

**AMENDMENT IN THE NATURE OF A SUBSTITUTE TO
H.R. 3862
OFFERED BY MR. QUAYLE OF ARIZONA**

Strike all that follows after the enacting clause and
insert the following:

1 SECTION 1. SHORT TITLE.

2 This Act may be cited as the “Sunshine for Regu-
3 latory Decrees and Settlements Act of 2012”.

4 SEC. 2. CONSENT DECREE AND SETTLEMENT REFORM.

5 (a) APPLICATION.—The provisions of this section
6 apply in the case of—

7 (1) a consent decree or settlement agreement in
8 an action to compel agency action alleged to be un-
9 lawfully withheld or unreasonably delayed that per-
10 tains to a regulatory action that affects the rights of
11 private parties other than the plaintiff or the rights
12 of State or local governments—

13 (A) brought under chapter 7 of title 5,
14 United States Code; or

15 (B) brought under any other statute au-
16 thorizing such an action; and

17 (2) any other consent decree or settlement
18 agreement that requires agency action that pertains

1 to a regulatory action that affects the rights of pri-
2 vate parties other than the plaintiff or the rights of
3 State or local governments.

4 (b) IN GENERAL.—In the case of an action to be re-
5 solved by a consent decree or a settlement agreement de-
6 scribed in paragraph (1), the following shall apply:

7 (1) The complaint in the action, the consent de-
8 cree or settlement agreement, the statutory basis for
9 the consent decree or settlement agreement and its
10 terms, and any award of attorneys' fees or costs
11 shall be published, including electronically, in a read-
12 ily accessible manner.

13 (2) Until the conclusion of an opportunity for
14 affected parties to intervene in the action, a party
15 may not file with the court a motion for a consent
16 decree or to dismiss the case pursuant to a settle-
17 ment agreement.

18 (3) In considering a motion to intervene by any
19 party that would be affected by the agency action in
20 dispute, the court shall presume, subject to rebuttal,
21 that the interests of that party would not be rep-
22 resented adequately by the current parties to the ac-
23 tion. In considering a motion to intervene filed by a
24 State, local or Tribal government entity, the court
25 shall take due account of whether the movant—

1 (A) administers jointly with the defendant
2 agency the statutory provisions that give rise to
3 the regulatory duty alleged in the complaint; or

4 (B) administers State, local or Tribal regu-
5 latory authority that would be preempted by the
6 defendant agency's discharge of the regulatory
7 duty alleged in the complaint.

8 (4) If the court grants a motion to intervene in
9 the action, the court shall include the plaintiff, the
10 defendant agency, and the intervenors in settlement
11 discussions. Settlement efforts conducted shall be
12 pursuant to a court's mediation or alternative dis-
13 pute resolution program, or by a district judge, mag-
14 istrate judge, or special master, as determined by
15 the assigned judge

16 (5) The defendant agency shall publish in the
17 Federal Register and by electronic means any pro-
18 posed consent decree or settlement agreement for no
19 fewer than 60 days of public comment before filing
20 it with the court, including a statement of the statu-
21 tory basis for the proposed consent decree or settle-
22 ment agreement and its terms, allowing comment on
23 any issue related to the matters alleged in the com-
24 plaint or addressed or affected by the consent decree
25 or settlement agreement.

1 (6) The defendant agency shall—

2 (A) respond to public comments received
3 under paragraph (5); and

4 (B) when moving that the court enter the
5 consent decree or for dismissal pursuant to the
6 settlement agreement—

7 (i) inform the court of the statutory
8 basis for the proposed consent decree or
9 settlement agreement and its terms;

10 (ii) submit to the court a summary of
11 the public comments and agency responses;

12 (iii) certify the administrative record
13 of the notice and comment proceeding to
14 the court; and

15 (iv) make that record fully accessible
16 to the court.

17 (7) The court shall include in the judicial
18 record the administrative record certified by the
19 agency under paragraph (6).

20 (8) If the consent decree or settlement agree-
21 ment requires an agency action by a date certain,
22 the agency shall, when moving for entry of the con-
23 sent decree or dismissal based on the settlement
24 agreement—

1 (A) inform the court of any uncompleted
2 mandatory duties to take regulatory action that
3 the decree or agreement does not address;

4 (B) how the decree or agreement, if ap-
5 proved, would affect the discharge of those du-
6 ties; and

7 (C) why the decree's or agreement's effects
8 on the order in which the agency discharges its
9 mandatory duties is in the public interest.

10 (9) The court shall presume, subject to rebut-
11 tal, that it is proper to allow amicus participation by
12 any party who filed public comments on the consent
13 decree or settlement agreement during the court's
14 consideration of a motion to enter the decree or dis-
15 miss the case on the basis of the agreement.

16 (10) The court shall ensure that the proposed
17 consent decree or settlement agreement allow suffi-
18 cient time and procedure for the agency to comply
19 with chapter 5 of title 5, United States Code, and
20 other applicable statutes that govern rule making
21 and, unless contrary to the public interest, the provi-
22 sions of any executive orders that govern rule mak-
23 ing.

24 (11) The defendant agency may, at its discre-
25 tion, hold a public hearing pursuant to notice in the

1 Federal Register and by electronic means, on wheth-
2 er to enter into the consent decree or settlement
3 agreement. If such a hearing is held, then, in ac-
4 cordance with paragraph (6), a summary of the pro-
5 ceedings and certification of the hearing record shall
6 be provided to the court, access to the hearing
7 record shall be given to the court, and the full hear-
8 ing record shall be included in the judicial record.

9 (12) The Attorney General, in cases litigated by
10 the Department of Justice, or the head of the de-
11 fendant Federal agency, in cases litigated independ-
12 ently by that agency, shall certify to the court his
13 or her approval of any proposed consent decree or
14 settlement agreement that contains any of the fol-
15 lowing terms—

16 (A) in the case of a consent decree, terms
17 that—

18 (i) convert into mandatory duties the
19 otherwise discretionary authorities of an
20 agency to propose, promulgate, revise or
21 amend regulations;

22 (ii) commit the agency to expend
23 funds that Congress has not appropriated
24 and that have not been budgeted for the
25 action in question, or commit an agency to

1 seek a particular appropriation or budget
2 authorization;

3 (iii) divest the agency of discretion
4 committed to it by Congress or the Con-
5 stitution, whether such discretionary power
6 was granted to respond to changing cir-
7 cumstances, to make policy or managerial
8 choices, or to protect the rights of third
9 parties; or

10 (iv) otherwise afford relief that the
11 court could not enter on its own authority
12 upon a final judgment in the litigation; or
13 (B) in the case of a settlement agreement,
14 terms that—

15 (i) interfere with the agency's author-
16 ity to revise, amend, or issue rules through
17 the procedures set forth in chapter 5 of
18 title 5, United States Code, or any other
19 statute or executive order prescribing rule
20 making procedures for rule makings that
21 are the subject of the settlement agree-
22 ment;

23 (ii) commit the agency to expend
24 funds that Congress has not appropriated

1 and that have not been budgeted for the
2 action in question; or

3 (iii) provide a remedy for the agency's
4 failure to comply with the terms of the set-
5 tlement agreement other than the revival
6 of the action resolved by the settlement
7 agreement, if the agreement commits the
8 agency to exercise its discretion in a par-
9 ticular way and such discretionary power
10 was committed to the agency by Congress
11 or the Constitution to respond to changing
12 circumstances, to make policy or manage-
13 rial choices, or to protect the rights of
14 third parties.

15 (c) ANNUAL REPORTS.—Each agency shall submit an
16 annual report to Congress on the number, identity, and
17 content of complaints, consent decrees, and settlement
18 agreements described in paragraph (1) for that year, the
19 statutory basis for each consent decree or settlement
20 agreement and its terms, and any awards of attorneys fees
21 or costs in actions resolved by such decrees or agreements.

22 **SEC. 3. MOTIONS TO MODIFY CONSENT DECREES.**

23 When a defendant agency moves the court to modify
24 a previously entered consent decree described under sec-
25 tion 2 and the basis of the motion is that the terms of

1 the decree are no longer fully in the public interest due
2 to the agency's obligations to fulfill other duties or due
3 to changed facts and circumstances, the court shall review
4 the motion and the consent decree de novo.

5 **SEC. 4. EFFECTIVE DATE.**

6 The provisions of this Act apply to any covered con-
7 sent decree or settlement agreement proposed to a court
8 after the date of enactment of this Act.

