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MEMORANDUM

To: ENRD Deputy Assistant Attorneys General and Section Chiefs

From: Jeffrey Bossert Clark, Assistant Attorney General (ENRD)

Re: Equitable Mitigation in Civil Environmental Enforcement Cases

Date: January 12, 2021

In March of last year I issued a memorandum explaining why Supplemental Environmental Projects ("SEPs") are illegal absent explicit Congressional authorization. *See* Jeffrey Bossert Clark, Supplemental Environmental Projects ("SEPs") in Civil Settlements with Private Defendants (Mar. 12, 2020). As I noted in that memo, the prohibition on SEPs "does not apply to payments that '*directly* remedy the harm that is sought to be redressed in a case, including for example, harm to the environment.'" *Id.* at 15 n.18 (quoting Attorney General Memorandum on Prohibition on Settlement Payments to Third Parties (June 5, 2017)) (brackets and ellipsis omitted). "In keeping with the attentiveness to the separation of powers expressed throughout th[at] Memorandum, however, I construe[d] the adverb 'directly' in [that] policy strictly, to refer to the various forms of injunctive relief intended to remediate the harm actually at issue in the matter under review." *Id.*; *see also* 28 C.F.R. 50.28(c)(1).

This memorandum seeks to explain this point more fully and to provide practical guidance to Division attorneys considering whether mitigation relief is appropriate in a specific instance. As with my March 12, 2020 discussion of SEPs, this memo is issued as an exercise of my authority as Assistant Attorney General to both (1) construe the governing sources of law as a necessary part of ensuring that all enforcement actions I authorize, and every position taken in court in cases that I supervise, comport with the law and (2) to exercise appropriate prosecutorial discretion as to both civil and criminal enforcement cases.

I. Background

a. The Legal Basis for Mitigation

Mitigation in the civil environmental enforcement context takes two basic forms: (1) cases brought under expressly codified remedial causes of action such as the Natural Resource Damages ("NRD") claims authorized by CERCLA, Section 311 of the Clean Water Act, and the Oil Pollution Act of 1990 and (2) cases seeking mitigation under more general grants of authority, such as district courts' jurisdiction under the Clean Air Act to "restrain violation[s], to require compliance, to asses . . . civil penalt[ies] [and related fees], and to award any other appropriate relief." 42 U.S.C. § 7413(b); *see also* 33 U.S.C. § 1319(b) (authorizing courts to "restrain" violations of, and "require compliance" with, the Clean Water Act); 42 U.S.C. 6928(a)(1) (empowering the government in RCRA cases to "[1] issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both, or [2] commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.").[1] This memorandum is primarily concerned with the latter form of relief, which I refer to throughout as equitable mitigation.

While the general authorizations quoted above speak only of *prospective* injunctive relief designed to bring violators into compliance going forward, this Division has argued with substantial success that judges also have the authority to enjoin defendants to remedy the harm caused by their *past* violations. *See, e.g.*, *United States v. Deaton*, 332 F.3d 698, 714 (4th Cir. 2003); *United States v. Banks*, 115 F.3d 916, 918 (11th Cir. 1997); *United States v.*

[1] A third variety is found in the regulations implementing Section 404 of the Clean Water Act, 33 U.S.C. § 1344. *See* 33 CFR Pt. 332. The implementation of these regulations goes beyond the scope of this memo, and nothing herein should be read as altering the requirements set forth in these regulations.

Holtzman, 762 F.2d 720, 724–25 (9th Cir. 1985); *United States v. Ameren Missouri*, 421 F. Supp. 3d 729, 820 (E.D. Mo. 2019); *United States v. Cinergy Corp.*, 582 F. Supp. 2d 1055, 1060–61 (S.D. Ind. 2008). *But see United States v. Alcoa Inc.*, 98 F. Supp. 2d 1031, 1036, 1039 (N.D. Ind. 2000).

The basis for this authority can be traced back to a venerable clear statement rule holding that, "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). This rule sets a high bar for those arguing that equitable jurisdiction has been curtailed: "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Id.*; *see also United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 496 (2001) (Thomas, J.) ("[W]hen district courts are properly acting as courts of equity, they have discretion unless a statute clearly provides otherwise.") (internal quotation marks and citations omitted).[2]

[2] As this broad language suggests, the *Porter* rule itself is something of an exception to the "canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Middlesex County Sewerage Auth. v. National Sea Clammers Assn.*, 453 U.S. 1, 14 (1981). The Supreme Court has acknowledged—but has done little to clarify—the tension between these two canons. *See Meghrig v. KFC W., Inc.*, 516 U.S. 479 (1996) (holding district courts' equitable jurisdiction does not extend to citizen suits under RCRA for equitable restitution of pre-suit clean-up costs). Despite this tension, the clear majority rule following *Mehgrig* remains that equitable authority under the major environmental statutes includes judicial authority to order equitable mitigation. *See Deaton*, 332 F.3d at 714; *U.S. Pub. Interest Research Grp. v. Atl. Salmon of Maine, LLC*, 339 F.3d 23, 27 (1st Cir. 2003); *Cinergy Corp.*, 582 F. Supp. 2d at 1060–6. The leading case taking a narrower view is Judge Sentelle's majority opinion in *United States v. Philip Morris USA, Inc.*, which held that a jurisdictional grant "to prevent and restrain" violations of the RICO statute did not authorize courts to issue injunctions requiring disgorgement. 396 F.3d 1190, 1197 (D.C. Cir. 2005).

This discretion allows courts to ensure that the ultimate quantum of relief does not turn on the accidents of when wrongdoing is discovered or an enforcement action concluded. This serves a very important purpose in ensuring that Congress's policy judgments are realized. *See, e.g., Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960) (courts wield "the historic power of equity to provide complete relief in light of the statutory purposes"). But it is not a blank check. Any variety of injunctive relief, including equitable mitigation, is "a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010). Thus, "[i]f a less drastic remedy . . . [i]s sufficient to redress [the] injury, no recourse to the additional and extraordinary relief of an injunction [i]s warranted." *Id.*[3] The relief must also be carefully tailored, and equitable mitigation is therefore appropriate only "*insofar as the court is remedying harm caused by* [the defendant's] *past violations*." *Atl. Salmon of Maine, LLC*, 339 F.3d 23, 31 (1st Cir. 2003). Put a different way, if relief is not closely tailored to restore (in whole or in part) the *status quo ante*, it is not mitigation.[4] This point is underscored by the Supreme Court recent decision in *Liu v. Sec. & Exch. Comm'n*, which held that

[3] *Monsanto* concerned a nationwide injunction—easily the most drastic form of equitable relief courts have at their disposal, though one of "legally and historically dubious" provenance. *Trump v. Hawaii*, 138 S. Ct. 2392, 2429 (2018) (Thomas, J., concurring) (citing Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 425 (2017)). But the general point—that injunctions should never be awarded "as a matter of course"—applies across the board. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (reiterating the Supreme Court's "characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief"); *see also* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 Vand. L. Rev. 997, 1037 (2015) ("The theme of exceptionalism is evident when the [Supreme] Court describes the preliminary injunction and the permanent injunction as extraordinary remedies.").

[4] This is not to say that equitable mitigation requires surgical precision. Virtually all mitigation projects will have some ancillary effects that go beyond restoring the

civil disgorgement that is not "tethered to a wrongdoer's net unlawful profits" or not paid to injured investors is generally impermissible because it exceeds the traditional bounds of equity and hence becomes a penalty. 140 S. Ct. 1936, 1943, 1949 (2020).

b. The Difference Between Equitable Mitigation and SEPs

SEPs, by contrast, are "environmentally beneficial project[s] or activit[ies] that [are] not required by law, but that a defendant agrees to undertake as part of the settlement of an enforcement action." U.S. Environmental Protection Agency, Supplemental Environmental Projects Policy 2015 Update, at 1 (Mar. 10, 2015) ("2015 SEP Policy"); *see also* U.S. Environmental Protection Agency, Securing Mitigation as Injunctive Relief in Certain Civil Enforcement Settlements, at 3-4 (Nov. 14, 2012). Unlike mitigation, SEPs are designed to offset the penalty amount and, by definition, differ from mitigation relief in that they cannot be ordered by a court as they do not remedy the specific harm at issue in the case, but rather purport to benefit the environment in a more general way, typically in exchange for a reduction in monetary penalties that would otherwise be payable to the U.S. Treasury. Even if the exchange is not explicitly recognized, the Supreme Court's decision in *Liu* implies that, because they exceed the quantum of relief that can be obtained in equity, SEPs are therefore by definition a form of congressionally unauthorized penalty.[5]

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status quo ante. For example, a sediment cleanup project on a river may remove additional waste beyond that wrongly discharged by the defendant. Similarly, a project reducing emissions from a stationary source below permitted levels to offset earlier excess emissions will have health benefits for those who live in the airshed during the period in which the mitigation project takes place, even if they moved to the area after the violations ceased.

[5] There is one exception—42 U.S.C. § 16138—which authorizes EPA to accept diesel emissions reduction SEPs.

The exact line between permissible mitigation relief and illegal SEPs can be difficult to trace. Take for example mitigation relief that would require a defendant in a Clean Air Act case to pay for the planting of new trees in a neighboring state whose forests had been damaged by acid rain. While it may be demonstrable that the defendant's excess air pollution contributed to acid rain that in turn harmed the forest, the number of other factors and potential intervening events may make it difficult to tell where mitigation ends and something more like a SEP begins.[6]

Further, a project that would be mitigation in one case may be a SEP in a different matter. For example, a project focused on reducing NO_x emissions at a power plant would be mitigation if the underlying violation was the emission of excess NO_x. But the project would be a SEP if the underlying violation were limited to wrongful emission of different chemicals that impose different health risks or impose them on different communities.

II. Equitable Mitigation in Practice

This Division should approach these matters with due care and common sense. As I explained in my SEPs memo, Congress was very clear in the Miscellaneous Receipts Act, 31 U.S.C. § 3302, that the executive branch may not repurpose "money for the government," no matter how wise or beneficial the repurposing might seem. And while courts do possess equitable authority to order mitigation, in the environmental context this authority largely arises from implication and extends only to remedying the underlying harm. It would be very wrong to let an implied power be stretched in a way that would overwhelm Congress's explicit command.

[6] This difficulty does not, as some have argued, mean that the distinction between mitigation and SEPs is arbitrary or endlessly malleable. *See* Fallacies, Stanford En-cyclopedia of Philosophy (Apr. 2, 2020), *available at* https://plato.stanford.edu/entries/fallacies/ (discussing the so-called "fallacy of the heap"—simply because it is not clear when a pile of stones becomes a heap of stones does not mean that the words "pile" or "heap" are meaningless).

More generally, it is important to remember that, "[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." *The Federalist* No. 51, at 290 (C. Rossiter ed. 1961) (J. Madison). As Madison explained, "[a] dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions." *Id.*

The purpose of this portion of the memo is to provide some helpful "auxillary precautions" to ensure that our civil enforcement actions do not overstep the bounds set by Congress. Nothing in this memo should be understood as discouraging appropriate uses of equitable mitigation. On the contrary, as I noted in the SEPs memo, "now that the Division is prohibited from seeking judicial SEPs, as such, we should see an increase in classic forms of injunctive relief explicitly identified as such." SEPs Memo at 15 n.18.

Going forward, Division attorneys considering whether to pursue equitable mitigation relief, should do so in light of the following touchstones:

> *First*, from the outset of any matter, Division attorneys should carefully consider the specific legal basis for potential mitigation relief, including by considering which statute is the best fit for a given factual scenario. No equitable mitigation relief should be pursued if there is not a strong chance that the relief sought could be lawfully ordered by a court. Nor should Division attorneys simply presume that equitable mitigation is appropriate. Equitable mitigation is a species of injunctive relief, and as such, is an "extraordinary remedy" that should therefore be sought only when properly tailored equitable relief is the only way in which the actual harm caused by the violation can be redressed. In making this assessment, Division attorneys should be guided by the equitable factors courts typically asses when evaluating mitigation proposals in en-

vironmental cases: "(1) whether the proposal 'would confer maximum environmental benefit,' (2) whether it is 'achievable as a practical matter,' and (3) whether it bears 'an equitable relationship to the degree and kind of wrong it is intended to remedy." *United States v. Deaton*, 332 F.3d 698, 714 (4th Cir. 2003); *see also Monsanto*, 561 U.S. at 165–66; *Winter*, 555 U.S. at 22 ("[I]njunctive relief is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."). In particular, when bringing an enforcement action under a statute in which Congress has set forth specific provisions governing remediation, such as the NRD provisions in the Clean Water Act or CERCLA, Division attorneys should not seek equitable mitigation relief unless the explicit provisions are manifestly insufficient or otherwise inapplicable (*e.g.*, if bringing NRD claims would require involving an agency different from the one that made the referral to ENRD).[7]

Second, if equitable mitigation is warranted, Division attorneys should consider all viable options, with a strong preference for those that take place in the same geographic area where the violation took place and that are closely tailored to remedying or offsetting the actual harm directly caused by the violation. For example, when the violation at issue involved emitting excess pollutants from a stationary source, the strong preference should be for mitigation projects at the site where the wrongful conduct occurred. If this is not practical or would be grossly inefficient, mitigation relief should take place at another facility owned or operated the defendant in the same area where the underlying harm occurred—for example, a defendant could offset prior emissions at one stationary source by reducing emissions of the specific pollutants at issue in

[7] I recognize that there sometimes may be cases in which there are valid reasons why a complaint should seek different kinds of mitigation relief simultaneously or in the alternative.

the case below permitted levels at a different stationary source in the same airshed.

In some cases, neither of these options will be available; in others these options may be inefficient or may not be sufficient to remedy the underlying harm. If that is the case, Division attorneys may consider mitigation options within the relevant ecological unit, such as the affected watershed or airshed. Such projects might include cleaning up a waterway of the pollutants the defendant wrongly discharged, removing materials illegally dumped in a public wetland, or restocking fish killed by the defendant's conduct. Division attorneys should be very careful to make sure that there is a close causal nexus between the mitigation project and the underlying harm.

Third, in considering a potential mitigation project, Division attorneys should consider the costs (both pecuniary and environmental) incurred by a potential equitable mitigation project as well as the benefits. For example, if an on-site mitigation project at a stationary source would result in an increase in electricity costs because it would hamper the ability of the defendant to keep up with demand, it may be appropriate to select an off-site project that would result in a similar environmental benefit without disrupting the marketplace to an unreasonable extent.

Fourth, securing penalty relief for the Treasury should be the first, non-extraordinary form of relief considered.[8] Mitigation relief should be treated in the same manner as all other injunctive relief and used only in appropriate situations. Although the government

[8] In addition to deterring future wrongdoing, appropriate civil penalties are necessary to ensure that those who violate our nation's environmental laws do not get a competitive advantage. As a practical matter, mitigation relief can have this effect as well, but this should never be the *reason* why mitigation relief is sought.

> does not view mitigation or any other injunctive relief as an alternative to civil penalty, there are cases where the total amount of money a defendant is able or willing to pay towards all relief is a limiting factor in negotiations. In such cases, demands for mitigation may as a practical matter reduce the amounts achievable in settlement for other forms of relief. This reality underscores the need for Division attorneys to carefully consider *at the outset* whether equitable mitigation is warranted and, if it is, the extent of a potential mitigation project.

Going forward, all memoranda seeking approval of a complaint, counter-claim, settlement agreement, or other similar proposal that includes proposed mitigation relief should include a discussion of these touchstones.

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This memo was shared with EPA prior to issuance. This memorandum relates only to internal procedures and management of ENRD. It does not create any right or benefit, substantive or procedural, enforceable at law by any party against the United States, its agencies, officers, or any other person.

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