

INSIGHTS

DOJ's Environmental Enforcement Priorities and Expectations – Refocusing on the Rule of Law

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In recent months, the U.S. Department of Justice (“DOJ” or the “Department”) has issued a series of memoranda from the Department’s highest levels to its various component divisions, which includes the Environment and Natural Resources Division (“ENRD”). The ENRD is charged with prosecuting cases against persons who violate the nation’s civil and criminal pollution-control laws. The ENRD has both a civil and criminal division, each of which routinely collaborates with various states in the ENRD’s pursuit of enforcement initiatives.

In the years leading up to the 2016 election, in both civil and criminal ENRD cases, settlement payments to non-party recipients had increasingly been permitted in exchange for the Department’s willingness to reduce – or eliminate – fines or other punishments. However, two DOJ memoranda issued within the last year noted that DOJ intends to eliminate that practice across all of its components.

Additionally, DOJ had shown a willingness to enforce based upon guidance that was not subject to notice-and-comment rulemaking. Under the current DOJ leadership, that practice will end.

Finally, the ENRD issued a memorandum regarding its enforcement principles and priorities, as well as how the ENRD plans to approach its settlement and enforcement efforts going forward. This blog post represents the first in a series of posts discussing these DOJ and ENRD initiatives and possible impacts of such initiatives on the energy sector.

Prohibition of Settlements to Third Parties

- [“Prohibition of Settlement Payments to Third Parties”](#) (the “Settlement Payment Memorandum”). The Settlement Payment Memorandum, issued on June 5, 2017, noted DOJ’s plan to discontinue its practice of paying certain third-party, non-governmental organizations as a condition of settlement with the United States government. The memorandum states that, going forward, DOJ attorneys cannot enter settlement agreements, accept plea agreements, or defer prosecution in exchange for payment or loan to any non-governmental person or entity that was not a party to (or a victim of) the dispute, except in three defined instances.^{[\[1\]](#)}
- As a follow-up to the Settlement Payment Memorandum, on January 9, 2018, the ENRD issued a memorandum titled [“Prohibition on Settlement Payments to Third Parties in ENRD Cases”](#) (“ENRD Settlement Payment Memorandum”), which provided guidance regarding how to apply the Settlement Payment Memorandum in

ENRD civil and criminal cases. The ENRD Settlement Payment Memorandum provided examples of the types of remedial initiatives that would fit the exception described in the Settlement Payment Memorandum (permitting the use of third-party payments in environmental cases where the payment or loan directly remedies the harm sought to be redressed¹).

Prohibition on Enforcement of Agency Guidance

- On November 16, 2017, the DOJ issued its “[*Prohibition on Improper Guidance Documents*](#)” (the “First Guidance Document Memorandum”). In it, the DOJ asserted that it will no longer use guidance documents that have not been subject to notice-and-comment rulemaking in order to impose requirements on entities outside the Executive Branch.
- As a follow-up to the First Guidance Document Memorandum, the DOJ released a memorandum titled “[*Limiting the Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases*](#)” on January 25, 2018 (the “Second Guidance Document Memorandum”). The Second Guidance Document Memorandum notes that principles from the First Guidance Document Memorandum extend beyond DOJ’s own guidance documents and are intended to guide DOJ litigators in determining the legal relevance of other agencies’ guidance documents in affirmative civil enforcement.

ENRD Enforcement Principles and Priorities



- Finally, on March 12, 2018, Jeffrey H. Wood, DOJ’s Acting Assistant Attorney General for ENRD, issued a memorandum titled “[*Enforcement Principles and Priorities*](#)” (the “Wood Memorandum”). The Wood Memorandum broadly outlined the ENRD’s 7 enforcement principles and its 5 enforcement priorities.

In the coming weeks, we intend to take a deeper dive into various concepts discussed above through individual articles devoted to these topics, including the principles that Acting Assistant Attorney General Wood identified, the ENRD’s enforcement priorities, and the practical impacts that restrictions on third-party settlement recipients and policy-based enforcement may have on department investigations. We invite you to regularly visit the Energy Legal Blog to view these materials as they become available.

In addition to our coverage of the DOJ and other enforcement-related topics through this series of postings, many of these topics and related topics will be discussed at our Spring 2018 Environmental Law Seminar on May 9, 2018 at Bracewell’s Houston office. The seminar will feature discussions with Ann Navaro, Counselor to the Solicitor at the U.S. Department of the Interior, and Dr. Michael Honeycutt, Director of the Toxicology Division at TCEQ and Chair of EPA’s Science Advisory Board, as well as other speakers and Bracewell attorneys. Panel topics will include:

- *Interior: An Inside Look at Policy and Regulatory Developments*
- *EPA’s Science Advisory Board: A New Era*
- *Singles and Doubles: What’s on Deck for NSR Reform*

- *Infrastructure: The Legal and Political Challenges to Stimulating and Streamlining Development*
- *Trends in Transactions*

For those interested in learning more about the Spring 2018 Environmental Law Seminar or determining if you are eligible to register for the event, please contact Christy Kobeski at christy.kobeski@bracewell.com or (206) 204-6224  .

[1] The Settlement Payment Memorandum listed three exceptions: (1) 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; (2) the policy does not apply to payments for legal or other professional services rendered in connection with the case; and (3) the policy does not apply to payments expressly authorized by statute, including restitution and forfeiture.