Testimony of Lois Schiffer, Retired General Counsel of the National Oceanic and Atmospheric Administration, before the Oversight and Investigations Subcommittee of the House Natural Resources Committee, June 28, 2017 at a hearing "Examining Policy Impacts of Excessive Litigation Against the Department of the Interior.

Chairman Labrador, Ranking Member McEachin, and members of the Subcommittee, thank you for the opportunity to testify today about settlements in federal agency litigation, with particular attention to the Department of the Interior.

With intermittent federal agency service of 25 years through several positions at the U.S. Department of Justice, the National Oceanic and Atmospheric Administration, and the National Capital Planning Commission, and as an adjunct professor of environmental law at Georgetown University Law Center for 30 years, I have had significant experience handling litigation and reaching and approving settlements of federal agency cases. I began work at the U.S. Department of Justice in 1978 as Chief of the General Litigation Section (now the Natural Resources Section) in the Land and Natural Resources Division, with responsibility for public land and water cases, surface mining, some cases related to Indians, and litigation generally under numerous federal statutes. In 1981, I became a Senior Litigation Counsel in the Lands Division, a position I held until 1984. I returned to the U.S. Department of Justice Department in 1993, first as Deputy Assistant Attorney General, then as Acting Assistant Attorney General, and from 1994 through January 2001, as Assistant Attorney General for the (renamed) Environment and Natural Resources Division. I have also served at General Counsel at the National Capital Planning Commission (2005-2010) and at NOAA (2010 through January 2017). I have worked in private practice at law firms and as a lawyer at non-profit organizations as well. I am also a trained mediator with the federal courts in the District of Columbia, and established a mediation program in the Environment Division in the 1990's. In these roles I have litigated and supervised thousands of cases, and have over many years been involved in settlements large and small. My remarks today are based on my own experience and are on my own behalf; I am not speaking for any federal agency or private group.

Today I will describe how several different types of lawsuits against the Department of the Interior are handled—cases where the plaintiff seeks injunctive relief, either against an agency rule or an individual action such as issuance or denial of a lease or permit; or seeks to compel the agency to comply with a mandatory duty under a statute; and cases where the plaintiff seeks monetary relief.

Overall, litigation is a means that our constitutionally established three-branch system of government makes available through the U.S. Constitution and federal statutes to help assure that agencies comply with Congressional statutes, agency regulations, the U.S. Constitution, and other laws. Courts decide disputes among parties with differing interests. It is an orderly and effective means of dispute resolution among the government and other parties, including State and local governments, citizens, and companies and organizations supporting a wide range of interests. Settlement is one tool in this toolkit, and certainly a tool used—outside of

government cases—by businesses as well as governments. Indeed many approaches to alternative dispute resolution are designed to identify common interests of disputing parties in lawsuits so that they can achieve a settlement. Those who seek to have the government run more like a business must be aware that full use of settlement authority in appropriate circumstances is one way to do that.

A word of background about lawsuits against the federal government: they are brought to challenge agency action or failure to act under specific statutes or regulations. They reflect the fact that in its actions under federal laws agencies are taking into account a broad range of legal requirements and public interests, often expressed through public comment or communicated to the agency through other means. Under federal law, the party bringing the lawsuit must establish standing – showing injury in fact, that the action or failure to act caused the injury, and that it may be redressed by the court. If the defendant does not object to an assertion that a plaintiff has standing, the Court on its own may determine that the plaintiff has not met this burden. In addition, the party suing must demonstrate that the case falls within the zone of interests protected by the statute or law at issue; that a statute provides a "cause of action", and that the agency either acted under the statute or regulation in an arbitrary and capricious manner or otherwise contrary to law, or that it failed to perform a mandatory duty. In effect, those bringing lawsuits are seeking to hold the agency to the requirements that Congress and the United States Constitution establish for agency action. Lawsuits are brought either under the Administrative Procedure Act, or under specific provisions of the substantive law.

Moreover, in filing a lawsuit in federal court, where most actions against federal agencies are brought, the lawyer must meet the requirements of Rule 11 of the Federal Rules of Civil Procedure, by which s/he must warrant, inter alia, that "the claims, defenses, and other legal contentions are warranted by existing law, or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law". [1] So before there is a possibility of settlement, there has to be

[1] Rule 11(b) of the Federal Rules of Civil Procedure provides:

"(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information."

a notice of or a filing of a non-frivolous lawsuit against the agency based on a statute, regulation, or the Constitution.

Litigation or settlement of cases seeking injunctive relief. Once a suit is filed, both the party bringing the case and the government agency, represented in Court in most instances by the U.S. Department of Justice, assess the nature and the merits of their case. Settlement is often considered as a possibility. Without invading any client confidences, I may say that it is useful for each party to assess what happens if s/he wins, what happens if s/he loses and what happens if s/he settles.

It is useful to make this assessment against the costs, delay, and uncertainty of the court deciding, either by summary judgment on a record and the pleadings, or after trial (depending on the type of case). At a minimum, the agency will be required to assemble an administrative record, and to work with the Justice Department on writing briefs and often, presenting argument to a judge. In cases seeking injunctive relief, the advantages of settlement are often time-savings, pragmatism, and control. As a specific example, under express provisions of the Endangered Species Act, the agency must take certain actions within specified timeframes (e.g within 12 months of receiving a petition to list or delist a species that the agency has found has sufficient information that action may be warranted). These schedules do not dictate particular outcomes, but do require action. If the agency misses the timeframe, and a petitioner sues to enforce the timeframe, the court may hold the agency to short and firm dates that the agency does not have resources to meet. That represents a loss for the agency and for the petitioner—seeking either listing or delisting—because a court victory may not get results. Alternatively a settlement for a schedule taking into account both the petitioner's interest and the agency's resources, may result in more practical dates without the need for full briefing to the Court.

The practical benefits of settling cases is well-recognized by the federal courts, virtually all of which have put in place alternative dispute resolution programs, procedures and requirements to encourage settlements.

The practical benefits are also well recognized by litigants against the government of every interest, and by federal agencies. If a more manageable result can be achieved with less time for briefing and assembling a record, that serves everyone's interest.

For settlements seeking injunctive relief—for example, the agency failed to meet a mandatory duty, the regulation should be set aside, the lease should be issued rather than denied based on the record before the agency—the settlement will require approval of both the Department of the Interior by a person with appropriate authority, and by the Department of Justice by a person of appropriate authority. In my experience, at the Department of Justice, the approval of a Section Chief or Assistant Chief, and possibly an even higher official, will be required for a significant non-monetary settlement. See generally 28 C.F.R. 0.160, the Justice Department regulation that specifies what settlements must be elevated beyond the

Assistant Attorney General. Within each Division at Justice, provisions are set forth as to what levels of approval are required for settlement.

Settlements may be reflected in Consent Decrees—an order approved by the Court, or by settlement agreement –in effect contracts between the parties setting forth what each party will do. Another benefit of settlements, rather than litigated judgments,, is that the option of a contract-like settlement agreement, rather than a court order, is available In fact, the federal government usually settles cases against it by settlement agreement rather than consent decree, so that any failure to comply is addressed in the first instance by further proceedings before the court as a failure to meet a contract term rather than as a contempt proceeding.

Under several statutes, including the Endangered Species Act and some of the pollution protection statutes like the Clean Air Act and Clean Water Act, Congress may be seen to contemplate settlements - a party may be required to give notice (for example, of 60 days) before a suit may be filed. The intention of such notice periods is to permit the agency to correct the problem or resolve the issue before a lawsuit is filed. A settlement agreement is one means for such resolution.

Suits against the federal government for money. In a suit against a federal agency or the United States for a monetary claim, once the claim is made (for example a tort claim) or the suit is filed (for example, a takings claim), a similar assessment by each party of strengths and weaknesses of its claims and arguments is a useful internal process. Claims for money occur under specific statutes where Congress has waived the sovereign immunity of the United States. Claims against the United States, such a takings claims, may directly relate to actions of a particular agency, including the Department of the Interior. Claims for money are more likely to be addressed in court through an evidentiary trial, rather than on an administrative record through summary judgment. That makes the cost and time of going to trial an additional factor. It is also useful to note that the Justice Department, which generally handles litigation of monetary claims, is governed by Justice Department regulations that require the approval of the Associate Attorney General or Deputy Attorney General for payments of claims against the United States where the payment is in excess of $4 million. Other factors also require approval above the Assistant Attorney General level. See generally 28 C.F.R 0.160 (the Justice Department regulation on settlement authority).

In my experience, in the Environment and Natural Resources Division at Justice, monetary settlements are reviewed carefully, with an eye to limiting costs to the public. Attorneys are mindful that they have responsibility to see that claims on the federal Judgment Fund are made wisely.

Money claims for attorneys' fees are strictly regulated by the governing statutes, including the Equal Access to Justice Act and attorneys' fees provisions in other statutes. These statutes, which are waivers of sovereign immunity, have specific standards for payment. Indeed, Congress enacted the Equal Access to Justice Act, which requires that attorneys' fees be paid from the agency budget rather than the

Judgment Fund, to encourage lawful agency conduct and deter agency decisions that skirted the law. From my experience at both NOAA and the Justice Department I note that claims for attorneys' fees under EAJA and other statutes are evaluated carefully before payment is made. Settlement generally has the effect of limiting the amounts paid by the federal government, in part because Courts may be less flexible, and in part because litigation over the fees generates "fees on fees"—fees go the plaintiff to litigate the claim if the government does not prevail, or does not (under EAJA) have a substantial basis for its position.

Concerns that settlements aren't transparent. Some have raised concerns about "secret settlements", and I have heard these concerns about settlements from a full range of parties. A few points: while settlement discussions of necessity are confidential to get results—a party cannot easily take a position in court and publicly undercut it in a public settlement discussion, but can in a private discussion-- the settlements themselves are quite public—I cannot recall being involved in a settlement on behalf of a federal agency (with the exception of personnel actions, where Privacy Act concerns may pertain) that did not have a public document as the outcome.

In conclusion, Congress and the Constitution provide citizens and organizations with the right to bring lawsuits against federal agencies and the United States as one means to assure that the agencies are meeting the requirements of the laws. Those seeking to sue must meet a set of requirements including establishing standing and making non-frivolous claims. Once notice is given or a suit is filed, evaluating whether a consensual resolution through settlement, rather than litigation and a court order, is an important and useful tool for both plaintiffs and the government in some cases. Many requirements within the government help assure that the tool is used appropriately.

Thank you for the opportunity to testify about this important subject.