

SUBJECT: Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements

The U.S. Environmental Protection Agency, in partnership with the states, serves a vital role in protecting human health and the environment. When conducting Agency action to achieve these objectives, the EPA must strive to promote transparency and public participation to provide the American public with due process, accountability, and a sense of fair-dealing.

It has been reported, however, that EPA has previously sought to resolve lawsuits filed against it through consent decrees and settlement agreements that appeared to be the result of collusion with outside groups. In some instances, EPA may have taken actions that had the effect of creating Agency priorities and rules outside the normal administrative process. When negotiating these agreements, EPA excluded intervenors, interested stakeholders, and affected states from those discussions. The days of this regulation through litigation, or "sue and settle," are terminated. EPA will not resolve litigation through backroom deals with any type of special interest group.

To promote transparency and public participation in the consent decree and settlement agreement process involving lawsuits against EPA, the Agency shall follow the procedures set forth below:

1. EPA's Office of General Counsel shall publish online a notice of intent to sue the Agency within fifteen days of receiving the notice from the potential litigant(s).
2. When EPA receives actual notice of a complaint or a petition for review regarding an environmental law, regulation, or rule in which the Agency is a defendant or respondent in federal court, the Office of General Counsel shall publish online that complaint or petition for review within fifteen days of receiving service of the complaint or petition for review.
3. EPA shall directly notify any affected states and/or regulated entities of a complaint or petition for review within fifteen days of receiving service of the complaint or petition for review. It shall be the policy of the Agency to take any and all appropriate steps to achieve the participation of affected states and/or regulated entities in the consent decree and settlement agreement negotiation process. Accordingly, EPA shall seek to receive the concurrence of any affected states and/or regulated entities before entering into a consent decree or settlement agreement.
4. Within thirty days of this directive, EPA shall publish online a searchable, categorized list of the consent decrees and settlement agreements that continue to govern Agency actions, providing a brief description of the terms of each consent decree and settlement agreement, including attorney's fees and costs paid. EPA shall update this list by publishing any new final consent decree or settlement agreement within fifteen days of its execution.
5. EPA shall not enter into a consent decree with terms that the court would have lacked the authority to order if the parties had not resolved the litigation. EPA shall also not enter into a consent decree or settlement agreement that converts an otherwise discretionary duty of the Agency into a mandatory duty to issue, revise, or amend regulations.
6. If EPA agrees to resolve litigation through a consent decree or settlement agreement, and therefore there is no "prevailing party," then the Agency shall seek to exclude the payment of attorney's fees and costs to any plaintiff or petitioner in the litigation. EPA shall not seek to resolve the question of attorney's fees and costs "informally."

7. If a consent decree or settlement agreement includes any deadline by which EPA must issue a final rule, the Agency must provide sufficient time (1) to modify its proposed rule if necessary, consistent with applicable laws and guidance on rulemaking, including any required interagency review or consultation, (2) to provide adequate notice and comment on the modified proposal, and (3) to conduct meaningful Agency consideration of the comments received on the modified proposal.

8. EPA shall post online for review and comment by the public any proposed consent decree lodged in federal court or draft settlement agreement to resolve claims against the Agency. EPA shall also publish a notice of the lodging of the proposed consent decree or draft settlement agreement in the Federal Register.

a. When posting the proposed consent decree or draft settlement agreement on EPA's website, the Agency shall explain: (1) the statutory basis for the proposed consent decree or draft settlement agreement; (2) the terms of the proposed consent decree or draft settlement agreement, including any award of attorney's fees or costs and the basis for such an award; and (3) where applicable, the Agency's plans to meet deadlines in the proposed consent decree or draft settlement agreement, including the identification of necessary milestones and a demonstration that the Agency has afforded sufficient time to modify its proposed rule if necessary, provide notice and comment on the modified proposal, and conduct meaningful Agency consideration of the comments received on the modified proposal.

b. EPA shall provide a public comment period of at least thirty days, unless a different period of time is required by law.

c. EPA may hold a public hearing on whether to enter into the proposed consent decree or draft settlement agreement.

d. Based on the timely public comments received, EPA may seek to withdraw, modify, or proceed with the proposed consent decree or draft settlement agreement. If the terms of a consent decree or draft settlement agreement are modified, EPA shall follow the process set forth above.

9. Where appropriate, I reserve the right to exercise my discretion and permit EPA to deviate from the procedures set forth in this directive. In no circumstance, however, will I permit the agency to violate its statutory authority or to upset the constitutional separation of powers.

10. This directive is intended to improve the internal management of EPA and does not create a right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, EPA, its officers or employees, or any other person.

With these improvements to transparency and public participation, EPA is taking another step to provide the public with a more open, accessible, and fair government. Together we can continue to improve the lives and livelihoods of the American people.

/s/

E. Scott Pruitt
October 16, 2017