A STEP TOO FAR FROM A "SEP" IN THE RIGHT DIRECTION

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Amid what some have perceived as chaos in the new Trump administration, significant and far reaching change is occurring quietly. Nowhere is the change more consequential than at United States Environmental Protection Agency ("EPA"). These days, newsworthy environmental stories that consume the headlines—the clean power plan, Arctic drilling and the definition of waters of United States—abound, but an early June memorandum issued by Attorney General ("AG") Jeff Sessions has set the stage for consequential environmental change of a different sort.

No one will argue that—reconsidering the waters of the United States rule with a view toward adopting Justice Scalia's test, which would include only those "relatively permanent, standing or continuously flowing bodies of water" and "wetlands with a surface connection to" those types of waters, or, issuing a permit for the Keystone XL Pipeline, which would transport crude from the "Tar Sands" in Canada to refineries in the United States, by facilitating the reversal of an Army Corp of Engineers decision to issue an easement to developers of the Dakota Access pipeline to construct an oil pipeline, before completing additional environmental review of alternate pipeline routes and tribal treaty rights—are without environmental consequences. However, constraining a company's ability to voluntarily carry out beneficial environmental projects, where the improvement is directly attributable to the underlying basis of the enforcement action, could strike many as deeply flawed.

In a potentially far-reaching reset to an EPA policy that has existed since the late 1990s, Supplemental Environmental Projects ("SEPs") are under assault. On June 5, 2017, AG Jeff Sessions, moved to limit, if not, end, the practice of a company using settlement funds to aid projects that are not germane to an underlying dispute. The Memorandum ("Memo") entitled "Prohibition on Settlement Payments to Third Parties"[1] directs all federal prosecutors to immediately end the practice of entering into federal settlements that provides for a payment or loan to any non-governmental person or entity that is not a party to the dispute. Sensibly, the memo carved out three exceptions—first, a payment or loan that provides restitution to a victim; secondly, payments for legal or professional services, and thirdly, the new policy does not apply to statutes, including restitution or forfeiture. Thus, if a SEP can be structured so that a governmental entity receives the benefit, that appears to be acceptable. Corporations will willingly implement SEPs rather than pay money in penalties because they believe the money is well spent on a SEP, or they believe that they will receive a public relations benefit. Nowhere does the memo explicitly reference SEPs or EPA. Nonetheless is it clear that EPA and SEPs

were in the AG's sights in issuing this directive. What follows is some background on SEPs and an analysis of how the Sessions Memo may have come about.

WHAT IS THE SEP FRAMEWORK AND BENEFIT COMPRISED OF?

When the government settles an enforcement action, after an environmental accident or incident, a company or environmental violator may voluntarily agree to undertake a project or projects that benefit the environment, and in that manner, mitigate the penalty that could otherwise be imposed. Beginning in the mid-90s, EPA's Office of Enforcement and Compliance Assurance ("OECA"), and the Office of the General Counsel ("OGC"), along with the U. S. Department of Justice ("DOJ") worked cooperatively to introduce the SEP framework. What began as an interim policy was superseded in 1998, with the Issuance of the Final Supplemental Environmental Projects Policy,[2] and in 2015, the policy was further updated,[3] but has persisted since 1998.

The SEP policy began as a vital tool in the toolbox to resolve harms occasioned by an acknowledged environmental violation. Under the SEP scheme, the federal government does not absolve a company of wrongdoing, but if the company agrees, it can enjoy the best of both worlds—it can pay a penalty for wrongdoing, and simultaneously take steps to address the environmental harm it caused. The government extracts a punishment and supports a company underwriting a project or activity that demonstrates an environmental benefit. What is more, the violator has the opportunity to repair relationships that may have frayed as a result of the violation. Encouraging companies to mitigate penalties and adopt pollution prevention techniques that minimize pollutant discharges or other harms the company may be responsible for causing has worked very well. A SEP shifts the focus toward a model where the offender or the environmental violator works to right the harm caused by their actions, besides paying a penalty.

Environmental settlement agreements are comprised of three legs: penalties (punitive or deterrent); injunctive relief (compensatory or remedial); and SEPs (comparable to penalties, but not deductible). EPA's SEP Policy defines a SEP as an environmentally beneficial action voluntarily undertaken by a defendant who is the subject of an environmental enforcement action. Utilizing its enforcement discretion, EPA may reduce the penalty assessed, in consideration of the defendant's commitment to perform the SEP, and give a credit mitigation It is a rarity when a violator achieves a dollar-for-dollar match, however, in most cases EPA will attribute a percentage credit mitigation that ranges up to 80 percent of the cost of the SEP. The commitment to perform the environmentally beneficial project itself, usually takes the form of a legally binding instrument, such as a Consent Decree. Under this construct, EPA does not compel the defendant to undertake the SEP, and the SEP is not considered a "penalty." Indeed, the project undertaken must be done voluntarily. Under this construct, the violator is punished for breaking the law, and at the same time the violator demonstrates its regard for making whole the environmental harm it caused. It is as close to a win-win situation as one can get.

RECENT EXAMPLES OF ACCEPTABLE SEPS

In 2015, when the DOJ resolved violations of chemical accident prevention laws following an explosion, a pesticide producing company committed to improving mobile communications for local first responders; providing emergency response and training for local fire and police departments; surveying the nature and extent of hazardous substances present at high schools and removing and properly disposing of chemicals while improving the safe management of chemicals remaining on school grounds.

WHY SEPS GOT SO MUCH ATTENTION

AG Sessions SEP Memo did not arise in a vacuum. Even before Jeff Sessions became Attorney General, the 115th Congress had acted to limit the manner in which settlement funds could be directed to third parties. Congress took action to frustrate those instances where a company might wish to direct funds to a party that was not directly or proximately harmed by the unlawful conduct of the company. They did so with the Stop Slush Funds Act of 2017.[4] The Act would prohibit government officials from entering into or enforcing any settlement agreement for civil actions on behalf of the United States, if the agreement requires the other party to the settlement to make a donation to a third party. The Act's prohibition, as with the Sessions Memo, would not include payments that provide restitution. In a recent settlement with the United States, Goldman Sachs was required to donate funds

to charitable institutions as part of the settlement, and on July 20, 2017 less than two months after the Sessions Memo, the DOJ told a federal court that it wished to cut a $3 million environmental project from an already proposed, but not yet entered, settlement with Harley-Davison, Inc. In conjunction, with the American Lung Association of the Northeast, the arrangement required the company to fund a $3 million program to mitigate pollution from hydrocarbons and oxides of nitrogen, including retrofitting or changing wood-burning appliances. Harley Davison made "tuners" designed to increase a motorcycle's power and performance that could cause motorcycles to pollute more than they would in the original configuration that Harley-Davidson had certified with the EPA. In moving to cut the $3 million SEP, DOJ did not seek to add any additional penalty.

For some time now, regulators have negotiated settlements with polluters that pay for projects, often managed by community groups or non for profit organizations, that can help compensate for the illegal pollution. Those charged with violating environmental law have restored wetlands and streams, protected habitat, monitored air pollution, and treated victims with breathing disorders. Frank Holleman, a senior attorney for the Southern Poverty Law Center, has said, that if settlement money for environmental violations goes into the Treasury Department, it may be spent on something else, and prevent restoration of or protection of an affected community or ecosystem. "You can't just dump money in the river and its get clean, he said, "you have to contribute to a nonprofit that does the work to make it that way. It's not just being thrown away or given to these entities—it's payments for a particular service."

As far back as 2005, in recognizing the importance of SEPs, the Bush administration DOJ agreed to a settlement with DuPont over a chemical release of PFOA (Perfluorooctanoic acid). Most people are familiar with PFOA as a non-stick coating surface for pans and other cookware. It is also used in many other products, such as fabric protectors. The DuPont settlement included $10 million in penalties and $6 million in SEPs, which included $1 million for a local education program in West Virginia, where DuPont is located. The program would foster science laboratory curriculum changes to reduce risks posed by chemicals in schools. In another civil settlement under the Bush administration, DOJ and EPA agreed to a settlement with Cargill for air pollution violations, which included $1.6 million in penalties and $3.5 million for SEPs that included wetland restoration projects in Nebraska and Iowa. AG Sessions Memo raised the ante on whether all of these cleanup efforts managed by third parties will go away, and tinkered with the question of whether all of the monies that would otherwise go to these projects, should go into the general treasury.

WHAT DID THE SESSIONS MEMO DO AND HOW DID IT IMPACT EPA AND SEPS?

Five months in the Trump administration, Attorney General Sessions issued a memorandum to all DOJ components and the 94 United States Attorney's Offices prohibiting them from entering into any agreement on behalf of the United States to settle federal claims or charges if the agreement directs or provides for a settlement payment to a non-governmental third party that was not directly harmed by the conduct. In the second paragraph of the one-page memorandum, it states that "[I]t has come to my attention that certain previous settlement agreements involving the Department included payments to various non-government third-party organizations as a condition of settlement with the United States. These third-party organizations were neither victims nor parties to the lawsuits." See https://www.eenews.net/assets/2017/06/07/document_gw_01.pdf. This statement appeared to come as a revelation to Sessions, when in fact as indicated by the Bush era settlements, it is not uncommon for DOJ to trumpet, if not encourage, these types of settlements.

The impact of this directive is nowhere more apparent than at EPA, where the practice of mitigating penalties by using SEPs is commonplace. A SEP is part of a settlement where an alleged violator may voluntarily agree to undertake an environmentally beneficial project related to the violation in exchange for mitigation of the penalty to be paid. In other words, the violator pays some cash penalty, and as a way to reduce that monetary amount that they might otherwise pay, and at the same time, as a way to benefit the environment, and obtain some public relations benefit, the violator volunteers to pay some monies to a third party or otherwise engage in a project that remedies the harm attributable to the violation. The Sessions Memo impacts SEPs in two ways:

- It applies to non-governmental entities and persons, so local municipalities would qualify, but a private entity might not qualify;
- It applies to an otherwise lawful payment that directly remedies a harm to the environment that the government enforcement action seeks to address, thus, if a company wishes to undertake a project, the company does so with the acknowledgment that there is some nexus between the violation and the underlying project.

SEPs have been around for a while, and have enjoyed popularity with regulators, the community and environmental advocates, because they go beyond what is required by law and, they provide an environmental and public health benefit. EPA, however, in being careful to maintain the deterrent effect of environmental laws, has established minimum penalties for violators. EPA's insistence on minimum penalties forces companies to think carefully should they volunteer to undertake a project to remediate harms.

In fact, the salient point of SEPs is that they are entered into voluntarily, and they have the added benefit of allowing the company to pay a lesser cash penalty, while at the same time assisting in preventing the harm, or lessening the opportunity for further harm down the line. Significantly, along with the voluntary nature of a company allocating funds for a cause that has some nexus to the harm of the underlying settlement, the project must nonetheless demonstrate environmental value. However, no one has raised the question of the extent to which SEP approval is solely within EPA's discretion. Congress could have perceived that one result of this settlement vehicle could be a lower amount of money ending up in the general fund. In addition to SEP approval, how the settlement funds are allocated, and to whom the funds may be directed, and how much credit a company receives are all factors in EPA's discretion. How better to limit EPA's discretion, and put more money into the general treasury, heedless of the fact that the basis of all SEPs is to protect and improve the environment, and heedless of the Congressional Budget Office's ("CBO") conclusion that limiting SEPs will not inure to the benefit of the general fund.

In fact, the CBO, could not determine whether enacting the legislation would lead to a change in the federal receipts and forfeitures stemming from future settlements, or to an increase or a decrease in the number of such settlements. Nor could the CBO determine the magnitude or timing of whether the Session's Memo had a limiting effect on direct spending by the government, or an effect on government revenues. Regardless, even before the Trump administration took office, Congress was looking for ways to deter agencies from efficient resolution of complaints through settlement agreements, and this effort was no more apparent than at EPA. Indeed, EPA has relished using SEPs as a means to prevent harm from environmental exposure.

EPA'S PRIORITIES AND INITIATIVES

For fiscal years 2017-2019 EPA's National Enforcement Initiatives ("NEI") added "reducing the risks and impacts of industrial accidents and releases" as one of three new initiatives. EPA indicated in the notice announcing the initiative that approximately 2,000 facilities are currently considered "high risk" because of their proximity to densely populated areas, the quantity and number of extremely hazardous substances they use, or their history of significant accidents. EPA's stated goal is to increase industry attention to preventing accidents, instead of addressing problems after the accidents occur. So in settling an environmental enforcement action, it makes good sense to use a SEP.

In settling an enforcement action, a SEP may be implemented when, a violator agrees to pay the government a lesser or reduced cash penalty amount, and in lieu of simply writing an even bigger check, the violator invests in a project, conducts training or provides other needed services. SEPs have included donating specialized equipment to local fire and police departments, in instances where the departments may not otherwise have had a budget or wherewithal to purchase the specialized item; a SEP could include training or supporting innovative enforcement tools, like fence line monitors, e-reporting, web posing of data, and independent third-party audits. If the equipment donated by a violator enhances the capability of the department and broadens their ability to carry out their function, it meets one of the SEP criteria. The government takes a favorable view if the violator provides a service in the same community or in a neighboring locale to where the environmental harm occurred, and this is a factor in the government imposing a lesser penalty.

SEP CRITERIA

An environmentally beneficial project qualifies as a SEP as long as it is not something that the violator was otherwise legally required to do; it must benefit the public health or the environment; and once EPA identifies a violation, EPA has the opportunity to shape the scope of the project and the project cannot commence until after EPA has identified the violation. These guidelines preclude a violator from receiving SEP credit for a project that they may have otherwise undertaken.

In the first instance, injunctive relief in connection with a violation identified by EPA, or injunctive relief required in another action, or by another regulator would qualify as something that a violator was legally required to do. Secondly, if a project or activity was required in an already existing settlement, or if the project or activity was required by some other legal action, or required by another state or local agency, it cannot qualify as a SEP. Thirdly, in order to be acceptable as a SEP, the project or activity must satisfy the requirements of one of seven categories identified by EPA, and the violator must demonstrate that there is nexus or some relationship between the violation and the proposed project.

The calculation of the percent of penalty mitigation is solely in EPA's discretion, and with two exceptions, cannot exceed 80 percent of the total SEP cost. The two exceptions are: if the violator is a small business, governmental entity or not-for profit and they can demonstrate that the project is of outstanding quality, or, if a violator can demonstrate that the SEP carries out pollution prevention, and if the project is of outstanding quality, the mitigation percentage can be as high as 100 percent.

The SEP credit, assigned entirely in EPA's discretion, is not a dollar for dollar match. EPA assigns an even greater credit if the project's primary impact is in the same locale where the environmental violation occurred. The credit assigned to the violator is allocated an even greater benefit, if it is in the community affected by the environmental harm. Environmental violators are encouraged to consider SEPs in communities where there are environmental justice ("EJ") concerns. EJ Is defined as the equitable distribution of environmental risks and benefits. EPA has always been keen to address harms done to communities disproportionately burdened by exposure to pollutants.

WAS THERE A NEED FOR LEGISLATION?

Despite the lack of evidence that funds for such projects were ever used for improper purposes, or anything other than environmental improvements, and building on legislation from the prior year, the House Judiciary Committee approved legislation, HR 732 ("the Stop Slush Fund Act of 2017") that would achieve a purpose similar to Session's third party liability Memo, and in some cases, prohibit environmental projects that are funded by settling parties. The AG's memo parrots language that is used in the House bill.

> Sec. 2. **Limitation on Donations made pursuant to settlement agreements to which the United States is a party**
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> (a) Limitation on required donations. — An official or agent of the Government may not enter into or enforce 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 provide 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.

Why? Perhaps the legislation had its genesis in the belief that somehow the government power to address, remedy or deter systemic harm caused by unlawful conduct was unconstrained, or perhaps Congress believed that the funds utilized for SEPs could otherwise augment appropriations for the general treasury. Both views follow the move toward limiting EPA's authority and removing their power naturally lead to a limitation on EPA's authority and discretion—something that many in government have long sought.

IS THE SESSIONS MEMO UPENDING SEPS AND EPA?

It would be unfortunate if AG Sessions June 5 Memo prohibiting third party settlements were interpreted as narrowing restricting or eventually doing away with SEPs. The SEP framework has been around since the early 1990s, as a way to encourage companies to lessen penalties and adopt pollution prevention techniques that minimize pollutant discharge, and it has worked very well.

After a chemical accident, it makes logical sense to seek to repair the harm done to the community and to obtain measurable benefits—by seeking to facilitate quicker and more efficient responses associated with emergency events; by seeking to provide technical support to the impacted community; by developing plans to respond to releases associated with emergency events and by working to enhance local coordination with emergency responders. If using a SEP can be viewed as a vehicle designed to make an aggrieved community whole, and if a particular SEP can enable a community to feel better equipped to handle an impending disaster, then why shouldn't a SEP be the premier mitigation tool in the enforcement arsenal, and the preferred tool to a large cash penalty.

With a SEP, an alleged violator voluntarily agrees to undertake an environmentally beneficial project related to a violation. The undertaking is not required by law, but is typically part of the settlement of an enforcement action. The SEP encourages environmental protection and public health benefits to the community that has been harmed. EPA insists that some nexus exists between the SEP and the violation. For example, a company that violates the Clean Air Act may propose a SEP that reduces air toxics into the environment. A SEP furthers EPA's goal of protecting and enhancing the public health and the environment. The environmental project must not be something that the violator is legally required to do. The SEP must, too, advance one of the objectives of the environmental statute that is the basis for the enforcement action.

It is no accident that EPA's 2017-2019 National Enforcement Initiative incudes risks from the impacts of industrial accidents and releases. In many ways EPA is looking to beef up its response to chemical releases. Operations in various industries still present significant risks of accidental chemical releases, like Arkema, the French chemical company, that produces organic peroxides used to make plastic, compounds known to be explosive. Following the flooding caused by hurricane Harvey, the plant experienced chemical explosions at the flood damaged plant outside of Houston. The chemicals used at the plant volatilize as they become warm, since chemicals produced by the plant need to be kept cold to avoid becoming unstable and explosive. The explosions came about after the main electrical system failed and the backups failed as well, cutting off refrigeration systems. Arkema and other chemical companies had fought Obama era rules designed to tighten safety at facilities nationwide. The Trump administration delayed the implementation of those rules until 2019. The rules, developed after several high profile accidents, included provisions that required companies to coordinate closely with emergency responders. Richard Rennard, an Arkema executive described the smoke produced by the blasts and fire as noxious and irritating to the eyes, lungs and skin, and residents within a mile and a half were placed under a mandatory evacuation order.[5] The Clean Air Act General Duty Clause ("GDC") requires facilities with extremely hazardous substances present in any amount to know the chemical hazards, assess the consequences of releases, design, and operate the facility to prevent accidental releases and minimize the consequences of any release. Working closely with first responders could achieve the goal of minimizing the consequences of such a release. An appropriate SEP here could provide specialized emergency equipment to volunteer firefighters or other local responders.

Companies can derive enormous benefits from implementing auditing programs for ensuring compliance with regulations, reviewing their chemical use, storage and handling practices, and whether their non-regulated chemical can be substituted for regulated ones or whether they can reduce quantities to below applicable RMP thresholds. All of these actions can complement the good results a supplemental environmental project could bring to a facility, and the surrounding community.

Does it make sense in the aftermath of a chemical accident for the government to seek enormous cash penalties for accident prevention, when instead they could do more to reap the benefits of improving the environment and the communities surrounding an incident, and at the same time the government could be more proactive in avoiding future environmental problems by fully embracing the use of SEPs.

CONCLUSION

SEPs are an important and integral part of environmental settlements and must remain so. EPA's SEP Policy must continue to require a nexus between the violation and the negotiated SEP; the policy should continue to accentuate the fact of the significance of a portion of the economic benefit of noncompliance, i.e. the use of the SEP should not weaken the deterrent effect of the environmental law; the SEP policy must continue

to include a mechanism for community input, which can tailor the SEP to the needs of the community, and encourage local participation, and finally, a geographic nexus ought to be encouraged and is desirable.

Notes

1 June 5, 2017, Memorandum for All Component heads and United States Attorneys, from Attorney General, Prohibition on Settlement Payments to Third Partiesavailable at https://www.justice.gov/opa/press-release/file/971826/download.

2 Issuance of Final Supplemental Environmental Projects Policy, April 10, 1998, Steven A. Herman, Assistant Administrator, U.S. Environmental Protection Agency, available at https://www.epa.gov/sites/production/files/documents/fnlsup-hermn-mem.pdf.

3 Issuance of the 2015 Update to the 1998 U.S. Environmental Protection Agency Supplemental Environmental Projects Policy, Cynthia Giles, Assistant Administrator, U.S. Environmental Protection Agency, available at https://www.epa.gov/sites/production/files/2015-04/documents/sepupdatedpolicy15.pdf.

4 H.R. 732 – 115th Congress: Stop Settlement Slush Funds Act of 2017.

5 Fiery Explosions Elevate fears for Chemical Plants Flooded by Texas Storms, September 1, 2017 New York Times, Julie Turkewitz, henry Fountain and Hiroko Tabuchi.