 2008)	Resource Conservation and Recovery Act
Oil Pollution Prevention; Spill Prevention, Control, and Countermeasure Rule Requirements – Amendments, 73 Fed. Reg. 74,236 (Dec. 5, 2008)	Clean Water Act
Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. 56,260 (Oct. 30, 2009)	Clean Air Act
Oil Pollution Prevention; Spill Prevention, Control, and Countermeasure Rule Requirements – Amendments, 74 Fed. Reg. 58,784 (Nov. 13, 2009)	Clean Water Act
Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 75 Fed. Reg. 14,670 (Mar. 26, 2010)	Clean Air Act
Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010)	Clean Air Act
Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010)	Clean Air Act
Oil Pollution Prevention: Spill Prevention, Control, and Countermeasure (SPCC) Rule - Amendments for Milk and Milk Product Containers, 76 Fed. Reg. 21,652 (Apr. 18, 2011)	Clean Water Act
Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208 (Aug. 8, 2011)	Clean Air Act
Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles, 76 Fed. Reg. 57,106 (Sept. 15, 2011)	Clean Air Act
Federal Implementation Plans for Iowa, Michigan, Missouri, Oklahoma, and Wisconsin and Determination for Kansas Regarding Interstate Transport of Ozone, 76 Fed. Reg. 80,760 (Dec. 27, 2011)	Clean Air Act
Regulation of Fuels and Fuel Additives: 2013 Biomass-Based Diesel Renewable Fuel Volume, 77 Fed. Reg. 59,458 (Sept. 27, 2012)	Clean Air Act
2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 59,458 (Sept. 27, 2012)	Clean Air Act
National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters, 78 Fed. Reg. 7138 (Jan. 31, 2013)	Clean Air Act

Source: GAO. | GAO-15-34

^aThis rule was issued after the court issued an order establishing a deadline to sign the notice of proposed rulemaking, and the parties reached a settlement establishing a deadline to sign the final rule.

Appendix III: Contents of Settlements Following Deadline Suits That Compelled EPA to Issue 9 Rules from May 31, 2008 to June 1, 2013

The Environmental Protection Agency (EPA) issued 9 major rules from May 31, 2008 to June 1, 2013 following seven settlements in deadline suits. Each of the seven settlements established a schedule to either issue a statutorily required rule or make a determination that such a rule is not appropriate or necessary pursuant to the relevant statutory provision. EPA negotiated extensions to the deadlines to issue the final rules in five of the seven settlements. Table 4 summarizes the contents of the seven settlements.

Table 4: Contents of Settlements in Deadline Suits Associated with 9 Major Rules EPA Issued from May 31, 2008 to June 1, 2013

Settlements containing a schedule to issue a rule	
Rules associated with the settlement	Settlement provisions and amendments
National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines, 75 Fed. Reg. 9648 (Mar. 3, 2010)	Among other things, deadlines for (1) proposing and (2) promulgating a final rule for stationary internal combustion engines that are area sources or are less than 500 horsepower and located at major sources.
National Emission Standards for Hazardous air Pollutants for Reciprocating Internal Combustion Engines: Existing Stationary Spark Ignition, 75 Fed. Reg. 51,570 (Aug. 20, 2010)	The rule for stationary internal combustion engines that are area sources or less than 500 horsepower and located at major sources was subsequently divided into new sources and existing sources, and the deadline for issuing a final rule for existing sources was extended. The rule for existing sources was then divided into rules for compression-ignition engines and spark ignition engines, and the deadline for issuing each rule was extended, making the final deadlines 26 months and 32 months, respectively, later than the initial deadline in the settlement.
National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9304 (Feb. 16, 2012)	Deadlines for signing for publication in the <i>Federal Register</i> a notice of (1) proposed and (2) final rulemaking setting forth EPA's emission standards for coal- and oil-fired electric utility steam generating units. The deadline for signing a notice of final rulemaking was subsequently extended by one month.
Settlements containing a schedule to issue a rule or make a determination that a rule is not necessary or appropriate	
Rules associated with the settlement	Settlement provisions and amendments
Standards of Performance for Petroleum Refineries, 73 Fed. Reg. 35,838 (June 24, 2008)	Deadlines for signing for publication in the <i>Federal Register</i> (1) proposed revisions to standards in New Source Performance Standards (NSPS), except to the extent that EPA determines that a review and/or revision is not appropriate, and (2) final revisions to standards in NSPS, except to the extent that EPA determines that a review and/or revision is not appropriate.

**Appendix III: Contents of Settlements
Following Deadline Suits That Compelled EPA
to Issue 9 Rules from May 31, 2008 to June 1,
2013**

<p>Primary National Ambient Air Quality Standards for Nitrogen Dioxide, 75 Fed. Reg. 6474 (Feb. 9, 2010) Primary National Ambient Air Quality Standard for Sulfur Dioxide, 75 Fed. Reg. 35,520 (June 22, 2010)</p>	<p>Deadlines for (1) issuing final Integrated Science Assessments addressing human health effects of oxides of nitrogen and sulfur, (2) signing a notice of proposed rulemaking concerning its review of primary oxides of nitrogen and sulfur National Ambient Air Quality Standards (NAAQS) and proposing such new and/or revisions of primary oxides of nitrogen and sulfur NAAQS as may be appropriate pursuant to the law, and (3) signing a notice of final rulemaking concerning its review of primary oxides of nitrogen and sulfur NAAQS and making such revisions and/or promulgating new primary oxides of nitrogen and sulfur NAAQS as may be appropriate pursuant to the law.^a</p> <p>The deadlines for issuing proposed and final rules for primary NAAQS for oxides of nitrogen and sulfur were subsequently extended by between about 1 and 4 months.</p>
<p>National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants, 75 Fed. Reg. 54,970 (Sept. 9, 2010)</p>	<p>Deadlines for signing and forward to the <i>Federal Register</i> for publication (1) one or a combination of the following: a proposed rule containing revisions to NSPS and/or a proposed determination not to revise NSPS and (2) one or a combination of the following: a final rule containing revisions to the NSPS and/or a final determination not to revise NSPS.</p> <p>The deadline for issuing a final rule was subsequently extended by about 15 months.</p>
<p>Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews, 77 Fed. Reg. 49,490 (Aug. 16, 2012)</p>	<p>Deadlines for (1) signing a proposed rule containing revisions to NSPS, a proposed determination not to revise the NSPS, and/or a proposed or final determination not to review the NSPS, (2) signing a final rule containing revisions to NSPS, a final determination not to revise NSPS, and/or a final determination not to review NSPS, (3) signing a proposed rule containing revisions to National Emission Standards for Hazardous Air Pollutants (NESHAP) or a proposed determination that the revision of NESHAP is not necessary, (4) signing a final rule containing revisions to NESHAP or a final determination that revision of NESHAP is not necessary, (5) signing a proposed rule promulgating residual risk standards or a proposed determination that promulgation of standards is not required, and (6) signing a final rule promulgating residual risk standards or a final determination that promulgation of standards is not required.</p> <p>The deadlines were subsequently extended by about 4 to 6 months.</p>
<p>National Ambient Air Quality Standards for Particulate Matter, 78 Fed. Reg. 3086 (Jan. 15, 2013)</p>	<p>Deadline for signing a notice of final rulemaking setting forth its final decision concerning its review of the NAAQS for particulate matter and promulgating such revisions to the NAAQS, and/or promulgating such new NAAQS as may be appropriate.^b</p>

Source: GAO. | GAO-15-34

^aIntegrated Science Assessments evaluate and synthesize the most policy-relevant science for reviewing the National Ambient Air Quality Standards (NAAQS). The Clean Air Act requires EPA to review, and revise as appropriate, NAAQS at 5-year intervals. 42 U.S.C. § 7409(d).

^bThe court had previously issued an order establishing a deadline to sign the notice of proposed rulemaking.

Appendix IV: Comments from the Environmental Protection Agency



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

NOV 25 2014

Mr. J. Alfredo Gomez
Director, Natural Resources and Environment
U.S. Government Accountability Office
441 G Street, N.W.
Washington, DC 20460

Dear Mr. Gomez:

Thank you for the opportunity to review and comment on the U.S. Government Accountability Office's draft report, "Environmental Litigation: Impact of Deadline Suits on EPA's Rulemaking is Limited" (GAO-15-34). EPA generally concurs in your analysis.

This report describes our longstanding and entirely appropriate approach to litigation brought against the U.S. Environmental Protection Agency (EPA). We, alongside the U.S. Department of Justice (DOJ), carefully and completely assess the merits of any claims against EPA, our litigation risks based on the law and underlying facts, and the interests of the Agency and the American public. We never agree to final substantive outcomes or otherwise use settlements to circumvent the lawful process for promulgating environmental regulations and standards. Finally, all of the settlements that led to major rules in your study were subjected to public scrutiny and comment before being finalized.

While we are always interested in ways to improve transparency where appropriate, many opportunities for robust public participation in the work of EPA already exist. These include opportunities to comment on many proposed settlements before they are finalized, and the comment period provided in any subsequent rulemaking process. Indeed, the latter opportunity is used by millions of Americans, from every State and all walks of life, to help inform the Agency in developing its rules in accordance with the law and the underlying science.

It is my hope that this report will put to rest any misconceptions about the relationship between the manner in which EPA and DOJ litigate claims brought against EPA and the content of any EPA regulations. In recent years, this Agency and others within the federal government have faced unfounded allegations that our efforts to resolve litigation are somehow conducted in a manner to evade public input on important questions of public policy. As your findings

**Appendix IV: Comments from the
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confirm, nothing could be further from the truth.

The fact is, Congress (wisely, in my view) designed key aspects of our environmental laws to mandate regulatory action by certain deadlines to improve the quality of the environment and the protection of public health. There is nothing secret about those mandates; they are the law of the land. And it was Congress that gave the public the legal tools to hold the government to account in carrying out the mandates it set.

There should be no doubt of the diligence and commitment of the attorneys in my office and at the Department of Justice, to carry out our laws fully and faithfully. EPA strives to meet statutory deadlines. When clear deadlines are missed, and EPA is sued on that basis, the sound judgment of EPA and DOJ—as expressed from Administration to Administration—and the reaction of the courts, make clear that it is almost always a fruitless endeavor to seek to avoid those deadlines through legal maneuvering. Further, such efforts cost the taxpayers' money and squander our limited resources. Settlements can allow EPA to avoid unnecessary costs and litigation and focus its resources, and DOJ's, on more productive efforts to advance and defend the Agency's work.

I also want to take this opportunity to thank you and your staff for your professionalism, objectivity, and diligence. By zealously researching the facts and circumstances surrounding our deadline suit litigation, you have provided a valuable contribution to public understanding of how EPA meets its statutory mandates to protect human health and the environment.

If you have questions or need further information regarding this engagement, please contact Marna McDermott ((202)-564-2890).

Sincerely,



Avi S. Garbow
General Counsel

cc: Gina McCarthy, Administrator
Joel Beauvais, Associate Administrator, Office of Policy
Janet McCabe, Assistant Administrator, Office of Air and Radiation
Sam Hirsch, Acting Assistant Attorney General for Environment and Natural Resources
Lee J. Lofthus, Assistant Attorney General for Administration

Appendix V: GAO Contact and Staff Acknowledgments

GAO Contact

J. Alfredo Gómez, (202) 512-3841 or gomezj@gao.gov

Staff Acknowledgments

In addition to the individual named above, Vincent P. Price, Assistant Director; Rodney Bacigalupo; Elizabeth Beardsley; John Delicath; Charles Egan; Cindy Gilbert; Tracey King; and Kathryn Smith made key contributions to this report.

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