Testimony of

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"A Review of Federal Consent Decrees"
On S. 489, the Federal Consent Decree Fairness Act

My name is Lois Schiffer and I appreciate the opportunity extended to me by members of this Subcommittee to offer my views on S. 489, described as the Federal Consent Decree Fairness Act.

I am currently a lawyer in private practice at the Washington, D.C. law firm of Baach Robinson & Lewis PLLC. From 1994-2001, I was the Assistant Attorney General in charge of the Environment and Natural Resources Division in the United States Department of Justice. There, I was responsible for federal litigation related to pollution, public lands and natural resources, wildlife, condemnation and inverse condemnation, and certain Indian cases. With the United States Attorneys Offices, this Division handles all federal litigation related to enforcement of laws protecting against pollution. Formerly, I worked in the Division from 1978-1984. I have also taught environmental law for 20 years as an adjunct professor at Georgetown University Law Center, and for a semester as a Lecturer at Harvard Law School.

I have had extensive experience with consent decrees to fix environmental problems. Indeed I have approved and signed hundreds of environmental consent decrees, and have personally negotiated many of them. That experience came primarily from my work at the U.S. Justice Department where, as Assistant Attorney General, I was responsible for supervising 700 people (400 lawyers) with cases in every federal court in the country, and some state courts as well. With the United States Attorneys, we were responsible for all environmental enforcement and defense litigation--both civil and criminal--on behalf of the Environmental Protection Agency, the Department of the Interior, the Department of Defense, and every other federal agency. The docket of the Division was over 10,000 cases at a time. We handled cases arising under over 100 federal statutes. The consent decrees I have approved obligate companies to undertake Superfund cleanups costing hundreds of millions of dollars; obligate local sewer authorities to put in new sewage treatment and collection systems to the tune of many millions of dollars and many years of work to protect public health; obligate companies to develop new diesel engines to comply with the Clean Air Act; and require cleanup of major river systems. I have approved many consent decrees that would be stabbed in the heart by S. 489.

The consent decree is one of the most important tools for getting state and local governments to comply with the environmental laws Congress enacts. The federal Department of Justice uses them daily, and a model Superfund consent decree is on the Division's website. Also, in environmental enforcement cases we often worked with states on enforcement cases, including actions to get local governments to comply. I testify today to inform this Subcommittee that S. 489, if enacted, would be a giant step backward in implementing our nation's environmental laws to give all Americans clean air, clean water, and clean land.

The gist of my testimony is that, from the perspective of environmental protection, S. 489 is fatally flawed. It stabs in the heart one of the most important tools for protecting our environment, and would be a giant step backward for clean air, water, and land in this country. The bill will effectively eliminate altogether the use of consent decrees for environmental problems, and disable an essential component of enforcing and implementing all our environmental laws.

? First, this bill would mean that the Justice Department and citizens groups would stop entering into consent decrees to resolve environmental cases brought against state and local governments. Since complying with laws passed by Congress can take time, a law that means consent decrees may be terminated after a short time eliminates them as a useful tool.

? Second, this bill would increase, not reduce, the amount and scope of litigation in our courts, with greatly added expense and grave burden on resources of the Justice Department and U.S. Attorneys; state governments that both bring enforcement cases and defend them; local governments that would face trials not settlements; and federal courts. This also is completely contrary to efforts in every federal court to encourage cases to settle.

? Third, the bill will seriously set back the enforcement of environmental laws passed by this Congress and give us all dirtier air, water, and land.

? Finally, the bill is completely unnecessary because, particularly under the recent Supreme Court decision in Frew v. Hawkins, 540 U.S. 431 (2004), state and local governments and courts already have good tools to address the concerns it seeks to remedy.

To make these points, this testimony details the problems S. 489 would create for use of consent decrees to resolve environmental cases; provides ten examples of cases that illustrate how important consent decrees are in protecting the environment; and also provides some background about just what consent decrees are and how they are used to resolve environmental cases. This information is important to understanding just how fatal S. 489 would be to a clean environment.

I. S. 489 would stab in the heart an important tool for fixing environmental
problems and getting state and local governments to comply with Congress' environmental laws.

The provisions of S. 489 erect major obstacles in the way of settling, rather than trying, environmental cases.

First, S. 489 would effectively eliminate consent decrees as tools to enforce our nation's laws against state or local government to assure that they meet their environmental protection obligations. Consent decrees are excellent tools to enforce Congress' laws, because they get the parties focused on fixing the problems rather than, as litigation does, on fighting over the problems themselves. If S. 489 becomes law, however, almost no one seeking to carry out Congress' goals--to enforce the law--would use consent decrees in the future, because essentially that person, including the United States, would be negotiating with a state or local government that may well not keep its word a few years down the road, and if the state or local government did decide to change its mind, the 90 day provision, which is totally unworkable, means there is little likelihood the agreement continues.

The problem is made greater because, in the area of environmental law, fixing problems often takes a long time. For example, municipalities with aging sewage treatment plants or sewage collection systems may take years to secure adequate funding and to upgrade their systems to assure that public health and the environment are protected from raw or improperly treated sewage. Cleaning up major Superfund sites may take a number of years, first to evaluate and determine an effective remedy, and then to implement the remedy. Disputes between states as to boundaries or water allocation may take years to resolve, and once they are resolved the parties would want to assure that the resolution stays in place well into the future. If enforcers--the federal government, state governments, or citizens--know that the resolution of the matter--the consent decree--would likely have to be reopened in under, even well under, four years, the tool becomes

unavailable for practical purposes. In many, or most, of the cases we litigated at the Department of Justice to enforce the environmental laws, if we had known that a consent decree in a case against a state or local government could be reopened for no reason well before the work required was completed, we would have taken the cases to trial to get a finding of liability and a court-decided injunction as to remedy to assure that the public health, welfare, and the environment would be adequately protected. Any other course would not have met our public trust to protect the American public.

Second, vast amounts of resources will have to be dedicated to litigation over the problem, rather than turning attention to the fix. These resources devoted to litigation--taking discovery, writing briefs, putting on witnesses, making arguments to judges--will be resources not only of the United States or the citizens groups, but also those of the state and local governments that will be required to spend money defending cases rather than resolving them and resolving the environmental problem. States also bring enforcement actions against local governments, so the states will be burdened as enforcers as well. All of this means that, in addition to being expensive for everyone including state and local governments, less enforcement will be accomplished. Less enforcement means less environmental protection all around, because violators won't be required to fix problems, and others deciding whether to comply with the laws will not be deterred from not meeting their obligations.

S. 489 would have a serious impact not only on resources of state and local lawyers, but also on federal courts, and on the justice system generally. With courts under heavy burdens and pressures to expedite a wide range of cases, including criminal cases subject to speedy trial requirements of the Constitution and U.S. law, seriously reducing or effectively eliminating an important settlement tool will interfere with the administration of justice in this country. It is certainly an approach at odds with the federal Alternative Dispute Resolution Act of 1998, 28 U.S.C. §651 et seq. Under that law, every federal court in the country now has an alternative dispute resolution program geared to encourage parties to settle. Every federal circuit court has an alternative dispute resolution program too, and those programs are key to reducing court caseloads. As Judge Jones' testimony so eloquently notes, most federal judges would be extremely dismayed by the bill.

Third, settling environmental cases with consent decrees provides far more flexibility to the parties in establishing what the state or local government must do to come into compliance with the environmental law. The parties, rather than the court, set the schedule. Each party compromises to come up with a more workable solution than a judge-decided ruling may provide. Moreover, a component of consent decree flexibility is that consent decrees can be modified. While both court-established remedies and consent decrees may be modified, courts may well be more willing to change an order not crafted by the judge. With consent decrees, there are effective tools for dealing with changed circumstances, including changed financial circumstances, in a state or local government. Frew v. Hawkins, 540 U.S. 431 (2004), decided by the U.S. Supreme Court in 2004, underscores those tools. The Court specifically states that courts must understand that state officials must be given flexibility in carrying out their responsibilities. For example, in the case of a consent decree to provide for restoring the Everglades in Florida with work covering many years, the parties agreed to seek a modification as circumstances changed. In the consent decree that requires the City of New York to build a drinking water filtration plant to comply with the Safe Drinking Water Act so that New Yorkers will have safe water to drink for years to come, the decree has been modified several times to extend the schedule. In the case requiring Wayne County (Detroit) to upgrade its sewer system, after the County completed fixing the system the consent decree was recently terminated. Each of these cases is described more fully below.

Fourth, in many environmental laws, Congress has explicitly provided that enforcement actions may be brought by private parties. These "citizen suits" are a critically important component of assuring effective enforcement of our nation's environmental laws, and of securing for the American public clean water, clean air, and clean land. Most of the sewage treatment cases described below were initiated by community groups as citizen suits, then the United States intervened and became actively involved. Many of these citizen groups have extensive experience with these laws, and of working with state and local governments, and a sound understanding of what Congress intended in enacting the laws and what ways work to get state or local governments to meet their obligations under the laws. Yet citizens often have limited resources. The provisions of S. 489, which that effectively eliminate use of consent decrees to solve problems, would gravely impair the important role that Congress has recognized for citizen suits in the enforcement of environmental laws.

A particular provision of the Clean Water Act is also noteworthy here. One of the big concepts in the law when it was first passed in 1972 was that sewage waste was a major polluter of our rivers and streams, and municipal sewage systems, if properly built and funded, could take a big step to improving water quality. Thus, under that federal law, municipalities have a special and important obligation to construct and maintain "publicly owned treatment works" (called POTWs), sewage systems that must properly collect and treat sewage that historically has been a significant component of water pollution. When it was passed in 1972, the Clean Water Act provided substantial federal funding so that municipalities would build or upgrade these systems. Under 33 USC §1319(e), a part of the enforcement provisions of the Clean Water Act, whenever the United States sues a municipality to enforce against it, it must join the state as a party, and the state is liable for payment of any judgment or any expenses incurred as a result of complying with any judgment entered against the municipality to the extent that the laws of the state prevent the municipality from raising revenues needed to comply. Under S. 489, both the state so joined and the local government that is seen as the source of the problem could each seek to set aside any consent decree as to which it had been a party.

Fifth, S. 489 would provide that if a state or local government moved to set aside a consent decree, the United States or citizen group, or state for that matter, that had brought the original case would have to show an ongoing violation of federal rights and a continuing need for the remedy and the court would have to act all within 90 days. This could be used after the ink was barely dry on a consent decree, and certainly in many cases in a year or two after the consent decree had been agreed to. The provision creates two overwhelming problems. For future consent decrees, meeting the requirements to continue the consent decree is such an impossible burden that, all by itself, the provision would stop enforcers from entering into consent decrees. If a law enforcer knows that a remedy takes ten years to implement, and s/he will face setting an agreement aside in only a few years, s/he would instead try the case and get the court to make findings and rulings about liability and remedy in order not to face the virtually insurmountable obstacle of putting the case together all over again a few years down the road. Protecting the public would demand no less. Also, the burden on judges--who already face docket demands including speedy trial requirements--of getting the parties to prepare, giving them trial and hearing time, and deciding the matter so quickly, is great.

For existing consent decrees, if S. 489 becomes law, federal judges all over the country will face the immediate problem of considering and deciding motions to set aside consent decrees that they will have to find a way to handle in 90 days or less, or know that important remedies may stop in their tracks. At a minimum, environmental enforcers as well as the many other affected plaintiffs in a wide range of cases would face reopened consent decrees and new negotiations. This would be a period of great turmoil in the administration of justice throughout the country.

In sum, if enacted, S. 489 will stab consent decrees, a key tool for securing compliance with our environmental laws, in the heart. It will result in increased litigation; less enforcement; reduced flexibility; great burdens on governments, citizen groups, and courts; and less environmental protection for all of us. Federal enforcers could not use consent decrees responsibly to resolve cases that require major fixes, and there would be a giant step backward in meeting the requirements and goals of the laws Congress has passed to protect and clean up the nation's air and water and land. S. 489 is a fatally flawed bill.

II. Examples of consent decrees entered in environmental cases illustrate the fatal flaws in S. 489.

Examples help in understanding the effect that S. 489, if enacted, could have on environmental cases, and in seeing how under present law the system is working for cases involving state and local governments. I have selected ten that arise under at least four environmental laws. There are many other consent decrees in environmental cases brought against state or local governments, but these show clearly how S. 489 would undermine the laws that Congress has passed since the 1970s to protect and clean up our environment. The examples underscore that fixing problems often takes longer than four years, and certainly more than one or two or three years. They also show that state or local governments can get consent decrees modified and terminated. They illustrate consent decrees where parties have negotiated and specified provisions important to each of them, including timing requirements. They certainly make clear that a focus on fixing these problems is far more productive than litigation about who caused the problem that would result if S. 489 made such consent decrees unlikely or indeed, was a

basis for seeking modification of the decrees here that are continuing. Many of these consent decrees are complicated because they solve complicated problems to protect public health and the environment--the idea that the United States or citizen groups would have to prove the underlying case in less than 90 days to keep them going after S. 489 is chilling. Certainly these ten examples underscore how useful and important consent decrees are to fix problems that the environment faces when states or local governments fail to comply with environmental laws. The ten examples are as follows:

1. New Orleans sewage in the streets. In United States v. Sewerage and Water Board of New Orleans, No. 93-3212 (E.D. La., case filed Oct. 30, 1993), the League of Women Voters of New Orleans and other community groups brought an enforcement action against the New Orleans sewer authority because it maintained an old sewage collection system that allowed raw human sewage to run in the streets of the city when it rained. Eventually, because of the importance of the problem, the Environmental Protection Agency and the U.S. Justice Department determined that the United States should join the suit. The parties actively negotiated a consent decree, which was signed in June 1998. The Consent Decree requires New Orleans to renovate its over 50-year-old sewage collection system over a time frame of eleven years. That the case was settled rather than litigated also allowed the flexibility of permitting the Board to restore Lincoln Beach, an historically African-American beach from the days of segregation, rather than pay a higher money penalty.

2. Sewage overflows in Knoxville, Tennessee. In February 2005, the court entered a consent decree in United States et al. v. Knoxville Utilities Board, No. 3:03-CV-497 (E.D. Tenn. case filed Dec. 1, 2004). In the case, the U.S. Department of Justice, the Environmental Protection Agency, the Tennessee Department of Environment and Conservation, a citizen group, and the City of Knoxville--as plaintiffs--entered into a consent decree with the Knoxville Utilities Board, an independent agency of the City of Knoxville. The consent decree requires the Board to take a number of specified steps to analyze and fix sewage overflows. The work is expected to cost $530 million, to eliminate 3.5 million gallons of sewage overflows annually, and will be implemented over the next 12 years (through 2016). It is noteworthy that the state agency of Tennessee--the state that is asking this Congress to overturn such decrees--and a local government in that state teamed up with the federal government to bring the case, and that under S. 489, the Knoxville Utilities Board, as an independent agency of the City of Knoxville, could seek to set aside the decree and oblige all parties to reprove their case to restore the consent decree.

3. Sewage overflows in Wayne County (Detroit) Michigan--now fixed. A final sewage treatment case is important in illustrating that current tools for terminating decrees are effective. In United States v. Wayne County (Detroit), the United States sued Wayne County, 13 downriver communities, and two drainage districts for violating provisions of their wastewater discharge permits. In 1994, the parties entered into a consent decree to implement the plan they had developed to upgrade the sewage treatment system so that the untreated sewage dumped into drains and eventually into the Detroit River would not back up into basements. The project has cost $295 million so far, and clearly required more than four years to complete. Last month, the parties asked the court to approve termination of the consent decree because "the objectives of the decree have been met." The court terminated the decree. United States v. Wayne County, C.A. No. 87-70992 (E.D. Mich., May 2, 2005). The case illustrates the need for consent decrees long enough to achieve environmental protection goals, and the capacity of present law to provide for changes to reflect new circumstances like completion of projects. When a consent decree has been completed, parties know how to terminate them, and do not require the provisions of S. 489 to accomplish that result.

4. Wastewater collection and treatment in Birmingham, Alabama. In United States v. Jefferson County, Alabama, Jefferson County Commissioners, and the State of Alabama, No. 93-G-2492-S (N. D. Ala. case filed Nov. 29, 1993), a consent decree provides for extensive rehabilitation to the entire Jefferson County wastewater collection system and the County's ten wastewater treatment facilities. The decree also requires, as a Supplemental Environmental Project, that the County acquire riparian properties or greenways to reduce or eliminate runoff pollution into the Cahaba and Black Warrior River systems in Jefferson County to generally enhance the water quality of those rivers. The consent decree requires these actions over a number of years.

5. Sewage-laden stormwater in Washington, D.C. Another citizen group, the Anacostia Watershed Society, brought a suit, later joined by the United States, against the District of Columbia Water and Sewer Authority (WASA). The consent decree, signed by the parties in late 2004, requires WASA to address Washington, D.C.'s sewage-laden storm water runoff by capturing it in three tunnels to be built under the agreement, then later treating it at Blue Plains sewage treatment plant. The estimated cost of the sewage control project is $1.4 billion and will take 20 years to build completely, with significant sections of the new system placed in operation along the way. United States v. District of Columbia Water and Sewer Authority, No. 00-183 (D.D.C., case filed Feb. 2, 2000).

6. Sewage spills in Los Angeles. In United States v. City of Los Angeles, No. 98-9039 (C.D.Cal., case filed Nov. 9, 1998), the state of California and community groups sued the City of Los Angeles to stop frequent sewage spills from deteriorated pipes in the city's sewage system in violation of the Clean Water Act. The consent decree requires the city to rebuild sewer lines, increase the system's capacity, enhance its spill control programs, and plan for future expansion. The state regional water board will use its portion of the civil penalties on environmental projects, and the city will perform over $7 million on environmental projects in addition to its work on the sewer system. The schedule for repairs and other projects runs through June 30, 2012.

7. Safe drinking water in New York City. A case related to water filtration is also instructive. The United States sued, then entered into a consent decree with, the City of New York to require that the City build a water filtration plant for water from the Croton watershed that becomes drinking water for New Yorkers. The consent decree was amended several times to accommodate the City's difficulties with siting issues. Assuring that New York City complies with the Safe Drinking Water Act is an essential public health matter. Identifying a site and building a water filtration plant is a major undertaking that requires more than four years. United States v. City of New York, 30 F. Supp. 2d 325 (E.D. N.Y. 1998). The Notice of the Second modification to extend time is at 69 Fed. Reg. 60188 (Oct. 7, 2004).

8. Restoring the Everglades. Our national crown jewel Everglades National Park has significantly benefited from a consent decree. Pursuant to a consent decree resolving a lawsuit brought by the United States against the State of Florida and the South Florida Water Management District, and entered by the federal court in 1991, the parties committed to extensive and long-term work to restore the Everglades to the River of Grass it was before the Corps of Engineers undertook extensive engineering work in the 1940's and on. The 1991 consent decree has been modified, and by a recent order, enforced. Indeed, after the consent decree was in place, Senator Bob Smith of New Hampshire played a significant role in assuring that Congress appropriated funding for the process. The replumbing of the Everglades is supported by Governor Bush. It takes many years to restore the ecosystem of this precious National Park. The case is United States v. South Florida Water Management District et. al. , No. 88-1886-Civ-Moreno (S.D.Fla.). Recently the Miccosukee Tribe and a number of environmental groups sought an order, granted by the court, enforcing the decree as to water quality in the Loxahatchee National Wildlife Refuge (order with opinion entered on June 1, 2005).

9. Superfund cleanups everywhere, including in Oyster Bay New York. Under authority of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or the Superfund law), consent decrees are an important tool for securing cleanups at Superfund sites. Indeed, a "model" Superfund consent decree is provided on the U.S. Department of Justice website. At a number of Superfund sites, local governments have been contributors of some of the hazardous substances. Cleanups are carried out often under consent decrees that cover a number of years. Especially given continuing interest in reducing transaction costs for Superfund, it would be perverse to encumber consent decrees and effectively require litigation to get Superfund cleanups. An example of a Superfund consent decree involving local governments is State of New York v. The Town of Oyster Bay, 696 F. Supp. 841 (E.D.N.Y. 1988), where a consent decree to clean up the Old Bethpage Landfill, a seriously contaminated site on the Superfund National Priority List, was entered in 1988. The Town undertook the remediation. Construction was completed at the site in 1993, and groundwater pumping continues. From April 1992 through March 2000, approximately 3.4 billion gallons of contaminated groundwater was treated on site. If S.489 had been in effect at the time of this consent decree, it could have been reopened before the cleanup was complete.

10. Original jurisdiction cases in the United States Supreme Court. Arizona v. California is an example of disputes between states as to water allocations or

boundaries. It was brought in the Supreme Court as an "original jurisdiction" matter. That means that, as a dispute between two states, the Supreme Court hears the case directly. For original jurisdiction cases, the Supreme Court appoints special masters to gather the facts, encourage the parties to resolve the dispute, or recommend a legal decision. In this case, in 1952 Arizona sued California in the U.S. Supreme Court to adjudicate rights to water from the Colorado River. The United States intervened seeking water rights on behalf of 5 Indian reservations. In 1964, the Court entered a decree based on a consent agreement of the parties allocating much of the water but held that the amount for the Indian reservations could be adjusted when a boundary issue was resolved. 376 U.S. 340. After various proceedings, including an argument in the Supreme Court to determine whether certain issues were res judicata, in 2000 the Supreme Court determined that the United States' claim for more water for the Quechen Tribe (Ft. Yuma reservation) was not precluded and could go forward. 530 U.S. 392 (2000). All parties have now reached a further settlement agreement that the Special Master has recommended to the whole court as a supplemental decree that would meet the definition of a consent decree under S. 489. The Tribe will get a portion of the water it claimed, and water it cannot use now can be used by California until the tribe can use it. Under S. 489, it would appear that California, after an election, could seek to upset this agreement. Further, the Supreme Court's effective use of Special Masters to address these original jurisdiction cases would be seriously impaired by the provision of S. 489 limiting the role and compensation for Special Masters.

Other original jurisdiction cases with decrees on agreement of the parties that allocate water are: Kansas v. Colorado; Kansas v. Nebraska; Nebraska v. Wyoming; and Wisconsin v. Illinois.

These ten examples effectively illustrate the serious problems to effective implementation of our nation's environmental laws, passed with bipartisan support of Congress, if S. 489 becomes law. They also underscore problems in carrying out the important goals of alternative dispute resolution set forth in the Alternative Dispute Resolution Act of 1998. Specifically:

? Use of consent decrees would be virtually eliminated because there is often a need for remedies to environmental problems that last longer than the less than four years for which any certainty in a consent decree would be provided under S. 489. The legislation would effectively eliminate the use of consent decrees by the federal government and citizens groups to ensure that state and local governments comply with environmental protection laws. This problem is especially acute under sewage treatment cases, because the Clean Water Act is designed to have municipal governments undertake key responsibility to build and maintain sewage treatment facilities to clean up our nation's waters.

? Immediately after enactment great confusion would occur. As to consent decrees in place in existing cases that provide for cleanup of Superfund sites, construction of improved sewage collection and treatment systems, restoration of the Everglades, allocation of water among states, and many other environmental actions, shortly after enactment of S. 489 many disputes that have been resolved and plans undertaken could be thrown into confusion. Courts would be burdened with revisiting old matters. State and local governments would be called on to reassess matters long settled. The burden--in terms of both money and work--would be imposed on federal courts, state and local governments, the United States government, and many citizens and citizens groups.

? In the future, the amount of litigation would be increased, not decreased, in our federal courts, as the United States, states, and citizens and citizen groups seeking compliance with federal law and the U.S. Constitution would find themselves compelled to litigate rather than settle cases. Disputes would focus on "what is the problem" rather than how to fix the problem. Burdens on the court system, and on the resources of each involved entity, would be great.

? Overall enforcement of environmental laws would fall. Because resources of federal, state, and local governments and citizen groups are finite, more would be expended on each case, and overall enforcement of environmental laws, and thus overall compliance with those laws, would go down. Moreover, because an important part of enforcement is the deterrent effect on others, less enforcement means even less compliance as cities and states see that if they fail to comply with the environmental laws they are not so likely to face enforcement actions. Our nation's citizens will have less environmental protection, and less clean air, clean water, and clean land. Public health could be affected adversely.

? The ten case examples make clear that the current system works. Consent decrees resolve disputes and achieve compliance. Courts have authority to modify decrees. Under Frew v. Hawkins, courts and thus parties before the courts are instructed to take into account the importance of providing flexibility for state and local officials.

In sum, these cases make clear that consent decrees that run more than four years are critically important tools to get our nation's water and air and land cleaned up and protected. By imposing serious obstacles in the way of effective use of those decrees, S. 489 will result in more litigation and less environmental protection.

III. Background information about consent decrees is useful to understanding how S. 489 stabs environmental consent decrees in the heart.

In a wide range of substantive areas, Congress passes laws setting forth goals, rules and standards that it requires to be implemented and enforced. These laws include environmental laws, public land laws, civil rights laws, antitrust laws, Medicare, Medicaid, and the Sarbanes-Oxley law to improve quality and transparency of financial disclosures and independent audits. In addition, of course, the United States Constitution protects all of us through its important provisions, including equal protection and due process. Surely when Congress enacts laws it does so with the expectation that those laws will be complied with and enforced.

Often, those who are the subjects of the legislation comply with the laws and regulations that implement them. But sometimes, the will of Congress in passing such laws as the Clean Water Act or the Medicaid Act are not carried out, and enforcement, including through lawsuits, must occur. Under environmental laws, enforcement tools include administrative actions, civil suits, and criminal actions. Lawsuits to enforce are brought by the United States through the U.S. Department of Justice and United States Attorneys offices, by states, and by private parties, including in the environmental area citizen suits expressly provided for in many of the environmental laws. Indeed, the possibility of enforcement encourages compliance even before enforcement suits are brought, and that deterrence component of an effective enforcement program is important too.

Although it is not the subject of S. 489, it is worth noting that the United States is obligated to comply with these environmental laws as well, and is commonly sued by states and citizens seeking orders for compliance. Congress has passed laws such as the Federal Facilities Compliance Act, 42 U.S.C. §6961 et. seq., making clear that federal agencies must meet the same pollution control standards as state and local governments and private parties when it comes to the environmental laws. Getting the federal government to meet obligations to use water and air pollution controls is certainly the essence of democracy.

Enforcement lawsuits to obtain compliance with the laws that Congress passes and with the U.S. Constitution may be resolved in a number of ways: through summary judgment if the court finds there are no disputed facts; through a full-blown trial; through a settlement agreement; or through a consent decree. A consent decree is an agreement among the parties, approved and entered as an order by the Court. It bears repeating that if the state or local government does not agree, there will be no consent decree. If the case is not resolved through settlement or consent decree, the court may conduct a trial on both the question of whether the defendant is liable, and after liability is determined, on what an appropriate remedy for the liability would be. The court may resolve the case with an injunction and/or with other remedies, including money penalties.

Often when a state or local government is sued because plaintiffs--including the United States or a citizen group--allege that it has failed to comply with a federal

law or with the U.S. Constitution, the state or local government makes an evaluation that it is likely to lose the case, and would rather not spend its lawyer, investigator, and other resources defending against claims it is likely to lose. Often, the parties to the lawsuit can decide whether to fight over whether there were violations of the law in the first place, or can focus attention and resources on how to fix the problem. A focus on fixing the problem generally turns to a discussion of a consent decree. The parties work out the terms of that decree, usually with each side making some compromises to get an agreement.

Congress has underscored the importance of settling cases. Under a law enacted by Congress in 1998, the Alternative Dispute Resolution Act, 28 USC §651 et seq., federal courts are strongly urged to encourage resolution of cases through means of "alternative dispute resolution", and, partly as a result of this law, every federal district court in the country has an alternative dispute resolution program to help parties obtain settlement short of trial. Indeed, every federal circuit court in the country has an ADR program as well. In the Sixth Circuit, for example, which covers Senator Alexander's state of Tennessee, the Court's website reports that its mediation office mediates approximately 1000 appeals per year, about 44% of which are resolved with no judicial involvement. My own home United States Court of Appeals for the District of Columbia Circuit has an outstanding alternative dispute resolution office that trains leaders of the bar and encourages them to mediate cases; that program has exposed many lawyers to ADR and they in turn have informed their clients of its value.

Because by negotiating consent decrees the plaintiffs--including the United States or states or citizen groups--and defendants, including state or local governments, turn resources and attention to fixing the problem, to assure compliance with the laws and constitution, rather than focusing on whether there is a problem, all participants achieve more and more effective enforcement. In addition, consent decrees often permit the parties--the state or local government and any other entity--to get to know each other better and work together more effectively over the long run.

The public has a role in many consent decrees. After the parties reach agreement, to become a consent decree the agreement must be approved by the Court where the case was filed. Under a number of environmental laws, before the Court determines whether to approve the consent decree, there is a requirement or a practice of public notice and an opportunity for public comment. This occurs, for example, under the Superfund law, under the Clean Air and Clean Water Acts, and under the hazardous waste law known as "RCRA" (the Resource Conservation and Recovery Act). The Court then takes into account any public comments and determines whether the agreement is reasonable, fair, and consistent with the purposes of the statute. See, e.g., United States v. Charles George Trucking, Inc., 34 F. 3d 1081 (1st Cir. 1994).

Other cases seeking to assure that state and local governments comply with the law or constitution are brought as class actions. In those cases, under provisions of the Federal Rules of Civil Procedure, Rule 23(e), the Court must hold a fairness hearing and evaluate the agreement to assure that it "fair, reasonable, and adequate." Rule 23(e)(1)(C).

Finally, the parties are not locked in to the specific terms of a consent decree. It has long been the law that parties can seek, first from each other and then from the court, modifications in light of changed circumstances or termination because the terms of the agreement have been fully met. Last year the Supreme Court reiterated that standard, and indeed expanded it, by unanimously approving a standard for seeking modifications in or relief from consent decrees that recognizes the important need for flexibility by state and local governments, especially when a new administration of the state or local government comes into office. Frew v. Hawkins, 540 U.S. 431 at 442 (2004).

The federal government extensively uses consent decrees to resolve enforcement actions under the full range of federal environmental laws. Indeed, under the federal Superfund program a model consent decree is posted on the website for the Environment and Natural Resources Division of the U.S. Department of Justice. Superfund cases, that may well include state or local government contributors to hazardous substances at a site, involve complicated settlement negotiations, often among numerous parties, and result in consent decrees that may take years to implement when the cleanup requires study or is large or time-consuming to implement. Another area in which the United States uses consent decrees is to resolve Clean Water Act enforcement actions brought against local sewage treatment systems to assure that they put into place effective sewage treatment systems. Such systems take many years to fund and build. A number of specific examples are described in Section II above. These are examples only--the United States seeks to settle environmental cases, and has used consent decrees, in a wide range of circumstances and under a wide range of statutes.

In summary, consent decrees are critically important tools to protect our nation's environment. Enacting S. 489 would cause great confusion under existing environmental consent decrees, and eliminate use of consent decrees for long-term state and local government fixes to environmental problems under the environmental laws. The result would be more litigation and less environmental protection. S. 489 should not be passed.