COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

QUESTIONS FOR THE RECORD TO
JEFFREY H. WOOD
ACTING ASSISTANT ATTORNEY GENERAL
ENVIRONMENT AND NATURAL RESOURCES DIVISION
U.S. DEPARTMENT OF JUSTICE

Questions submitted for the Record from Subcommittee Chairman Marino

1. According to a 2013 report by the Chamber of Commerce, six sue-and-settle regulations under the Clean Air Act and the Clean Water Act impose up to $101 billion in annual costs. These include the Utility MACT rule and Reconsideration of 2008 Ozone NAAQS. Does DOJ factor the potential cost impacts of its settlements into its decisions over whether and how to craft settlements?

   RESPONSE: With regard to the "sue and settle" issue, first, let me say that the focus in our Division is on defending the lawful regulations and actions of our client agencies. Under my watch, there will be no collusion involving any sue and settle actions whatsoever. And, with respect to the policy of the Department of Justice, we will abide by Attorney General Meese's memorandum that provides guidance for settlements in these kinds of cases.[1] For example, that policy restricts a settlement that would convert a discretionary authority to a mandatory duty for the agency. Whenever settlement agreements are presented for my review and signature, we will look closely to make sure it abides by that policy.

   More specifically to your question, I am unable to comment on the particulars of cases such as those addressed in the cited report, which were settled long before my tenure in the Environment and Natural Resources Division (ENRD). I can say, however, that the laws enacted by Congress at issue in a particular case will govern the evaluation of that case, and the applicable law may or may not allow the consideration of cost. Where consideration of cost is permissible, ENRD would not agree to settle a case unless the client federal agency has determined that the terms of the settlement are appropriate and feasible to implement. There is also a frequently recurring context where Congress has set statutory deadlines for certain agency actions and has, separately, authorized "any person" to file a lawsuit when the agency fails to meet those deadlines. Often in these contexts, the agency is left with few defenses, if any, and a frequent outcome is a settlement agreement or a consent decree between the agency and the plaintiff that resolves the lawsuit and establishes specific timeframes under which the agency agrees to take the

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[1] Memorandum from Edwin Meese, III, Attorney General, to All Assistant Attorneys General and All United States Attorneys entitled "Department Policy Regarding Consent Decrees and Settlement Agreements" (March 13, 1986) (copy attached). *See also* 28 C.F.R. 0.160(d).

procedural action. In many of these cases, the "successful" plaintiff is entitled by a separate statute to recover attorneys' fees. Many have questioned the soundness of such a regime, especially given the sheer number of statutory deadlines. *See, e.g.*, **Jacob E. Gersen & Anne Joseph O'Connell, Deadlines in Administrative Law, 156 U. Pa. L. Rev. 923, 925 & n.7, 939-42, 979-82 (2008). Usually, in those kinds of cases, the settlement has required some kind of procedural action by the agency (e.g., a decision on whether to issue a proposed rule by a certain date). A cost-benefit analysis would usually await for the substantive rulemaking stage, consistent with any applicable statutes providing for consideration of costs.**

Questions submitted for the Record from Judiciary Ranking Member Conyers

1. In your prepared statement, you describe certain "course corrections in key areas within the purview" of your Division. One of these directives pertains to reducing regulatory burdens with regard to energy development. How is this directive compatible with the Administration's apparent priority to protect clean air and clean water? If the Obama Administration's Clean Power Plan were implemented, would that have helped to protect clean air and reduce global warming?

   RESPONSE: As described in Executive Order 13783, the Administration believes that energy development should be done in a clean and safe manner and in compliance with our nation's environmental laws. If the EPA, the Department of the Interior, or other agencies revise or rescind regulations relating to energy development, it is ENRD's job to defend lawful agency actions if they are challenged in court. Further, ENRD will continue to vigorously enforce the nation's criminal and civil environmental laws against violators in all sectors of the economy, including energy development. On this point, I would refer you to our ENRD website, https://www.justice.gov/enrd/press-room, which provides information about several recent enforcement cases, including cases against the energy sector where violations have occurred.

   With regard to the Clean Power Plan (CPP), as I stated in my testimony to the Committee, I am recused from the existing CPP litigation. Specific questions related to the benefits associated with the CPP, including potential air quality improvements, are best addressed to EPA. Our client agencies, in this case EPA, develop policies and regulations for the protection of human health and the environment, consistent with federal statutes. ENRD defends the lawful actions of our client agencies and enforces federal environmental laws.

2. What are your views about the Endangered Species Act?

   RESPONSE: The Endangered Species Act is a vital statute that provides valuable protection of fish, wildlife, and plant species that are at risk of extinction. As acting head of ENRD at the Department of Justice, my responsibility is to enforce laws like the Endangered Species Act and to defend the lawful actions of our client agencies

who implement it, including the Fish and Wildlife Service and the National Marine Fisheries Service. We are honored to serve these and other client agencies, and while some actions may be reviewed or reconsidered by our client agencies, we will continue to defend their actions to the extent they are challenged in court. Working closely with these and other federal agencies, we also use the criminal provisions of the Endangered Species Act and other wildlife protection statutes, such as the Lacey Act, to prosecute wildlife traffickers as part of the Administration's ongoing efforts to battle the scourge of wildlife trafficking. As recognized in Executive Order 13773, the Administration sees combating wildlife trafficking as an integral component of our broader efforts to dismantle transnational criminal organizations that present a threat to public safety and national security. The Department of Justice, along with the Departments of State and the Interior, co-chairs the 17-member Presidential Task Force on Wildlife Trafficking, which leads and coordinates a whole-of-government approach to addressing the global crisis in wildlife trafficking.

Questions submitted for the Record from Subcommittee Ranking Member Cicilline

1. In your written testimony, you state that your Division will be involved in the property condemnation process necessary to construct the Southwest Border Wall.

   RESPONSE: That is correct. The Division's Land Acquisition Section handles, in cooperation with the U.S. Attorneys' Offices, all condemnation matters referred to the Department of Justice by a federal agency.

2. How many miles of Border Wall will need to be built? How many private properties will be needed to be confiscated for this project?

   RESPONSE: Any decisions as to whether and how to proceed with construction of a Border Wall, including how many miles will be built and where it will be located, would be made by the Department of Justice's client agencies, including the Department of Homeland Security (DHS), consistent with applicable Congressional authorization. Generally, the United States-Mexico border is approximately 1,986 miles with 382 miles in Arizona, 141 miles in California, 181 miles in New Mexico, and 1,282 miles in Texas. I have been informed that, as it exists today, DHS has completed 654 miles of primary vehicle and pedestrian fencing. Of these 654 miles, 307 miles are located in Arizona, 116 miles in California, 116 miles in New Mexico, and 115 miles in Texas.

   I have also been informed that at this early stage of development, DHS does not know how much additional land will be needed to construct a border wall and whether it will need to acquire land through condemnation. It is always DHS' preference to acquire private property through voluntary sale. However, in situations where voluntary acquisition is not possible, DHS may have to consider acquisition through condemnation.

3. How do you anticipate the Division's condemnation activity related to the Border Wall to affect low-income individuals, ranchers, or other persons who live along the border?

   RESPONSE: Acquisition of land for federal public works projects is guided by the U.S. Constitution, which requires payment of just compensation based on fair market value. We take this constitutional duty very seriously. The Uniform Relocation Assistance and Real Property Acquisition Policies Act provides further direction for this process, ensuring that the government provides fair market value to all those who have a real property interest in the land being acquired, including residents, tenants, and ranchers. The Act also provides for payment of moving and business expenses as needed to landowners who may be displaced or otherwise affected by the acquisition of land for federal projects.

4. Will the Border Wall impinge on any environmentally sensitive areas or impact any endangered species? If so, will construction of the Border Wall trump these environmental concerns?

   RESPONSE: As noted above, any decisions as to whether and how to proceed with construction of a Border Wall, including any necessary assessments of environmental impacts, would be made by the Department of Justice's client agencies, including the Department of Homeland Security. Section 102(b)(1)(C) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. §1103 note) states, "the Secretary of Homeland Security shall consult with the Secretary of the Interior, the Secretary of Agriculture, States, local governments, Indian tribes, and property owners in the United States to minimize the impact on the environment, culture, commerce, and quality of life for the communities and residents located near the sites at which such fencing is to be constructed." In the REAL ID Act of 2005 (Pub. L. No. 109-13), Congress also authorized the Secretary of the Department of Homeland Security to elect to waive otherwise-applicable legal requirements if he/she deems it necessary. ENRD's role is to defend the lawful actions of our client agencies, in this case the Department of Homeland Security.

5. Will the ENRD comply with the National Environmental Policy Act, the Endangered Species Act, and other applicable environmental protection statutes while acquiring privately owned lands for the purpose of constructing the Border Wall?

   RESPONSE: Any decisions as to whether the National Environmental Policy Act, the Endangered Species Act, or other environmental protection statutes apply, and how best to comply with these and other statutes while pursuing their priorities and mandates, are made by the Division's client agencies. The Division is responsible for defending lawsuits alleging that a federal agency decision does not comply with the environmental laws, including the National Environmental Policy Act, the Endangered Species Act, and other environmental protection statutes.

The Civil Division and ENRD are also responsible for defending any decisions by our client agencies to waive any such requirements consistent with other applicable law.

Questions submitted for the Record from Congresswoman Jayapal

1. Since 2008, climate scientists in peer-reviewed research have recommended reducing atmospheric CO2 concentrations to 350ppm or less in order to avoid extreme risks of harm to current and future generations and irreversible climate change impacts, like sea level rise and species extinction. Since then, the two degree Celsius level of global warming above the preindustrial global average temperature was selected as a politically achievable target through the United Nations Framework Convention on Climate Change. How are you working within your division and with other agencies to ensure that this goal is met in order to prevent the negative public health and environmental impacts of climate change?

   RESPONSE: Climate change is an important issue and I appreciate the significant body of work that is going into understanding the interaction of man-made emissions of greenhouse gases and broader dynamics. At this time, the United States is not subject to any legally binding target set through the United Nations Framework Convention on Climate Change. Our focus is on enforcing and defending the laws of the United States. Our client agencies, such as EPA and the Interior Department, develop policies and regulations for the protection of human health and the environment, consistent with federal statutes. ENRD will continue to vigorously defend the lawful actions of our client agencies and enforce federal environmental laws.

Attachment

Office of the Attorney General
Washington, D. C. 20530

13 March 1986

MEMORANDUM

TO: All Assistant Attorneys General
All United States Attorneys

FROM: EDWIN MEESE III
Attorney General

SUBJECT: Department Policy Regarding Consent Decrees and Settlement Agreements

The following policy is adopted to guide government attorneys involved in the negotiating of consent decrees and settlements. Adopted pursuant to the Attorney General's litigation and settlement authority, these guidelines are designed to ensure that litigation is terminated in a manner consistent with the proper roles of the Executive and the courts. They are to be followed in all cases tried by counsel under the direction of the Attorney General.

I. General Policy on Consent Decrees and Settlement Agreements

Consent decrees are negotiated agreements that are given judicial imprimatur when entered as an order of the court. Because of their unique status as both contract and judicial act, consent decrees serve as a useful device for ending litigation without trial, providing the plaintiff with an enforceable order, and insulating the defendant from the ramifications of an adverse judgement. In the past, however, executive departments and agencies have, on occasion, misused this device and forfeited the prerogatives of the Executive in order to preempt the exercise of those prerogatives by a subsequent Administration. These errors sometimes have resulted in an unwarranted expansion of the powers of judiciary -- often with the consent of government parties -- at the expense of the executive and legislative branches.

The executive branch and the legislative branch may be unduly hindered by at least three types of provisions that have been found in consent decrees:

1. A department or agency that, by consent decree, has agreed to promulgate regulations, may have relinquished its power to amend those regulations or promulgate new ones without the participation of the court.

2. An agreement entered as a consent decree may divest the department or agency of discretion committed to it by the Constitution or by statute. The exercise of discretion, rather than residing in the Secretary or agency administrator, ultimately becomes subject to court approval or disapproval.

3. A department or agency that has made a commitment in a consent decree to use its best efforts to obtain funding from the legislature may have placed the court in a position to order such distinctly political acts in the course of enforcing the decree.

In Section II these guidelines address each of these concerns and limit authority to enter into consent decrees that would require the Secretary or agency administrator to revise, amend or promulgate regulations; that would require the Secretary or agency administrator to expend funds which Congress has not appropriated, or to seek appropriations from Congress; or that would divest the Secretary or the agency administrator of discretion granted by the Constitution or by statue.

These limitations on entry into consent decrees that might include such provisions are required by the executive's position, that it is constitutionally impermissible for the courts to enter consent decrees containing such provisions where the courts would not have had the power to order such relief had the matter been litigated.

The limitations in Section II.A. of the guidelines are not intended to discourage termination of litigation through negotiated settlements. The Attorney General has plenary authority to settle cases tried under his direction, including authority to enter into settlement agreements on terms that a court could not order if the suit were tried to conclusion. Settlement agreements -- similar in form to consent decrees, but not entered as an order of the court -- remain a perfectly permissible device for the parties and should be strongly encouraged. Section II.B., however, places some restrictions on the substantive provisions which may properly be included in settlement agreements. For example, Section II.B.1. allows a department or agency to agree in a settlement document to revise, amend, or promulgate new regulations, but only so long as the department or agency is not precluded from changing those regulations pursuant to the APA. Similarly, under Section II.B.2. the Secretary or agency administrator may agree to exercise his discretion in a particular manner, but may not divest himself entirely of the power to exercise that discretion as necessary in the future. The guidelines further provide that in certain circumstances where the agreement constrains agency discretion, a settlement agreement should specify that the only sanction for the government's failure to comply with a provision of a settlement agreement shall be the revival of the suit. Revival of the suit as the sole remedy removes the danger of a judicial order

awarding damages or providing specific relief for breach of an undertaking in a settlement agreement.

Finally, it must be recognized that the Attorney General has broad flexibility and discretion in the conduct of litigation to respond to the realities of a particular case. Such flexibility can be exercised by the Attorney General in granting exceptions to this policy.

II. Policy Guidelines on Consent Decrees and Settlement Agreements

A. Consent Decrees

A department or agency should not limit its discretion by consent decree where it would assert that a similar limitation imposed by injunction unduly or improperly constrains executive discretion. In particular, the Department of Justice will not authorize any consent decree limiting department or agency authority in the following manner:

1. The department or agency should not enter into a consent decree that converts into a mandatory duty the otherwise discretionary authority of the Secretary or agency administrator to revise, amend, or promulgate regulations.

2. The department or agency should not enter into a consent decree that either commits the department or agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question, or commits a department or agency to seek a particular appropriation or budget authorization.

3. The department or agency should not enter into a consent decree that divests the Secretary or agency administrator, or his successors, of discretion committed to him by Congress or the Constitution where such discretionary power was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties.

B. Settlement Agreements

The Department of Justice will not authorize any settlement agreement that limits the discretion of a department or agency in the following manner:

1. The department or agency should not enter into a settlement agreement that interferes with the Secretary or agency administrator's authority to revise, amend, or promulgate regulations through the procedures set forth in the Administrative Procedure Act.

2. The department or agency should not enter into a settlement agreement that commits the Department or agency to

expend funds that Congress has not appropriated and that have not been budgeted for the action in question.

In any settlement agreement in which the Secretary or agency administrator agrees to exercise his discretion in a particular way, where such discretionary power was committed to him by Congress or the Constitution to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties, the sole remedy for the department or agency's failure to comply with those terms of the settlement agreement should be the revival of the suit.

C. Exceptions

The Attorney General does not hereby yield his necessary discretion to deal with the realities of any given case. If special circumstances require any departure from these guidelines, such proposed departure must be submitted for the approval of the Attorney General, the Deputy Attorney General, or the Associate Attorney General at least two weeks before the consent decree is to be entered, or the settlement agreement signed, with a concise statement of the case and of reasons why departure from these guidelines will not tend to undermine their force and is consistent with the constitutional prerogatives of the executive or the legislative branches. Written approval of the Attorney General, the Deputy Attorney General, or the Associate Attorney General will be required to authorize departure from these guidelines.