



THE SECRETARY OF THE INTERIOR
WASHINGTON

ORDER NO. 3368

Subject: Promoting Transparency and Accountability in Consent Decrees and Settlement Agreements

Sec. 1 Purpose. This Order is intended to promote transparency and accountability in consent decrees and settlements entered into on behalf of the Department of the Interior (Department) and better ensure that the Department's views regarding such agreements and settlements reflect the scope of the Department's authority and the public interest.

Sec. 2 Authorities. This Order is issued under the authority of Section 2 of Reorganization Plan No. 3 of 1950 (64 Stat. 1262), as amended, as well as other relevant statutes.

Sec. 3 Background. In recent years, the Department supported entering a number of consent decrees and settlement agreements, including some with significant implications for the policies and priorities of the Department. Between January 1, 2012 and January 19, 2017, the Department agreed to enter into over 460 settlement agreements and consent decrees (an average of over 90 per year), and agreed to pay more than \$4.4 billion in monetary awards. From January 1, 2016 through January 19, 2017, the Department entered into approximately 96 settlement agreements or consent decrees, agreeing to pay more than \$1.7 billion in monetary awards.

In many cases, entering a consent decree or settlement agreement may be a prudent use of taxpayer resources to avoid costly and drawn out litigation that the Department is likely to lose. However, concerns have been raised with respect to various Federal Agencies that the litigation process has been used to undermine the procedural safeguards Congress put in place to ensure that the public has input in policymaking, particularly through a practice referred to as "sue and settle."

This Order is intended to alleviate those concerns by giving the public notice of litigation, settlement agreements, and consent decrees involving the Department. In addition, it provides a process for public input before the Department recommends approving a settlement with certain long-term policy implications or large budgetary commitments.

Sec. 4 Implementation. Consistent with governing laws and regulations, as well as principles of transparency and accountability, I direct the following actions:

- a. With respect to procedural transparency:

(1) Within 30 days, the Office of the Solicitor shall work with the Office of the Chief Information Officer to establish a publicly accessible "Litigation" webpage that is prominently linked to the Office of the Solicitor's homepage.

(2) Within 90 days, the Office of the Solicitor shall compile and the Office of the Chief Information Officer shall post, on the Litigation page, a searchable list of final judicial and administrative consent decrees and settlement agreements (consent decrees and settlement agreements) that continue to govern Departmental actions (including those of any Bureau or Office thereof), including a brief summary of each decree or agreement, a note of any attorney fees or costs paid, and a link to the text of the decree or agreement.

(3) Within 15 days of receiving service of a complaint or petition for review regarding a law, regulation, or rule that names the Department, any Bureau or Office thereof, and/or any person acting in their official capacity as an employee thereof as a defendant or respondent in Federal court, the Office of the Solicitor shall:

(a) Directly notify any State(s) or Tribe(s) upon which the complaint or petition would have a substantial direct effect through the relevant Office of the Attorney General of any State or Principal Elected Tribal Official (e.g., Chairman, President) of any Federally recognized Tribal nation, respectively. No notification is required under this section where the relevant State or Tribe is a party to the action; and

(b) Working with the Office of the Chief Information Officer, publicly post the following information on the Litigation page:

- (i) Names of the parties;
- (ii) Case number;
- (iii) Date filed;
- (iv) Court the complaint was filed in; and
- (v) Statutory and/or regulatory provisions at issue.

(4) The Office of the Solicitor shall compile and the Office of the Chief Information Officer shall post, at the top of the Litigation page, any proposed consent decree or settlement agreement that commits the Department to seek a particular appropriation or budget authorization from Congress or formally reprogram appropriated funds, and/or places obligations on the Department that extends beyond 5 years. The Office of the Solicitor shall publish a notice of the proposed consent decree or settlement agreement in the Federal Register, and provide a public comment period of at least 30 days. The notice shall include explanations for the following:

(a) Statutory basis for the proposed consent decree or settlement agreement.

(b) Relevant terms of the proposed consent decree or settlement agreement, including a description of the specific obligations imposed upon the Department and a general breakdown of the monetary terms, including any payment of costs or attorney fees;

(c) A summary of why the proposed settlement agreement or consent decree is in the public interest; and

(d) The Department's timeline for meeting the obligations set forth therein.

(5) The Department shall provide the Department of Justice a summary of the comments received prior to or simultaneous with a formal recommendation or opinion regarding the proposed consent decree or settlement.

(6) Within 15 days of executing a consent decree or settlement agreement, the Office of the Solicitor, with the assistance of the Office of the Chief Information Officer, shall add a brief summary and link to the text of the decree or agreement to the searchable list posted on the Litigation page. Simultaneously, the decree or agreement, including any maps, charts, or other images, will be made available to the public in the Reading Room of the Department of the Interior Library.

b. With respect to ensuring that consent decrees and settlement agreements are consistent with the public interest and the limitations set by Congress, the Department, including any Bureau or Office thereof, will not recommend that the Department of Justice enter into a consent decree or settlement agreement that:

(1) Converts into a mandatory duty the otherwise discretionary authority of the Secretary of the Interior (Secretary) and/or his designees (including Bureau and Office heads) to revise, amend, or promulgate regulations; or interferes with the Secretary and/or his designees' (including bureau and office heads) authority to revise, amend, or promulgate regulations through the procedures set forth in the Administrative Procedure Act.

(2) Commits the Department or any of its Bureaus and Offices thereof to expend funds that Congress has not appropriated and that have not been budgeted for the action in question.

(3) Requires the Department or any subdivision thereof to pay attorney fees and costs unless the plaintiff or petitioner has established a strong likelihood of obtaining such fees under the law; or

(4) Prohibits public disclosure of any consent decree or settlement agreement, except to the extent necessary to protect proprietary information, such as trade secrets, or otherwise mandated by law.

c. The following limitations and exceptions shall apply:

(1) Notwithstanding the above, this Order shall not apply to consent decrees or settlement agreements intended to resolve personnel matters, tort claims, or contract disputes, including, but not limited to, bid protests.

(2) Nothing in this Order shall be deemed to supersede any applicable provision of law or judicial decree, including those mandating confidentiality.

(3) The requirements of this Order may be waived, in whole or in part, upon a written determination by the Secretary, Deputy Secretary, or Solicitor that doing so is in the best interest of the Department and is consistent with the Department's statutory authority, sound principles of democratic accountability, and constitutional separation of powers. Within 15 days, any waiver (with appropriate redactions) shall be posted on the Litigation page.

Sec. 5 Effect of the Order. This Order is intended to improve the internal management of the Department. This Order and any resulting reports or recommendations are not intended to, and do not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies, instrumentalities or entities, its officers or employees, or any other person. To the extent there is any inconsistency between the provision of this Order and any Federal laws or regulations, the laws or regulations will control.

Sec. 6 Expiration Date. This Order is effective immediately. It will remain in effect until its provisions are implemented and completed, or until it is amended, superseded, or revoked.



Deputy Secretary

Date: SEP 11 2018