

United States Senate

WASHINGTON, DC 20510

December 11, 2017

The Honorable Jeffrey H. Wood
Acting Assistant Attorney General
U.S. Department of Justice
Environment and Natural Resources Division
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Dear Acting Assistant Attorney General Wood:

On October 16, 2017, Environmental Protection Administration (EPA) Administrator Scott Pruitt issued the “Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements” (“the Directive”).¹ By its terms, the Directive was motivated by alleged reports “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.” “When negotiating these agreements,” the Directive claims, “EPA excluded intervenors, interested stakeholders, and affected states from those discussions.” The Directive mandates that now, whenever EPA receives notice of a complaint or petition for review, “EPA shall directly notify any affected states and/or regulated entities,” and “seek to receive the concurrence of any affected states and/or regulated entities before entering into a consent decree or settlement agreement.”

As outlined in a November 13, 2017 letter by fifty-seven former EPA career attorneys,² the Directive’s unsupported allegations of prior collusion with outside environmental groups “do the public a great disservice by sowing confusion about the important role the public plays in ensuring that EPA complies with and enforces public health and environmental protection laws.” The Directive’s mandated consultation only with “regulated entities” and “affected states,” terms which are not defined, appears to give some nonparty entities, but not other members of the public, a seat at the settlement table. Before settling any claim, EPA must now seek the blessing of the very entities it is supposed to regulate. This raises serious concerns about agency capture.

This new directive should be of significant concern to the Environment and Natural Resources Division (ENRD) given its role representing the EPA in litigation and related settlement negotiations. Since 1977, the Department of Justice (through ENRD) and EPA have operated under a Memorandum of Understanding which makes clear “the Attorney General shall retain control over the conduct of all litigation” and that the “negotiation of any agreement to be filed in court shall require the authorization and concurrence of the Attorney General.” 42 FR 48942, 48943. Administrator Pruitt’s Directive appears to infringe upon the long-standing prerogatives of DOJ to conduct litigation and settlement negotiations in the matter it sees fit by obligating

¹ *Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (Oct. 16, 2017), available at <https://www.epa.gov/newsroom/directive-promoting-transparency-and-public-participation-consent-decrees-and-settlement>.

² *Letter from Former EPA Counsel to Administrator Scott Pruitt* (Nov. 13, 2017), available at <https://drive.google.com/file/d/11adso6yX2JSDywvsLYH6lnHifsG9pfdy/view>.

EPA to “seek to receive the concurrence of any affected states and/or regulated entities before entering into a consent decree or settlement agreement.” The Directive also appears to limit DOJ’s ability to negotiate on the issue of attorney’s fees.

To help us better understand how the new EPA Directive will affect DOJ’s ability to represent EPA in court, we respectfully request that you respond to the following questions by December 22, 2017:

1. What role, if any, did ENRD play in drafting, reviewing, commenting on, editing, or approving EPA’s October 16 Directive?
2. In the course of its representation of EPA during the Obama Administration, when did ENRD enter into any consent decrees or settlement agreements that were the “result of collusion with outside groups”? Please specify and explain.
3. In the course of its representation of EPA during the Obama Administration, when did ENRD enter into any consent decrees or settlement agreements that violated the terms of the March 13, 1986 Memorandum from Attorney General Ed Meese titled, “Department Policy Regarding Consent Decrees and Settlement Agreements”? Please specify and explain.
4. If the answer to Questions 2 and 3 are “no,” does DOJ believe there is a basis for the assertion 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”?
5. As noted above, the Directive provides that EPA shall notify, consult, and “seek to receive the concurrence of any affected states and/or regulated entities before entering into a consent decree or settlement agreement.” Who is responsible for determining which “states and/or regulated entities” must be notified and consulted under the Directive? What criteria will be used to determine if such determinations are made?
6. How does ENRD interpret the Directive’s mandate 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”? What specific steps does ENRD deem appropriate?
7. Rule 24 of the Federal Rules of Civil Procedure provides the process by which affected or interested non-parties may intervene in a litigation as active parties. Given that there already exists a neutral legal process for including affected or interested parties, why is the new process articulated in the Directive necessary? How will ENRD implement the Directive in light of Rule 24?
8. Pursuant to the Directive, how will ENRD include affected states and/or regulated entities in settlement negotiations between the parties? Will ENRD allow these states and entities to participate in drafting the settlement agreement or consent decree, or will these states and entities have a more limited role (and if so, please describe it)? What discretion, if any, does ENRD have to permit or prohibit particular affected states and/or regulated entities from participating in settlement discussions?

9. Under what circumstances would it be permissible for EPA and/or ENRD to have ex parte communication with affected states and/or regulated entities about potential consent decrees or settlement agreements without the participation of the plaintiff(s)?
10. How is EPA's new concurrence requirement related to the obligation to provide notice and comment of proposed settlements in the Federal Register? What responsibilities will ENRD and EPA notice and comment under the Directive? How will ENRD weigh contribution from affected states and regulated entities received through the concurrence process as compared with comments received through notice and comment? Will ENRD make input received in the concurrent process available to the court?
11. How will implementation of the Directive affect ENRD's ability to assure the court that settlement negotiations are progressing well enough for the court to continue to hold the case in abeyance, given that the new concurrence requirement will likely have the effect of prolonging settlement negotiations?
12. Since October 16, 2017, in any pending or resolved matter, has ENRD, on behalf of EPA, and pursuant to the Directive, taken any steps "to achieve the participation of affected states and/or regulated entities in the consent decree and settlement agreement negotiation process"? If so, please specify which matters, which affected states and/or regulated entities were consulted for participation, what input they provided, what result was reached (if applicable), and whether the consulted entities gave their concurrence in such result. (Please note that, given the necessary involvement of non-parties to the litigation in such negotiations, any claim of privilege as to those consultations will have been waived.)
13. How do you anticipate the Directive will change ENRD's litigation costs, including personnel costs? Do you anticipate that you will have to hire additional attorneys and other staff in order to respond to increased case loads? For example, all other things being equal will the Directive make it more expensive to litigate a deadline suit than before the Directive was in place? Will the Directive's requirements that EPA notify and seek the concurrence of affected states and regulated entities before entering into a settlement agreement increase the length of time necessary to resolve cases?

Thank you for your prompt attention to these questions.



Sheldon Whitehouse
United States Senator



Thomas R. Carper
United States Senator

cc: The Honorable Chuck Grassley
The Honorable Dianne Feinstein
The Honorable John Barrasso