

JAMES M. INHOFE, OKLAHOMA
SHELLEY MOORE CAPITO, WEST VIRGINIA
JOHN BOOZMAN, ARKANSAS
ROGER WICKER, MISSISSIPPI
DEB FISCHER, NEBRASKA
JERRY MORAN, KANSAS
MIKE ROUNDS, SOUTH DAKOTA
JONI ERNST, IOWA
DAN SULLIVAN, ALASKA
RICHARD SHELBY, ALABAMA

THOMAS R. CARPER, DELAWARE
BENJAMIN L. CARDIN, MARYLAND
BERNARD SANDERS, VERMONT
SHELDON WHITEHOUSE, RHODE ISLAND
JEFF MERKLEY, OREGON
KIRSTEN GILLIBRAND, NEW YORK
CORY A. BOOKER, NEW JERSEY
EDWARD J. MARKEY, MASSACHUSETTS
TAMMY DUCKWORTH, ILLINOIS
KAMALA HARRIS, CALIFORNIA

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

RICHARD M. RUSSELL, MAJORITY STAFF DIRECTOR
GABRIELLE BATKIN, MINORITY STAFF DIRECTOR

December 13, 2017

The Honorable Scott Pruitt
Administrator
Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20004

Dear Administrator Pruitt,

We write to request information about the manner in which the Environmental Protection Agency (EPA) intends to implement your “Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements” (“the Directive”), issued on October 16, 2017.¹ In your accompanying memorandum,² you indicate that 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.” The memorandum additionally claims that “[w]hen negotiating these agreements, EPA excluded interveners, interested stakeholders, and affected states from those discussions.” The memorandum goes on to announce that “the days of this regulation through litigation, or ‘sue and settle,’ are terminated.” The Directive could thus be read as a refusal by the EPA to settle any matter going forward, a position that would sharply contrast with national judicial trends.³ We are concerned that the Directive may introduce unnecessary delays and extra costs into a litigation process that was previously more straightforward, sensible and transparent.

There are a number of different types of lawsuits that can be filed against the EPA. For example, certain statutes, such as the Clean Air Act, include mandatory deadlines for the EPA to complete certain actions. If the EPA misses a deadline, any person can file a lawsuit—referred to as a deadline suit—to force it to complete these activities. Similarly, interested persons may file “unreasonable delay” suits alleging that the agency has taken too long to take an action required by statute but for which there is no specified statutory deadline. In addition, under the Administrative Procedure Act, the EPA must give interested persons the right to petition for the issuance, amendment, or repeal of a rule.⁴ Moreover, some environmental statutes provide any person or state the opportunity to petition EPA for specific rulemaking actions.

¹ <https://www.epa.gov/newsroom/directive-promoting-transparency-and-public-participation-consent-decrees-and-settlement>

² Adhering to the Fundamental Principles of Due Process, Rule of Law, and Cooperative Federalism in Consent Decrees and Settlement Agreements,” Oct. 16, 2017.

³ See, e.g., Marc Galanter and Angela Frozena, The Continuing Decline of Civil Trials in American Courts, Pound Civil Justice Institute: 2011 Forum for State Appellate Court Judges (describing a 10-fold decline in federal bench and jury trials since 1962).

⁴ 5 U.S.C. § 553(e).

According to the Directive, going forward, 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.” This drastically changes the previous practice of attempting to settle legitimate claims in a fair and efficient manner.

For example, where the EPA would have previously settled a deadline suit for clearly failing to meet a statutory deadline, the EPA appears to now intend to litigate that claim irrespective of the merits— absent agreement from the party(ies) that might be regulated if EPA takes action —resulting in excessive time and litigation costs to taxpayers and plaintiffs and yet leading to the same outcome: the Court setting a deadline for EPA action.

Moreover, the Directive appears to create unnecessary alternatives to pre-existing mechanisms that already ensure transparency in lawsuits or give voice to impacted parties. Specifically, the federal court rules permit impacted stakeholders to join as parties. Further, impacted parties are also welcome to comment on the proposed settlement when it is published in the Federal Register. The Directive does not speak to why these mechanisms are inadequate.

To help us better understand how the new Directive will be interpreted and implemented by the EPA, we respectfully request that you respond to the following questions by January 19, 2018:

1. Since 1977, the Department of Justice (through its Energy and Natural Resources Division) 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. The new 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 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. What role, if any, did the Energy and Natural Resources Division play in drafting, reviewing, commenting on, editing, or approving EPA’s October 16 Directive? Please provide copies of any communications between the Department of Justice and the EPA about the Directive as it was being developed.
2. Many statutes require litigants to file a Notice of Intent (NOI) with the EPA so that the agency has an opportunity to remedy the alleged wrong before a formal complaint is filed in court. What impact, if any, does the Directive have on the agency’s handling of NOI’s? Does the Directive mean that EPA will allow everything to proceed to litigation? If not, will EPA seek concurrence from affected non-parties if it intends to address the claim before a lawsuit is filed?
3. As noted above, the Directive provides that the 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

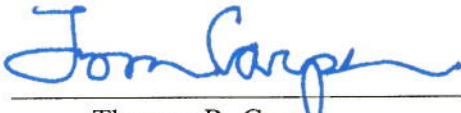
4. and/or regulated entities” must be notified and consulted under the Directive? Would you also contact stakeholders who are not regulated entities but may be impacted by the settlement, such as local and tribal governments or community and non-governmental organizations? What criteria will be used to determine who should be notified?
5. How does the EPA 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 the EPA deem appropriate?
6. Rule 24 of the Federal Rules of Civil Procedure provides the process by which affected or interested non-parties may intervene in a lawsuit 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 the EPA’s Directive be implemented in light of Rule 24?
7. Pursuant to the Directive, how will the EPA include affected states and/or regulated entities in settlement negotiations between the parties? Will the EPA 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)? Given that settlement discussions are considered confidential only between the parties in a lawsuit, do you acknowledge that the involvement of non-parties will waive that protection?
8. How is the EPA’s new concurrence requirement related to the EPA’s obligation to provide notice and comment of proposed settlements? How will the EPA weigh contributions from affected states and regulated entities received through the concurrence process as compared with comments received through notice and comment? Will the EPA make input received in the concurrence process available to the court and the public, and if not, why not?
9. How will implementation of the Directive affect the EPA’s counsel’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?
10. Will the Directive treat lawsuits differently based on their expected impact or the nature of their claim for relief? Will the EPA treat deadline suits and the various types of petitions that are filed under environmental statutes differently? If so, please specify any differences.
11. Do you anticipate that it will cost more to litigate a “deadline suit” than before the Directive was in place? Will the Directive’s notification and concurrence requirements increase the length of time necessary to resolve cases? How do you anticipate the Directive will change EPA’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 caseloads? Have you conducted an analysis as to comparative costs of litigation vs. settlement for each type of litigation (and if so, please provide it)? Do you anticipate that potential budget cuts to EPA and/or to the Energy and Natural Resources Division, combined with the EPA’s intent to litigate all matters absent stakeholder consensus, will make it more difficult and costly for

EPA to settle matters? If not, why not?

12. Please use the attached document to provide information for each complaint or petition brought against the EPA during the period January 20, 2009 to present. (Please note that, given the planned involvement of non-parties to the litigation in negotiations conducted on or after October 16, 2017, any claim of privilege as to those consultations will have been waived.) After your initial response, please provide an updated document covering new information to the Committee on a quarterly basis.

Thank you very much for your attention to this important matter. If you have any questions or concerns, please ask the appropriate members of your staff to contact Michal Freedhoff, a member of the Environment and Public Works Committee staff, at 202-224-8832, or Dan Dudis, a member of Senator Whitehouse's staff, at 202-228-6294.

Sincerely,



Thomas R. Carper
Ranking Member



Sheldon Whitehouse
United States Senator