power of one senator.

The rewrite of the Endangered Species Act (ESA) provides an example of a more typical way in which what Congress does affects the rights and interests of tribes. In a more open process than occurred in the Senate, the House Resources Committee belatedly realized that they should have thought about how tribes fit into the ESA, and they added a few provisions in committee mark-up. The bill passed by the House, the Threatened and Endangered Species Recovery Act (TESRA), H.R. 3824, would make some sweeping changes from the existing law. (Its fate in the Senate is uncertain.) One reference to Indian tribes would amend Section 6 of the ESA, 16 U.S.C. § 1535, to expressly authorize the Secretary of the Interior to enter into cooperative agreements with tribes "in substantially the same manner in which the Secretary may enter into a cooperative agreement with a State." There is very little in the bill, or in its legislative history to date, though, to indicate much awareness of or attention to tribal concerns.

Tribes do have a range of concerns relating to the ESA, and there is no single tribal position. In some cases, tribes have been involved in management of habitat, seeking to bring species back, not just from the brink of extinction, but to the kind of abundance that would allow substantial harvesting by tribal members. Some tribes have been involved in reintroduction of listed species. In other cases, tribes have objected to the designation of critical habitat within their reservations. In 1997, tribal concerns regarding the ESA led to the issuance of a Joint Secretarial Order issued by the Secretaries of the Interior and Commerce, captioned "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act" (*available at* www.fws.gov/endangered/tribal/index.html). If there is genuine interest in Congress regarding tribes and the ESA, the Secretarial Order might be a good starting point.

The case before the Supreme Court is *Wagnon v. Prairie Band Potawatomi Nation*, No. 04-631, which was argued on October 3, 2005. The Tenth Circuit Court of Appeals held that a state tax on motor fuels sold at the Band's on-reservation gas station was incompatible with federal and tribal interests, including a tribal tax comparable to the state tax and, as such, was preempted by operation of federal law. *Prairie Band Potawatomi Nation v. Richards*, 379 F.3d 979 (10th Cir. 2004). Distinguishing an earlier ruling in *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980), the Tenth Circuit said that the Band was not marketing a tax exemption but, rather, was providing a service to people who came to its reservation for other purposes (generally for gaming). (In *Colville*, the Supreme Court had ruled that, while the tribe could tax tobacco products and other commercial activities on trust land, the state could also tax sales to nontribal members; that is, the state tax was not preempted.) In the oral arguments before the Supreme Court, much of the questioning from the Justices focused on the issue of who bears the burden of the state tax. The underlying policy issue, which could be addressed by Congress regardless of how the Court rules, is whether tribes will be able to raise revenues for governmental operations by levying taxes on various kinds of commercial activities within their reservations or whether tribes will have to continue to rely mainly on federal contracts and grants to fund their governmental operations, supplemented in many cases by tribal casinos. In other words, do we, the American people, want Indian tribes to be fully functional governments, or do we want them to limit their activities to running casinos and administering federal assistance programs for tribal members?

In the self-determination era of federal Indian policy, determining the nature of its relations with the larger American society should be, to a large extent, something for the members of each tribal nation to determine for themselves. But, of course, we must also contend with the federal Indian law doctrine of the plenary power of Congress. One implication of this is that, at some level, the status of Indian tribes in American government is subject to the will of the American people.

The three events noted in this piece have led me to realize that I need to take more personal responsibility for enhancing the awareness of tribal government environmental programs within the legal profession. So I proposed to my fellow members of the editorial board of this magazine that we devote an issue to the theme of Tribal Environmental Programs. My fellow board members agreed. It gives me great pleasure to announce that this will be the theme of the Winter 2007 issue (Volume 21, Number 3). And, as always, we are looking for authors to contribute.

Settling NSR Cases: Can you? Is it really over?

Michael D. Freeman and Christopher L. Yeilding

As the sun was setting on the Clinton administration in late 1999, the U.S. Environmental Protection Agency (EPA) initiated the largest environmental enforcement initiative in history. Targeting utilities with coal-fired plants, EPA filed lawsuits in federal district courts across the Midwest and South claiming widespread noncompliance with the Clean Air Act's

Mr. Freeman is a partner and Mr. Yeilding an associate at Balch & Bingham LLP in Birmingham, Alabama. They may be reached at mfreeman@balch.com and cyeilding@balch.com, respectively.

(CAA) New Source Review (NSR) requirements. EPA alleged that the targeted utilities committed hundreds of violations of NSR by "modifying" their existing units, thereby converting them into "new sources." According to EPA, because these "modifications" improved power plant reliability, which results in increased kilowatt generation and a related increase in total emissions, they required NSR permitting and the installation of best available control technology (BACT). *See generally* Christopher W. Armstrong, *New Source Review Enforcement Initiatives*, 14 NAT. RES. & ENV'T 3, at 203 (Winter 2000).

While some utilities settled early (presumably to avoid prolonged litigation), many fought back claiming that EPA was changing the rules and seeking retroactive application of new regulatory interpretations. These utilities pointed out that the projects in question were not secret, but were done openly over a period of decades, and that many had, in fact, been permitted. The utilities argued that none of the projects increased the generating capacity of any of the units and, therefore, were not subject to NSR review.

While some of the NSR enforcement cases have settled, others continue to be litigated, and one—*Duke Energy*—was recently won outright by the utility at the appellate level. *See United States v. Duke Energy Corp*, 411 F.3d 539 (4th Cir. 2005). But beyond the fight over the merits, there are many important issues and disagreements over the settlements. As discussed below, there are pitfalls and dangers lurking in the settlement process. There is some question whether the settlements reached really do resolve all the claims raised or, alternatively, whether they contain illusory promises or assurances that could subject some settling defendants to future litigation they thought was resolved.

As with any settlement of an environmental matter with the government, the first step is to negotiate the terms of a proposed consent decree. Once the parties have reached agreement on a proposed consent decree, the government then files a Notice of Lodging a Proposed Consent Decree informing the court that the government has lodged the proposed decree with the clerk and that the government is required by regulation to invite public comment on the proposed decree for a period of thirty days before seeking judicial approval of the decree. *See* 28 C.F.R. § 50.7. The notice asks the court to await a subsequent submission by the government following the public comment period before the court decides whether to approve the proposed decree.

In the NSR cases that have settled thus far, the government has provided notice of the proposed consent decree in the *Federal Register* providing the public opportunity to comment. The government must consider all public comments and decide whether to move forward with seeking approval of the proposed decree. The government must also inform the court of all public comments and of the government's current position on whether the court should approve the proposed decree. The court then decides whether to enter the decree.

Initially, it should be noted that because the federal government and a utility have agreed to settle a case, signed a proposed consent decree, and filed it in court by no means assures a settlement. No better example of this exists than the ongoing saga facing Wisconsin Electric Power Company (WEPCO). *See United States v. Wisconsin Electric Power Co.*, CV-03-C-0371 (E.D. Wis.). In April 2003, WEPCO and the federal government agreed to a proposed consent decree, and the government filed the proposed decree with the court. More than two years later, that proposed decree is still awaiting a judge's signature. For the past two years, a coalition of environmental groups and other interested parties have successfully opposed entry of the decree. These groups intervened in the court proceedings, affirmatively challenged the terms of the proposed decree, and sought and obtained the right to conduct discovery. Their challenge has resulted in extensive discovery, briefing, and expense over the last two years, certainly eliminating some of the biggest benefits WEPCO must have hoped to achieve by settling—closure and certainty.

Unlike the WEPCO situation, there are NSR consent decrees that have been filed and approved by courts. *See, e.g., United States v. Illinois Power Co.*, CV-99-833 (S.D. Ill. May 27, 2005). As is typically the case with settlements, the consent decrees contain releases for *past* conduct. Under the CAA's statutory bar against citizen suits as well as common law principles, the decrees should effectively bar any future citizen suits based on the *past* conduct covered by the decree. Specifically, the same provision in the CAA that grants authority for filing citizen suits also bars them when the federal government or a state "has commenced and is diligently prosecuting a civil action." 42 U.S.C. § 7604(b). It should be noted that, on its face, 42 U.S.C. § 7604(b) does not apply to suits alleging PSD violations. This appears to be a drafting oversight in the 1977 amendments. In 1977, Congress added a subsection to Section 7604 allowing citizens to sue for PSD violations, 42 U.S.C. § 7604(a)(3), but Congress did not update the citizen suit bar to reference the added subsection. While this appears to be a legislative oversight, one judge has relied on the face of the statute in allowing a citizen PSD claim to proceed while the federal government's action was pending. *United States v. AEP*, 137 F. Supp. 2d 1060 (S.D. Ohio 2001).

Regardless of whether a court finds that the statutory bar precludes citizen suits following entry of a consent decree, the common law doctrines of res judicata and claim preclusion apply to consent decrees, just as they apply to ordinary judgments, and courts have

applied them to bar citizen suits following on the heels of consent decrees. *See, e.g., United States v. City of Green Forest, Arkansas*, 921 F.2d 1394 (8th Cir. 1991) (citizen suit asserting CWA claims precluded by consent decree between government and defendant); *CLEAN v. Premium Std Farms, Inc.*, 2000 WL 220464 (W.D. Mo. 2000) (citizen suit claims for CAA and CWA violations precluded by consent decree); *United States v. Olin Corp.*, 606 F. Supp. 1301, 1304 (N.D. Ala. 1985) ("the weight of authority indicates that once a state represents all of its citizens in a parens patriae suit—meaning "parent of the country"—a consent decree or final judgment entered in such a suit is conclusive upon those citizens and is binding upon their rights.")

The key to determining whether a citizen suit will be barred by common law principles or allow to proceed is whether the right being asserted is a "public" or "private" right. Generally speaking, an action under the CAA will be considered a "public" action asserting public rights, and, as mentioned above, numerous courts have held that private citizens are bound by the results of a governmental action that addresses public rights. However, a governmental action may not preclude a citizen from asserting *private* rights. To illustrate, a consent decree in an NSR enforcement action should preclude an environmental group from filing suit based on the same alleged CAA violations, but it may not preclude a neighboring landowner from filing a nuisance claim for some sort of interference with his right to the enjoyment of his property.

While consent decrees releasing claims for past conduct should preclude future citizen suits based on the same allegations, it is possible that a state agency could bring an enforcement action based on the same conduct covered by the consent decree. On this topic, at least one court has held that a consent decree in a federal action precludes a later *state* action. *State Water Control Board v. Smithfield Foods*, 542 S.E.2d 766 (Va. 2001). However, in another case, a court suggested the opposite. *United States v. Texas Eastern Transmission Corp.*, 923 F.2d 410 (5th Cir. 1991) (court denied state's motion to intervene in federal enforcement action because state did not show that it would be bound by result in federal action).

In the situation where the state action preceded the federal action, some courts have held that EPA was bound by the prior state/local government action, *see Harmon Industries, Inc. v. Browner*, 191 F.3d 894 (8th Cir. 1999); *United States v. ITT Rayonier*, Inc., 627 F.2d 996 (9th Cir. 1980), while other more recent cases take a contrary view. *United States v. Power Engineering Co.*, 303 F.3d 1232 (10th Cir. 2002), *cert. denied*, 123 S. Ct. 1929 (2003) (court allowed federal action to proceed in spite of prior state court settlement regarding same allegations); *United States v. Murphy Oil, USA, Inc.*, 143 F. Supp. 2d 1054 (W.D. Wis. 2001) (EPA not precluded in CAA case); *United States v. LTV Steel Co.*, 118 F. Supp. 2d 827 (N.D. Ohio 2000) (same). The courts finding that EPA was not bound seemed to base their holding on the fact that EPA and state agencies do not necessarily share the same interests or that the federal government did not direct or have a "laboring oar" in the state actions.

In many of the NSR enforcement actions, the federal government has also agreed to language in the consent decree releasing claims (or "covenanting not to sue") for modifications that occur sometime before a certain date in the future. Different cases have had different limitations on this covenant, but the point is that the government has in fact either released claims or covenanted not to sue with respect to things *that have not yet taken place*. The government's release of claims as to future actions is unusual. In the NSR-enforcement actions, the government has alleged that certain past activities (including maintenance work necessary to keep the plants running) were violations of the Clean Air Act. But the government has now also agreed through consent orders to allow similar activities in the future without the utilities facing any permitting requirements.

Notwithstanding EPA's and DOJ's willingness to agree to such language, some states and environmental groups have suggested that the federal government lacks the authority to make such promises, and that consent decrees containing such provisions are not enforceable. For instance, with respect to the consent decree proposed in *United States v. Virginia Electric and Power Co.*, CV-03-517A (E.D. Va.), the State of Massachusetts filed comments challenging EPA's "ability" to resolve future NSR violations and stated that Massachusetts "put[s] all parties on notice that we do not consider the Commonwealth so bound." Whether a covenant not to sue for future conduct made by the federal government precludes others, including state and local air pollution control agencies or environmental groups, is another unresolved issue, and that uncertainty must be considered by a defendant contemplating settlement.

Entering a NSR consent decree is not simple or foolproof. The very process of trying to negotiate terms to a consent decree with the federal government and other interested parties can be costly and time-consuming. Even when an agreement is reached, it still must be published in the *Federal Register*, lodged in court and, ultimately approved by a judge. But perhaps the most troublesome aspect of the consent decrees entered into in NSR cases is the uncertainty as to whether they will protect utilities from future lawsuits arising out of the same old claims thereby potentially denying utilities one of the most important benefits of any settlement—closure. Prior to embarking down a path fraught with so many pitfalls, a utility should think long and hard about the ramifications of doing so.