DOJ/EPA Memos Change Enforcement Policies

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Three memoranda, two issued by the United States Department of Justice ("DOJ") and one issued by EPA, mark a significant shift in how the federal government approaches civil and criminal enforcement for violations of environmental laws. The memoranda direct DOJ and EPA employees, respectively, to do the exact opposite of what was required of them under the Obama Administration.

Memo Limiting Use of Guidance Documents

Last November, the U.S. Attorney General issued a memorandum prohibiting DOJ from issuing guidance documents with a binding effect on the public unless they undergo notice-and-comment rulemaking. The memo also prohibited DOJ from using its guidance documents to coerce regulated parties into taking action, or to refrain from taking action, beyond that required by law or regulation. DOJ's recent memorandum takes the November 2017 memorandum one step further.

The memorandum issued on January 25, 2018 is directed to DOJ litigators who bring civil enforcement actions. It directs them not to use agency guidance documents to create binding requirements that do not already exist under statute or regulation. Similarly, DOJ litigators are instructed not to use noncompliance with guidance documents as a basis to contend that a regulated party violated environmental laws. The memo states that simply because "a party fails to comply with agency guidance expanding upon statutory or regulatory requirements does not mean [it] violated those underlying legal requirements; agency guidance documents cannot create any additional legal obligations."

Memo Limiting Use of Settlement Payments

The U.S. Attorney General issued a memorandum last June applicable to environmental enforcement cases brought by DOJ's Environment and Natural Resources Division ("ENRD"). The memorandum prohibited settlement payments under federal consent decrees to third-party organizations that were neither victims of the violations nor parties to the lawsuit. The new memorandum issued on January 9, 2018 expounds on the June memo. It keeps this prohibition in place unless (i) the payment meets one of three limited exceptions, and (ii) approval has been obtained as outlined in the January 9, 2018 memo. The effect of the prohibition is to stop a practice that many in industry have long complained

about, being the federal government requiring payments by the settling party to environmental groups for projects wholly unrelated to violations at issue in the case. The January 2018 memorandum makes clear that third-party payments may be made under limited circumstances, but that doing so will continue to be the exception, not the rule.

There are three limited exceptions under which payments to third parties are permissible. First, the third-party payment prohibition does not apply to an otherwise lawful payment or loan that "directly remedies the harm that is sought to be redressed in a civil or criminal action, including harm to the environment." Thus, for example, funds may be used to perform a study by a non-governmental third-party of environmental impacts caused by violations at issue in the case.

Second, the third-party payment prohibition does not apply to payments to governmental entities, provided that the payments have a clear nexus to the environmental harm sought to be remedied. As an example, the memorandum points out that many previous ENRD settlements have provided for payments to Congressionally-chartered corporations, such as the National Fish and Wildlife Federation.

Third, the third-party payment prohibition does not apply to an otherwise lawful payment that provides restitution to a victim of the violation. A payment to a community service organization that serves the victims is an example of a permissible payment, provided the payment directly remedies the environmental harm.

The memorandum cautions that care must be taken in selecting appropriate third parties to receive payments. Factors to be considered include, among other things, experience with the kind of work necessary to remedy the environmental harm at issue, the ability of the third party to complete the remedy project in a timely and cost-effective manner, and a minimization of administrative overhead costs. "In no case should a third party be selected on the basis of political affiliation, personal relationship with or financial interests of any person or entity involved in the case, or any other improper basis." Significantly, the memorandum states that the defendant will, as a general rule, propose an appropriate third party for payments, subject to ENRD approval. Where the defendant does not do so prior to resolution of the case, the memorandum directs the settlement instrument to provide objective criteria to guide both the defendant's selection of an appropriate third party and the government's review and approval of the third party.

Memo Deferring EPA Enforcement to Authorized States

EPA's recent Interim Guidance memo states that the agency will generally defer inspections and enforcement to authorized states "as the primary day-to-day implementer of their authorized/delegated programs." This means most states around the country will take the lead on inspections and enforcement. There are exceptions, however, when EPA says it will become involved, such as (i) where an audit of a state's enforcement program shows the state's program is deficient, (ii) emergency situations resulting in a significant risk to public health or the environment, and (iii) serious violations that need to be investigated and addressed by EPA's criminal enforcement program. If EPA seeks to take back the lead from a state, the memorandum encourages discussion between upper management of both agencies. It says that "where senior leadership in the [EPA] region and State do not agree…, the matter should be elevated to the OECA Assistant Administrator for a decision. This elevation is

important to ensure a consistent national program among states and the EPA and a level playing field for regulated entities." EPA indicates it will review and update the Interim Guidance as appropriate during FY2019 based on input from its regional offices.

These memoranda represent a sea-change in the policies of the Obama Administration and are welcome news for regulated parties. On the other hand, environmental groups will almost certainly see them as cutting the legs out from under effective federal environmental enforcement. Regulated parties who welcome the relief should enjoy it while it lasts; the pendulum is almost certain to swing the other way at some future date.

Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases (DOJ January 25, 2018).

Settlement Payments to Third Parties in ENRD Cases (DOJ January 19, 2018).

Prohibition on Settlement Payments to Third Parties (DOJ June 5, 2017).

Interim OECA Guidance on Enhancing Regional-State Planning and Communication on Compliance Assurance Work in Authorized States (EPA OECA January 22, 2018).

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