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MEMORANDUM

To: ENRD Deputy Assistant Attorneys General and Section Chiefs

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

Re: Guidance Regarding Newly Promulgated Rule Restricting Third-Party Payments, 28 C.F.R. § 50.28

Date: January 13, 2021

In my memorandum of March 12, 2020, "Supplemental Environmental Projects ("SEPs") in Civil Settlements with Private Defendants" ("March 12 Memo"), I explained the conclusion that SEPs violate both the letter and spirit of the Miscellaneous Receipts Act ("MRA"), 31 U.S.C. § 3302, and sound public policy. I therefore directed ENRD attorneys to no longer include SEPs in civil environmental enforcement settlements. Since then, on December 16, 2020, the Attorney General revised the Department of Justice's regulations to provide another, separate basis for SEPs' unlawfulness. 85 Fed. Reg. 81,409 (Dec. 16, 2020).

This new prohibition is found in 28 C.F.R. § 50.28 and is entitled "Prohibition on settlement payments to non-governmental third parties." It provides as follows:

> (a) The goals of a settlement agreement between the Department of Justice and a private party are to compensate victims, redress harm, or punish and deter unlawful conduct. It is generally not appropriate to use a settlement agreement to require, as a condition of settlement, payment to non-governmental, third-party organizations who are not victims or parties to the lawsuit.
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> (b) Except as provided in paragraph (c) of this section, Department attorneys shall not enter into any agreement on behalf of the United States in settlement of federal claims or charges, including agreements settling civil litigation, accepting plea

agreements, or deferring or declining prosecution in a criminal matter, that directs or provides for a payment or loan, *in cash or in kind*, to any non-governmental person or entity that is not a party to the dispute.

(c) Department attorneys may only enter into such agreements in four specific situations:

(1) When the otherwise lawful payment or loan, in cash or in kind, provides restitution or compensation to a victim, though *in no case shall any such agreements require defendants in environmental cases, in lieu of payment to the Federal Government, to expend funds to provide goods or services to third parties for Supplemental Environmental Projects*;

(2) When, in cases of foreign official corruption, a trusted third party is required to facilitate the repatriation and use of funds to directly benefit those harmed by the foreign corruption;

(3) When payment is for legal or other professional services rendered in connection with the case; or

(4) When payment is expressly authorized by statute or regulation, including restitution and forfeiture.

(d) This policy applies to all civil and criminal cases litigated under the direction of the Attorney General and includes civil settlement agreements, cy pres agreements or provisions, plea agreements, non-prosecution agreements, and deferred prosecution agreements.

(emphases added).

DISCUSSION

As the preamble to the new rule explains, § 50.28 formalizes and clarifies the requirements of the June 5, 2017 memorandum issued by then-Attorney General Sessions entitled "Prohibition on Settlement Payments to Third Parties." As this suggests, § 50.28 does not impose any drastic new requirements on this Division. Nevertheless, there are four points that I do believe warrant some brief discussion and elaboration to ensure that we comply with its requirements.

First, § 50.28(c)(1) emphasizes the need to carefully delineate between permissible mitigation relief and impermissible SEPs. To that end, I issued a memorandum yesterday entitled "Equitable Mitigation in Civil Environmental Enforcement Cases," which provides a detailed explanation of the distinction between SEPs and mitigation as well as a set of touchstones that should guide Division attorneys in selecting mitigation relief consistent with traditional principles of equity. Division attorneys should consult that document when considering whether to pursue mitigation or other forms of backward-looking injunctive relief, such as Natural Resource Damage claims.

Second, the rule provides additional clarification that the restrictions of the MRA (and, consequently, the Anti-deficiency Act ("ADA")) may not be circumvented through in-kind (as opposed to monetary) transfers. 85 Fed. Reg. 81,409; 28 C.F.R. § 50.28(b), (c)(1). These restrictions, however, do not apply to in-kind transfers that are not SEPs but that instead are necessary to actually remedy the harm. 28 C.F.R. § 50.28(c)(1).

Third, § 50.28(b) should be understood as supplementing, not supplant-ing the March 12 Memo with respect to SEPs. As the preamble to the rule makes clear, the restrictions imposed on government attorneys by the MRA

and ADA remain as salient as ever as do the various policy considerations I discussed.

As I explained at length last March, the legal problem with SEPs is that they were accepted in lieu of penalties and thus effectively diverted funds that otherwise would go to the Treasury to private projects without the consent of Congress. Without express statutory authorization, such diversions of money violate the MRA and ADA. Although some critics have taken issue with this conclusion, it is one that finds clear support in both the text of those statutes and long practice within the federal government. *See, e.g.*, *In re Steuart Transp. Co.*, 4B Op. O.L.C. 684, 684-85, 88 (1980) ("[M]oney available to the United States and directed to another recipient is constructively 'received'"; thus, the fact that "no cash actually touches the palm of a federal official is irrelevant . . . if a federal agency *could have accepted possession* and retains discretion to direct the use of the money.") (emphasis added);[1] *Letter*

[1] The OLC opinion at 30 Op. O.L.C. 111, 120 (2006), concerning Canadian lumber duties, is distinguishable from *In re Steuart Transp. Co.*, in several dimensions:

> Initially, it is doubtful that the United States, even though having physical custody of the special accounts under the Byrd Amendment, "could . . . accept[] possession" of those funds "for the Government," such that the MRA would create an issue. As explained above in Part II, the United States disclaims any interest in the funds, and the strongest claims are those of private parties. The real issue in dispute is to whom the United States should give the funds—to private American parties pursuant to the Byrd Amendment, or to the Canadian Producers as a refund pursuant to federal law, *see, e.g.*, 19 U.S.C. § 1673f (2000) (permitting the "refund[s]" of duties that were improperly assessed). Just as there is little if any basis for considering the $450 million to be federal funds for pur-

to the Chairman of Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, B-247155.2, 1993 WL 798227 at *2 (Comp. Gen. March 1, 1993) (permitting "alleged violators to make payments to an institution other than the federal government . . . in lieu of penalties paid to the Treasury," allows "the agency to improperly augment its appropriations for . . . other purposes, in circumvention of the congressional appropriations process.").

This conclusion is underscored by how Congress itself has treated SEPs. As I noted in the March 12 Memo, Congress has on only one occasion seen fit to give the Executive branch permission to seek SEPs: 42 U.S.C. § 16138, which authorizes the use of diesel emissions SEPs in Clean Air Act settlements. One point that I did not highlight, however, was that Congress gave the executive permission to seek such SEPs "notwithstanding sections 3302 and 1301 of Title 31," *i.e.*, the MRA and the ADA. The clear implication of this language is that, without express congressional authorization, diesel emission SEPs (and therefore all SEPs) *do* violate the MRA and the ADA. That Congress views SEPs as diverted penalties is further supported by the 1990 amendment to the Clean Air Act's citizen suit provisions, which authorizes Courts to redirect up to $100,000 of a civil penalty to pay for SEP-

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> poses of the GCCA, so also here, and by analogy to our 1980 opinion, there is little basis for attributing any of the $450 million to the United States.

Of course, the issue with SEPs is not *how* they give out funds, but rather whether funds originating from penalty or fine claims arising under federal environmental statutes must be sent to the U.S. Treasury only or may be diverted elsewhere.

like "beneficial mitigation projects." 42 U.S.C. § 7604(g)(2). This again confirms the notion that SEPs should be viewed as diverting federal penalty dollars to private projects.

Section 50.28 is properly understood as simply another recognition by the Executive Branch that these signals from Congress should not be ignored.

I acknowledge, of course, that the prohibition of SEPs nevertheless remains controversial in some quarters. As I have considered these criticisms, however, I have been struck by how consistently those in favor of SEPs have tacitly conceded that SEPs are unlawful. Even before the March 12 Memo, some defenders of SEPs frankly acknowledged that SEPs circumvent Congress's power of the purse. In fact, they cast this infirmity as a feature, not a bug, stating, for example, that "the alternative [to SEPs] is that the penalties just go to the U.S. Treasury and buy a hubcap on a vehicle or something." *DOJ Blocks Attorneys from Favored Settlement Tool*, LAW360 (Oct. 31, 2019).[2] Similar arguments have continued to appear since I issued the

[2] To be sure, EPA's 2015 SEPs Policy claimed to reject this conclusion by asserting that "SEPs are not accepted in lieu of a penalty." U.S. Environmental Protection Agency, Supplemental Environmental Projects Policy 2015 Update, at 25 (Mar. 10, 2015) ("2015 SEP Policy"). But the policy's reasoning cannot be squared with such an *ipse dixit*-style conclusion. Although it is true that a SEP could not be used to eliminate a civil penalty *entirely*, there is no question that, under the EPA's 2015 SEP Policy, the agency did proportionally reduce the *amount* of the penalty. *See id.* at 24. Further, in setting the minimum penalty, the 2015 SEP Policy specifically instructed that the penalty reduction applies to that part of the penalty that would otherwise have been imposed to account for the gravity of the offense, which—in environmental cases—is typically a reflection of the seriousness of the harm the defendant caused to the environment. *See id.* at 22 (The minimum penalty "must equal or exceed either: a. The economic benefit of noncompliance plus ten percent (10%) of the gravity component; or b. [t]wenty-five percent (25%) of the gravity component only; whichever is greater.").

March 12 Memo. For example, as a reporter noted in the *Bloomberg Law Environment and Energy Report* on March 13, "[s]topping the use of supplemental environmental projects (SEPs) cuts against the wishes of many in the business community, *who favored the projects as a way of lowering their fines* while also letting them perform projects that improve their public image."[3] Another commentator likewise noted that "SEPs allow settling parties to mitigate a portion of a civil penalty *in exchange for* performance of environmentally beneficial projects."[4]

In addition to demonstrating the legal issues with SEPs, these comments also highlight an additional policy reason for rejecting their use, namely that SEPs reduce the deterrence value of enforcement actions by allowing offenders to escape the ignominy of paying a large civil penalty while simultaneously letting those responsible for illegal pollution to project an environmentally friendly image—a PR strategy known as "greenwashing." *See* Thomas O. McGarity, *Supplemental Environmental Projects in Complex Environmental Litigation*, 98 Tex. L. Rev. 1405, 1423 (2020).

Fourth, in the March 12 Memo, I noted that I hoped to also "begin a project to review . . . the use of SEP-like devices in the criminal sphere." March 12 Memo at 19 n.25. As 28 C.F.R. § 50.28 expressly applies to both civil and criminal settlements, however, that question has now been resolved Department-wide. Going forward, criminal prosecutors within the Environmental Crimes Section should therefore not to include any SEPs, or

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[3] Stephen Lee, Justice Department Ends Use of Environmental Settlements Tool (Mar. 13, 2020) (emphasis added), available at https://news.bloomberglaw.com/environment-and-energy/justice-department-ends-use-of-environmental-settlements-tool.

[4] Francis X. Lyons, DOJ Policy Review of SEPs May Have Big Implications for Company Environmental Settlements, *The National Law Review* (Mar. 20, 2020) (emphasis added), available at https://www.natlawreview.com/article/doj-policy-review-seps-may-have-big-implications-company-environmental-settlements.

SEP-like projects, in plea agreements or settlements, whatever label they may travel under.

If an attorney believes that a potential project in a criminal plea: (1) would not violate 28 C.F.R. § 50.28, (2) is consistent with the MRA and ADA, and (3) is consistent with the policy considerations listed here in and in the March 12 Memo, he or she may seek approval to purse that project by submitting a package to the front office requesting approval. Such requests should include a detailed discussion of all three points and should be made with sufficient lead time.

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