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EPA In The Trump Era: The DOJ's 3rd-Party Payment Policy

By **Raymond Ludwiszewski** (February 23, 2018, 1:55 PM EST)

Since President Donald Trump took office just over one year ago, much has changed at the U.S. Environmental Protection Agency. In this Expert Analysis series, former EPA general counsels discuss some of the most significant developments and what they mean for the future of environmental law in the U.S.

On June 5, 2017, Attorney General Jeff Sessions released a memorandum to the U.S. Department of Justice titled “Prohibition on Settlement Payments to Third Parties” in which he announced a new policy. The DOJ was ending the last administration’s common practice of “includ[ing] payment to various non-governmental, third party organizations as a condition of settlement with the United States.”[1] As justification, the Sessions memorandum noted that “the goals of any settlement are, first and foremost, to compensate victims, redress harm, or punish and deter unlawful conduct,” but that third-party organizations receiving such payments are “neither victims nor parties to the lawsuits.”[2] This is an important change of course that will meaningfully impact the contours of future judicial civil consent judgments with the U.S. Environmental Protection Agency.

Raymond Ludwiszewski

Most recently, this policy grew out of a concern in Congress that the Obama administration was aggressively using settlements to compel defendants to pay funds to favored third parties. In April 2016, Rep. Bob Goodlatte, R-Va., introduced the “Stop Settlement Slush Funds Act of 2016” under which the government would be prohibited from “enter[ing] into or enforc[ing] any settlement agreement on behalf of the United States, directing or providing for a payment to any person or entity other than the United States, other than a payment that provides restitution for or otherwise directly remedies actual harm (including to the environment) directly and proximately caused by the party making the payment, or constitutes payment for services rendered in connection with the case.”[3] The same bill was introduced again in the House of Representatives on Jan. 30, 2017, passed on Oct. 24, 2017, and received in the Senate on Oct. 25, 2017, where it was referred to the Committee on the Judiciary and remains pending.[4]

Although this specific proposed legislation is new, such settlement practices have been a concern of Republican administrations and legislators for decades. As far back as 1987, during the Reagan

administration, the Subcommittee on Fisheries and Wildlife Conservation and the Environment and the Subcommittee on Oceanography held a hearing regarding the use of environmental improvement projects — also referred to as mitigation projects or credit projects — in enforcement proceedings under the Clean Water Act and the Ocean Dumping Act. At the time, I was the associate deputy attorney general, but was previously special counsel to the assistant attorney general in the then Land and Natural Resources Division. I testified that although credit projects "are constructive and they allow funds derived from the polluters to be used to finance projects that help the environment[,] ... if they are overused, misused or abused, they can have serious detrimental effects."[5] Specifically, I noted that the unfettered use of credit projects could create legal problems, such as under the Miscellaneous Receipts Act.[6]

The new policy outlined in the Sessions memorandum will particularly impact environmental cases, as such third-party payment provisions became very common practice in Obama administration pleas and settlements. For example, as part of its "Dieselgate" settlement in 2016, Volkswagen was required to invest $2 billion in zero-emission vehicle (ZEV) charging infrastructure and in the promotion of ZEVs.[7] As part of the penalty in an Oil Pollution Act case, in 2016 a cruise line was ordered to pay $7 million to the National Fish and Wildlife Foundation, which was directed "to fund projects and initiatives benefiting the maritime environment and marine and coastal natural resources," and $3 million to the South Florida National Parks Trust, which was directed to use funds "to promote education, training, public outreach, and resource protection and preservation by funding programs, projects, enforcement efforts, and initiatives benefitting the maritime environment and marine and coastal natural resources, environment, and ecosystems within the boundaries" of several national parks.[8] Finally, in 2015 an oil and natural gas exploration and production company was ordered to "spend no less than $1 million to sponsor a wood-burning appliance replacement and/or retrofit project that ... is implemented by one or more third-party non-profit organizations or entities."[9]

The new policy against settlement payments to third parties, as outlined in the Sessions memorandum, contains only three limited exceptions. Under the first exception, "the policy does not apply to an otherwise lawful payment or loan that provides restitution to a victim or that otherwise directly remedies the harm that is sought to be redressed, including, for example, *harm to the environment* or from official corruption."[10] On Jan. 9, 2018, the Environment and Natural Resources Division of the DOJ released guidance providing further direction regarding how settlements in environmental cases should take place under the Sessions memorandum, including circumstances that fall into the Sessions memorandum exception.[11] As a general matter, the ENRD memorandum cautioned that "third-party payments should only be included in a settlement agreement or consent decree after thorough and careful review to ensure consistency with [the Sessions memorandum]," and stated that the "[u]se of such payments will not be routine in ENRD matters."[12]

The Sessions memorandum has already had a significant impact on environmental settlements, and more should be expected. For example, the Sessions memorandum impacted a settlement agreement with a motorcycle manufacturer relating to the company's alleged sale of after-market tuning devices that allegedly negatively impacted emissions control systems. The DOJ cited the Sessions memorandum as its reason for dropping a proposed requirement that the company spend $3 million to update certain wood-burning stoves to make them more environmentally friendly.[13] As the DOJ noted, "[t]he original consent decree would have required defendants to pay a non-governmental third-party organization to carry out the mitigation project. Questions exist as to whether this mitigation project is consistent with the new policy."[14] It should be expected that future proposed settlement agreements might entirely avoid proposals that appear to be directed at third parties in order to comply with the new policy.

However, policies that “directly remed[y] the harm” should still be permissible. So, for example, there is still an open question as to how and when supplemental environmental projects (SEPs) can be used in settlement agreements. Whether the inclusion of a SEP is permissible will likely turn on whether that SEP is or can be “directly” linked to remedying the harm at the heart of the alleged violations. For example, the ENRD memorandum specifies that in the context of Clean Air Act violations, payments of SEPs must redress “the same type of harm” and should “not mitigate harm out of proportion with the harm that resulted from the unlawful conduct.”[15]

It is too early to know how this policy, and particularly the recent guidance from ENRD will impact future environmental settlements. For example, it is unclear whether implementation of the policy will result in reduced total settlement levels or simply a redirection of funds to the U.S. Department of the Treasury or to direct victims. Although some might fear the policy will take away a key option for future negotiations, ultimately the guidance might simply force parties to think more creatively about how they tie environmental funds and projects to the alleged “harm” being redressed in future settlement agreements. This will be a key area that practitioners should watch for developments over the near term.

Raymond B. Ludwiszewski is a partner and a member of the environmental litigation and mass tort practice groups at Gibson Dunn & Crutcher LLP in Washington, D.C.. He is a former EPA general counsel.

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[1] Memorandum from the Office of Attorney General to All Component Heads and United States Attorneys, Prohibition on Settlement Payments to Third Parties at 1 (June 5, 2017) (hereinafter, Sessions memorandum).

[2] Id.

[3] H.R. 5063, 114th Cong. (2016).

[4] H.R. 732, 115th Cong. (2017).

[5] Hearing on H.R. 3411 Before the Subcomm. On Fisheries and Wildlife Conservation and the Environment and the Subcomm. On Oceanography of the H. Comm. on Merchant Marine and Fisheries, 100th Cong. 21 (1987) (Statement of Raymond Ludwiszewski).

[6] Id. 21–22. h

[7] Partial Consent Decree ¶ 4, Appx. C, In re: Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation (N. D. Cal. Oct. 25, 2016) (3:15-md-02672), ECF No 2103-1.

[8] Plea Agreement ¶¶ 5(c), United States v. Princess Cruise Lines, LTD. (S.D. Fla. Dec. 1, 2016) (1:16-cr-20897).

[9] Consent Decree ¶ 38, United States of America and Colorado v. Noble Energy Inc. (C.D. Co. June 2, 2015) (1:15-cv-00841), ECF No. 15.

[10] Sessions memorandum at 1 (emphasis added).

[11] Memorandum from Jeffrey H. Wood, Acting Assistant Attorney General to ENRD Deputy Assistant Attorneys General and Section Chiefs, Settlement Payments to Third Parties in ENRD Cases (Jan. 9, 2018) (hereinafter, ENRD memorandum).

[12] Id. at 1.

[13] Notice of Lodging of Consent Decree at 2, United States v. Harley-Davidson Inc. et al. (D.D.C. July 20, 2017) (1:16-cv-01687), ECF No. 6.

[14] Id.

[15] ENRD memorandum at 3-4.