UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

MAR 18 2022

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Consent Decrees and Settlement Agreements to Resolve Environmental Claims Against the Agency

From: Michael S. Regan

To: Deputy Administrator
General Counsel
Assistant Administrators
Inspector General
Chief Financial Officer
Chief of Staff
Associate Administrators
Regional Administrators

As Administrator of the U.S. Environmental Protection Agency, I am committed to the fair and efficient resolution of environmental claims brought against the EPA. I am also committed to transparency for the American people, including those in environmental justice communities, in settling such claims.

To help fulfill these commitments, I am revoking the memorandum "Adhering to the Fundamental Principles of Due Process, Rule of Law and Cooperative Federalism in Consent Decrees and Settlement Agreements" and the accompanying "Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements," both issued on October 16, 2017, and replacing them with this memorandum.

In enacting environmental laws, Congress included tools to ensure that the EPA carries out its vital mission to protect human health and the environment for all. In environmental statutes, and in tandem with the Administrative Procedure Act, Congress commonly has adopted provisions authorizing judicial action against the EPA, such as citizen suits to enforce deadlines and judicial review processes related to final agency action. At the same time, parties, including federal agencies, frequently enter into settlements to avoid expensive and resource-intensive litigation, where appropriate. Settlements can preserve resources of the parties and the courts; in many instances they can be the most practical, economical and efficient path forward while also serving the public interest. Appropriate settlement of environmental claims against the EPA

preserves agency resources to focus on the vital work the agency carries out under the environmental statutes.

Through the decades, and in close coordination with the Department of Justice, the EPA has appropriately settled environmental claims brought by affected individuals, organizations, regulated entities, states and others. There are, however, constraints on the federal government's – including the EPA's – ability to enter into settlements. For example, longstanding Department of Justice policy disfavors consent decrees or settlements that convert a discretionary duty into a mandatory one in the context of regulatory action and requires associate or deputy attorney general approval for any such agreement. In addition, in entering into consent decrees or settlements, the EPA has always considered the amount of time it will need to fulfill applicable public notice-and-comment requirements and adequately consider public feedback and, as appropriate, incorporate it into its final rules and decisions.

The prior administration issued the aforementioned memorandum and directive regarding agency settlements in October 2017. That memorandum and directive contained inaccurate characterizations of the agency's settlement practices as well as of EPA attorneys and staff who have for decades appropriately negotiated settlements to resolve litigation. I want to emphasize that the EPA's dedicated career staff have exemplified the utmost nonpartisan professionalism in settling lawsuits in accordance with the law and agency practice.

Further, the memorandum and directive established procedural requirements inappropriately favoring certain stakeholders in settling environmental claims brought against the EPA. Lastly, the memorandum and directive gave little weight to the well-understood value of settlements in appropriate cases.

Consistent with my commitment to the fair and efficient resolution of environmental claims and transparency for the American people, I am pleased to announce that the Office of General Counsel is taking simple yet effective steps to enhance public awareness of such claims against the agency and to provide an opportunity for public review and comment on proposed settlements of them. These steps, which go beyond the requirements of law and the past practice of the agency, include the following[1]:

- posting new Notices of Intent to Sue the Agency, petitions for review, complaints and proposed settlements (consent decrees and settlement agreements) to OGC's website for public awareness;

- maintaining a public email listserv for automated email notice of newly posted NOIs, petitions for review, complaints and proposed settlements; and

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[1] These steps are intended to apply to notices of intent to sue the EPA, petitions for review, complaints and settlements that are based on the environmental statutes that the EPA administers and in tandem with the Administrative Procedure Act, where applicable, that authorize judicial action against the agency, such as citizen suits and judicial review related to final agency action. These steps do not apply to enforcement-related cases and attorney fee settlements.

- making proposed settlements available for public review and comment after they have been conditionally approved by government decision-makers, for at least 30 days unless a different period of time is required by law.

OGC will continue to develop and refine these steps based on its experience. If the general counsel determines with regard to a specific matter that circumstances warrant a departure from these steps, such as time sensitivity or an imminent need to avoid an adverse environmental outcome, OGC will make the final agreement available to the public by posting it on OGC's website.

These steps do not supersede or replace Section 113(g) of the Clean Air Act, which requires notice in the *Federal Register* before the EPA enters into certain consent decrees and settlement agreements under that act.[2]

These steps advance open communication and transparency and allow the EPA to settle cases when doing so is a fair and efficient resolution of the claims at issue and in the public interest.

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[2] The steps included in this memorandum are intended to assist with agency management and do not create a right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, the EPA, its officers or employees, or any other person.