November 13, 2017

Administrator Scott Pruitt
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460
sent via email

Dear Administrator Pruitt,

We write as former counsel to the U.S. Environmental Protection Agency (EPA) to correct the many mistakes of law and fact made in your October 16, 2017 Directive and accompanying explanation, concerning EPA settlement of lawsuits brought against the agency.[1]

Your recent pronouncements make unfounded and unsupported accusations about EPA's longstanding and non-partisan approach to defending the agency's actions in lawsuits that Congress empowered members of the public to bring when the agency allegedly fails to follow the law.[2] Your misrepresentations 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. Your Directive compounds that disservice by attempting to give regulated parties a special and powerful seat at the table with no corresponding role for other members of the public. Your explanation for the Directive does EPA and the Department of Justice (DOJ), which represents EPA in lawsuits, a grave injustice by alleging, without evidence, collusion with outside groups. You fail to acknowledge that a recent Government Accounting Office (GAO) report found no basis for the claims you make.[3]

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[1] "Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements" and "Adhering to the Fundamental Principles of Due Process, Rule of Law, and Cooperative Federalism in Consent Decrees and Settlement Agreements," Oct. 16, 2017.

[2] Your Directive appears aimed primarily at two types of lawsuits brought against EPA: "deadline" suits alleging that the agency has failed to take an action required by a statute by the deadline set in the statute; and "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. We refer to deadline and unreasonable delay suits as schedule suits. The Directive also appears to address "petition for review" suits alleging that a final action that the agency has taken is unlawful.

[3] See GAO-15-34, "Environmental Litigation – Impact of Deadline Suits on EPA is Limited.," December 2014. See also GAO-15-803T, testimony before the Subcommittee on Superfund, Waste Management, and Regulatory Oversight, Committee on Environment and Public Works, U.S. Senate, August 4, 2015.

Based on our decades of experience as counsel for EPA, we believe your Directive will work against the agency and the public's interest in fair and efficient EPA operations and reasonable timeframes for EPA action. The Directive favors regulated parties; it requires EPA to expend far more resources in attempting to settle legitimate claims; and it all but eliminates the chance that settlements can be reached by requiring that EPA "seek to receive the concurrence of any affected state and/or regulated entities before entering into" an agreement. The Directive will almost surely result in EPA litigating the schedule suits brought against it, at significant additional expense to taxpayers and at the risk of tight court-ordered deadlines that curtail careful agency consideration. You claim your Directive is needed to preserve the agency's ability to do its job well, but it is highly likely to have the opposite effect.

We had the privilege and duty of giving sound, unbiased legal advice to appointees of previous Republican and Democratic administrations about the laws and court opinions governing EPA actions. We submit the following information and analysis in the hope that you will reconsider the directive and the explanation accompanying it. We urge you to revise your Directive and explanation so that both comport with the relevant laws and facts and better serve the American people, who rely on EPA to protect them from harmful pollution.

Flawed premise

The premise for your Directive is that EPA has settled suits with outside groups by "agree[ing] that EPA would take an action with a certain end in mind, relinquishing some of its discretion over the Agency's priorities and duties and handing them over to special interests and the courts."[4] In the process, you claim that EPA has risked "bypassing the transparency and due process safeguards enshrined in the Administrative Procedure Act and other statutes." You also claim that EPA has typically reached settlements without meaningful involvement of other interested stakeholders and states. Some of these settlements, you allege, reduce Congress' ability to influence policy. You further contend that EPA's past settlement of lawsuits suggests that EPA has failed to zealously defend its actions.

You provide no evidence to substantiate any of these claims, and there is none. You instead resort to stating that one or another alleged transgression "has been reported." You do not identify those reports, and you fail to acknowledge a recent

[4] As your Directive explains, EPA settles suits by entering into a consent decree, which results in an enforceable court order, or a settlement agreement, which generally resolves disputes without a court order. In this letter, we use "settlements" to refer to both consent decrees and settlement agreements.

GAO report that found that schedule suits affect only the timing and order of agency action, not the substance.[5] There is, in fact, no foundation for your claims.

- *Settling lawsuits "with a certain end in mind" and bypassing due process*

EPA has not and cannot agree to settle a suit by agreeing to reach a certain end. As GAO reported in 2015, EPA and DOJ have settled schedule suits consistent with the Justice Department's 1986 Meese memorandum, which precludes agency settlements from including terms that require the agency to take an otherwise discretionary action or prescribe a specific substantive outcome.[6] In fact, GAO noted that the schedule suit settlements it reviewed contained provisions that "specified that nothing in the settlement can be construed to limit or modify any discretion accorded EPA by the Clean Air Act [the relevant statute] or by general principles of administrative law."[7]

Settlements do not lead to bypassing the notice-and-comment rulemaking process. The Administrative Procedure Act (APA) and other applicable procedural laws generally require that EPA issue a public notice of any proposed agency action and provide the public with an opportunity to comment before the agency makes a decision.[8] As you well know, states, regulated entities and other members of the public have objected to proposed actions that they believe are beyond the agency's authority or not supported by the facts, and often specify how the proposed action should be changed. The APA and other statutes also require that EPA explain whatever action it ultimately takes in light of the comments received. If EPA fails to comply with these requirements, its action can be overturned by a court.

In view of these procedural requirements and the consequences of bypassing them, EPA has settled well-founded suits against it by agreeing to act according to a schedule that allows time for required procedural steps that ensure public involvement in the formulation of agency actions. As the GAO report makes clear, EPA settlements have not preordained the outcome of that action.

An example may be instructive. EPA often negotiates a settlement in cases brought to enforce a statute that sets a deadline for EPA to set or review a pollution control standard, where the agency has missed the deadline. In settling those cases, EPA

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[5] GAO-15-803T, pp. 15-17.

[6] *Id.,* pp. 6-7, 15. Also see GAO-15-34, pp. 6-7.

[7] GAO-15-803T, p.15.

[8] Section 307(h) of the Clean Air Act calls for the public have at least 30 days to comment on most proposed rules under the Act. In our experience, EPA has generally provided at least 30 days for public comment on proposed rules, and in the case of complex rules, 60 days or more.

has agreed on a schedule to make a decision on setting or revising the standard, but it has not agreed on how to set or revise the standard, or to set or revise it in a certain way or to a certain level. EPA settlements, in short, set a timeline for the agency to take an action required by Congress, but the settlements do not determine the outcome of that action.

- *Relinquishing EPA discretion*

EPA has not relinquished its discretion when it has agreed to settle suits. The 2015 GAO report found that EPA and DOJ have been careful to preserve the agency's discretion in settlement agreements. In the same report, GAO also found that settlements in schedule suits have affected the timing and order of some EPA actions.[9] In those cases, however, EPA no longer has discretion regarding the timing of those actions because it has missed the deadlines Congress set for the agency in environmental laws. When EPA is legally obligated to take a specified act by a specified deadline or within a reasonable period time, it does not have discretion to miss the deadline or not act at all.

- *Handing over discretion to the courts*

Courts do not take over the discretion that Congress afforded EPA when a court orders EPA to act or approves a settlement agreement requiring EPA to take an action by a certain date, after EPA has failed to act in the time frame required by law. If EPA misses a statutory deadline, it no longer has discretion regarding the timing of the overdue action. Congress in many environmental laws gave "any person"[10] the right to sue EPA if it fails to meet statutory deadlines or unreasonably delays action the agency is required to take.[11] Congress also gave federal courts the jurisdiction to compel EPA to take the required action if the agency misses the applicable deadline or unreasonably drags its feet. The court is not telling EPA what decision to make; instead it sets the time frame in which EPA must make a decision or take an action. In ordering EPA to take an overdue action by a certain date, courts are lawfully exercising the authority Congress gave them to enforce statutory deadlines and other requirements that Congress itself included in environmental statutes.

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[9] GAO-15-803T, pp. 15, 17.

[10] See, e.g., Clean Air Act section 304(a). "Person" is generally defined as any individual, corporation, partnership, association, State, municipality, and other entities (see, e.g., Clean Air Act section 302(e)).

[11] Environmental statutes with so-called citizen suit provisions include the Comprehensive Environmental Response, Compensation, and Liability Act, the Clean Air Act, the Clean Water Act, the Emergency Planning and Community Right-to-Know Act, Safe Drinking Water Act, Resource Conservation and Recovery Act, and the Toxic Substances Control Act.

In your explanation of the Directive, you suggest that Congress' decision to empower the public and the courts to enforce statutory deadlines and other requirements against EPA contravenes constitutional separations of powers. You state that "[t]he Agency must strive to meet the directives and deadlines that Congress set forth in our governing environmental statutes. But we must not surrender the powers we receive from Congress to another branch of government – lest we risk upsetting the balance of powers that our founders enshrined in the Constitution. [Footnote to Federalist No. 47.] Sue and settle disrespects the rule of law and improperly elevates the powers of the federal judiciary to the detriment of the executive and legislative branches." You go on to state that EPA "should not readily cede our authority and discretion by letting the federal judiciary dictate the priorities of the Administration and the Agency."

This is a novel and dangerous conception of executive power. For decades, courts have exercised the authority Congress gave them in environmental laws to compel EPA to take statutorily required actions, and to our knowledge, no significant constitutional objections have been raised or pursued by Congress or the Executive. Far from maintaining the balance of powers enshrined in the Constitution, your conception upsets them. You appear to believe that the executive branch has discretion to decide whether and when to fulfill statutory directives set by Congress, and that Congress may not authorize the courts to enforce the requirements it sets in law.

Your expansive view of executive discretion upends the Constitution's careful balancing of power among the three branches of government that avoids the accumulation of too much power in any one branch. You provide no basis for your assertions, and the general statements you cite from the Federalist Papers are better read as cautioning against the views expressed in your explanation, which appear to reject as suspect and improper a traditional and long accepted judicial oversight role, specifically established by Congress. It is bedrock constitutional law that Congress makes the laws, the Executive administers them, and the courts enforce them, including against Executive Branch agencies.

The sad fact is that when EPA misses statutory deadlines or drags its feet in taking legally required action, it has failed to exercise the discretion Congress has afforded it. EPA may set priorities among its duties and other responsibilities so long as it honors the priorities that Congress has set. If it fails to do so, courts may enforce Congress' priorities. If EPA disagrees or has concerns with those priorities, it may raise its concerns to Congress.

- *Excluding other interested parties and states in reaching settlements*

The explanation of your Directive overlooks or pays short shrift to the fact that EPA already gives states and the public, including regulated entities, notice of most lawsuits against the agency and an opportunity to comment on most proposed

settlements. Most environmental statutes require anyone wishing to sue EPA to submit a "notice of intent to sue" at least 60 days before filing suit.[12] Since 2013, EPA has posted the notices it receives on the agency's website. As required by section 113(g) of the Clean Air Act, EPA also publishes draft settlements in the Federal Register and gives the public a 30-day opportunity to submit comment on them. The EPA Administrator or the Attorney General must consider those comments before a decision is made as to whether to finalize the settlement. As the explanation for your Directive acknowledges, EPA has modified draft settlements in response to public comments.[13] Since the vast majority of settlements are under the Clean Air Act, especially those leading to major rules, EPA already receives public input on most settlements before they are finalized.[14]

In your explanation of the Directive, you express particular concern for states potentially affected by settlements. You correctly note the crucial role that states play in implementing environmental rules in partnership with EPA. However, your claim that EPA's past practice of settling well-founded schedule suits has disadvantaged states and harmed that partnership is unfounded. States benefit from the notice EPA provides of lawsuits filed and settlements drafted, and have ample opportunity to weigh in by submitting comments. States also have the option of contacting EPA's Office of Intergovernmental Affairs, a headquarters office devoted to engaging with states, and EPA's regional offices, which build close relationships with the states in their jurisdiction.

As discussed below, your Directive will not increase the level of input on settlements from states and other stakeholders, but instead will lead to fewer settlements and shorter and less flexible schedules for EPA to take actions required by Congress.

- *Reducing Congress' influence*

Settlement of litigation has no substantive effect on Congress' ability to influence policy. In fact, settlement of well-founded schedule suits helps uphold congressional

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[12] See, e.g., Clean Air Act section 304(b)(2).

[13] Comments on draft settlements are not limited to debating how long the schedule for agency action should be. As GAO noted in its 2015 report, commenters in some cases objected to the settlement, presumably because, in their view, the EPA action being sought is not statutorily required. GAO-15-803T, p. 16. If EPA is unpersuaded and goes forward with the settlement, commenters may raise that objection during the comment period for any proposed action, and if EPA takes the action, they may take their objection to a court.

[14] GAO 15-34, "What GAO Found;" pp. 12-13.

directives that EPA has failed to obey.[15] If Congress wants to change its directives, it can pass legislation to change the relevant law. Under the Congressional Review Act (CRA), Congress may also pass resolutions to rescind agency rules using streamlined procedures for House and Senate consideration. Since President Trump took office, Congress has passed and the President has signed 14 such resolutions.[16]

- *Settling instead of zealously defending EPA actions*

Settling cases and zealously defending EPA are not mutually exclusive. Counsel to EPA zealously represent and defend the agency, in line with their professional duty. In the case of suits against EPA, DOJ attorneys represent the agency along with EPA's attorneys. As GAO explained, DOJ and EPA work together to decide whether to litigate or settle a suit.[17] They consider the likelihood that EPA will win the case if it goes to court; the cost of the litigation; and whether EPA and DOJ believe they can negotiate a settlement favorable to the agency. EPA counsel and DOJ, after consulting with EPA decision-makers, only settle cases when they determine that the settlement is better for EPA than the risk of an adverse judicial decision after a contested hearing. Private sector attorneys take a similar approach when their clients are sued by EPA for allegedly violating environmental laws and the attorneys conclude that settlement is better than the risk of losing to EPA.

Flawed Directive

We have carefully reviewed your Directive and come to the conclusion that, with some minor exceptions, it is unfair, unrealistic, and ultimately counterproductive.

We agree that some of its provisions may help regularize and extend steps EPA already takes to notify the public of suits and draft settlements.[18] It also embodies

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[15] There is an obvious incongruity in your concern for preserving Congress' influence over agency actions with your view that courts should not enforce Congress' directives concerning EPA's timing for various actions.

[16] https://goo.gl/HtFu1v

[17] GAO 15-34, pp. 2, 7-8. The GAO report looked particularly at deadline suits, but in our experience the approach it describes is used by EPA and DOJ in determining whether to settle any suit against the agency.

[18] As noted earlier in this letter, the Clean Air Act, under which most deadline suits have been brought, requires that the public be given a 30-day opportunity to comment on draft settlements. While the other environmental statutes do not include this provision, EPA has provided notice of draft settlements as a matter of practice in some other areas. The Directive extends this practice to settlements under all EPA statutes, and makes the court filings that bring suits against the agency available on the agency's website.

the substance of the 1986 Meese memorandum that GAO confirms EPA and DOJ already follow.

However, other provisions favor regulated entities over other members of the public and effectively doom EPA and taxpayers to fewer settlements and more litigation, costing more money and resulting in more court-ordered timetables for agency action that provide less, not more, time for the careful consideration that you observe is crucial to formulating sound agency policies.

The Directive favors certain parties at the expense of the public

The Directive is patently biased. It directs EPA to notify "any affected states and/or regulated entities" of a lawsuit brought against the agency. It further requires EPA to take "any and all appropriate steps to achieve the participation of affected states and/or regulated entities" in the settlement negotiation process. It goes on to state that "[a]ccordingly, EPA shall seek to receive the concurrence of any affected states and/or regulated entities before entering into" a settlement.[19]

The import and implications of these provisions are clear. The Directive seeks to give regulated parties, but not other members of the public, a seat at the settlement table.[20] It similarly seeks to give "affected states," but not necessarily all states, a seat at the table.[21] The coup de grâce is its call for concurrence of any affected states

[19] Notably, your explanation for the Directive states that when considering settlement of a lawsuit, "EPA should welcome the participation of the affected states and tribes, regulated communities, and other interested stakeholders." However, the Directive fails to include tribes or other interested stakeholders in its provisions directing EPA to notify and seek participation and concurrence from affected states and regulated entities.

[20] The Directive overlooks the wholesale imbalance it creates when regulated entities sue the agency. Since it seeks to guarantee only affected states and regulated entities a seat at the negotiation table, when regulated entities sue, no members of the public or public interest groups can be sure of being included in settlement discussions, even though the public has a strong interest in the timing and content of agency actions to regulate harmful pollution. Overall, the Directive appears focused on giving industry and states a seat at the table when members of the public try to get EPA to take overdue action to control pollution, while largely ignoring litigation brought by industry.

[21] The Directive does not explain how a state must be affected to get a seat at the table, nor does it ensure that all interested states will get a seat. A good argument can be made that lawsuits seeking to enforce statutory deadlines for pollution control standards, for example, affect all states as co-regulators or as the potential recipients of cross-state pollution. But if affected regulated entities are clustered in just one or a few states, "affected states" might be more narrowly interpreted to refer just to those states, even though pollution from those entities may affect other states.

The Directive also does not explain who in the state government is supposed to concur for the State. Is it the Governor, the head of the appropriate environmental unit, or the State Attorney General?

and regulated entities. The inexorable result is settlements that skew towards the interests of affected regulated entities and/or states, or what is much more likely, no settlement at all.

The Directive's participation and concurrence provisions are unworkable

The Directive's favoritism aside, its provisions for notifying and "achieving the participation" and "concurrence" of affected states and regulated entities are unworkable. EPA can only settle a lawsuit if the party bringing the lawsuit is willing to engage in settlement negotiations. A party open to settlement discussions with EPA is very likely to reject a negotiation process that could include representatives of as many as 50 states and potentially large numbers of regulated entities. This is not a far-fetched scenario. National Ambient Air Quality Standards (NAAQS) under the Clean Air Act are subject to recurring statutory deadlines for review that EPA often misses. NAAQS affect all states (as well as territories and tribes), and, in the case of some NAAQS, affect many industries with many members. Even in situations involving fewer affected states and regulated entities, there is no reason to expect the parties suing EPA will allow the negotiation process to be expanded and delayed as envisioned in your Directive. As discussed below, their recourse is not to settle the case and instead have the issue of the appropriate schedule decided by the court after a contested hearing.[22]

The Directive discourages settlements

The Directive further discourages settlement by requiring that any schedule EPA negotiates allow time for additional procedural steps, such as second rounds of public comment on draft settlement agreements and proposed rules. It also requires that EPA insist on additional time for White House and inter-agency review, even though courts have refused to factor in that review since it is not required by statute and only lengthens the time needed by EPA to complete the action already overdue. It will not be lost on a party bringing suit to enforce a missed statutory deadline that these provisions will slow, not expedite, agency action.

In the unlikely event that a party bringing suit remains open to settlement, EPA faces the potentially large task of notifying all affected regulated entities and states, and organizing and leading settlement negotiations among many participants.

States themselves likely will not be clear on that matter, adding further confusion and delay to any possible settlement process.

[22] It is also worth noting that settlement discussions only occur after seeking the court's permission to hold the case in abeyance. If settlement discussions do not wrap up in a reasonable time, the court can lift the stay and require the parties to litigate. Protracted discussions with many participants would likely test the patience of courts.

Given the Directive's call for concurrence of "any affected regulated entities," negotiations could be long and open-ended as each participant wields what appears to be veto power over any agreement. Under these circumstances, the chances for reaching agreement are likely to be vanishingly small, and the time and expense devoted to settlement negotiations wasted. Given these risks, there is no reason to think that the party bringing suit will agree to negotiate a settlement.[23]

The Directive will increase litigation and costs to taxpayers and litigants

All told, the Directive will almost certainly result in many more schedule suits against the agency being litigated, not settled, with the additional cost and risk that litigation entails. In the case of schedule suits brought to enforce missed statutory deadlines, courts will determine the schedule for agency action after hearing from EPA and the party bringing the suit in a contested proceeding. EPA will need to make the case that it would be impossible to meet a schedule faster than the one EPA seeks from the court. The party suing EPA has the option of seeking discovery of information in EPA's possession that sheds light on how quickly EPA can act and why it has not acted in a timely fashion. Discovery can be a costly and time-consuming proposition for the agency.

The Directive will likely lead to rulemakings that are more rushed and with shorter public comment periods, compared to schedules arrived at through settlement

More importantly, when schedule suits have not been settled, and instead have been contested and decided by courts, the terms of the court orders have generally not been favorable to the government. In our collectively long and broad experience, courts have had little patience with EPA's failure to comply with federal law, and have been unpersuaded by pleas for more time.

By making settlement agreements all but impossible to reach, your Directive needlessly foregoes the opportunity to negotiate schedules that are expected to be better than the schedule that a court would impose if the case were not settled. Ironically, your Directive is likely to exacerbate the process concerns you describe in your explanation by resulting in court orders with shorter, less flexible schedules for EPA action, allowing less time for public comment and agency consideration.

It is hard not to conclude that the Directive is intended to effectively preclude EPA from settling the deadline and unreasonable delay cases brought against it. This is foolhardy and a waste of limited EPA resources when the agency still has much

[23] The Directive also attempts to deny attorney fees for parties that sue EPA when the agency decides to settle the suit. The Directive states that in such cases there is no "prevailing party," and it calls on EPA to seek exclusion of payment of the suing party's attorney fees. Court opinions are clear, however, that there can be a prevailing party if a case is settled. Moreover, DOJ handles attorney fee issues, not EPA.

work that it is required to do under environmental laws. Maybe that is the point. We sincerely hope not, since you have sworn to faithfully uphold those laws.

You reserve the right in your Directive to exercise your discretion and permit EPA to deviate from the procedures set forth in the Directive, where appropriate. We note that in May 2017, prior to the Directive's release, EPA settled a lawsuit brought by the company proposing to mine the Pebble deposit near Bristol Bay, Alaska. The agency reached that settlement without taking any of the transparency measures called for by the Directive and in apparent contravention of another principle embodied in the Directive, that settlements not limit the agency's statutory discretion in ways that a court could not. To the extent you exercise your discretion under the Directive, you should do so fairly and even-handedly, and not only to promote and fashion settlements in cases brought against the agency by regulated entities.

Conclusion

You announce in your Directive that "[t]he days of . . . regulation through litigation, or 'sue and settle,' are terminated." That is wishful thinking, at best. The only way to avoid litigation over requirements that Congress has established for EPA in environmental laws is for EPA to meet its statutory deadlines and fulfill its other duties on a timely basis. It is EPA's failure to comply with legal requirements that is the problem, not the people who sue EPA, the courts that hear the suits, or the EPA and DOJ staff who faithfully negotiate settlements that provide EPA longer and more flexible schedules than it would receive if there were no settlement.

We strongly urge you to revise your Directive and explanation so that it truly promotes fair, transparent, and efficient settlement of well-founded suits against the agency. More fundamentally, we encourage you to lead EPA in a way that allows the agency to meet its statutory obligations on a timely basis. That is the only way to minimize lawsuits and the need for settlement, and to serve the American people as Congress intended.

Respectfully,

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