



**Walter Wright, Jr.**  
wwright@mwlaw.com  
(501) 688.8839

# U.S. Environmental Protection Agency Administrator E. Scott Pruitt Addresses Consent Decrees/Settlement Agreements: October 16th Memorandum and Directive

10/17/2017

United States Environmental Protection Agency ("EPA") Administrator E. Scott Pruitt issued two documents dated October 16th addressing procedures involved in the resolution of litigation through consent decrees and settlement agreements.

The documents issued are:

- Adhering to the Fundamental Principles of Due Process, Rule of Law, and Cooperative Federalism in Consent Decrees and Settlement Agreements ("*Memorandum*")
- Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements ("*Directive*")

The documents were described in an October 16th EPA news release.

The focus of both documents is the Administrator's perception of EPA's previous resolution of litigation through consent decrees and settlement agreements with outside groups. Concerns expressed in the documents include:

- EPA would take an action with a certain end in mind
- Relinquishment of agency discretion over priorities and duties and conceding them to special interests or the courts
- Exclusion of intervenors, interested stakeholders and affected states in negotiation of agreements

Administrator Pruitt refers to these actions as "sue-and-settle." The *Memorandum* outlines what the Administrator describes as his fundamental principles of government which are stated to include:

1. The importance of process,
2. Adherence to the rule of law,
3. The applicability of cooperative federalism

The *Memorandum* provides the Administrator's rationale for the accompanying *Directive*.

The *Directive* requires that the agency and its partnership states in conducting an action to protect public health and environment must:

... strive to promote transparency and public participation to provide the American public with due process, accountability, and a sense of fair-dealing.

The *Directive* outlines 10 requirements that the EPA must follow in the consent decree and settlement agreement process involving lawsuits against the federal agency. The EPA news release contains a summarized version of these 10 steps which include:

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.
- 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.

- EPA shall provide a public comment period of at least thirty days, unless a different period of time is required by law.
  - EPA may hold a public hearing on whether to enter into the proposed consent decree or draft settlement agreement.
  - 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

The environmental organization Earthjustice criticized the documents, stating in part:

The Directive would force parties into protracted litigation, even when the agency openly acknowledges that it has broken the law by, for example, missing a statutory deadline for adopting controls that would protect the public from dangerous pollutants. Prior to this Directive, when a member of the public filed a claim against the government for not complying with some clear legal requirement, the government was able to engage in settlement discussions with the party that brought the suit, and take responsibility for its unlawful conduct by agreeing to take the action already required by law by a certain date.

This Directive would prevent or restrict the government from accepting responsibility for its illegal conduct, instead forcing both parties to engage in unnecessary litigation, putting a strain on the resources of both members of the public and the federal government, and prolonging the harms to the public that result from the agency's failure to comply with the law. It could also have a chilling effect on parties bringing suits seeking to compel government action if they know costly and prolonged litigation will be necessary to obtain relief.

[A copy of the news release, Memorandum and Directive can be downloaded here.](#)