



New DOJ Policy Curbs Settlements Funding Third-Parties

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A recently-issued U.S. Department of Justice policy memorandum (Policy Memo) substantially narrows DOJ's authority to approve settlements that include payments to or for the benefit of third-party non-governmental entities. While the Policy Memo will likely scale back the existing practice of funding Supplemental Environmental Projects (SEPs) as a condition of settling environmental claims with the United States, it does not expressly preclude the availability of SEPs in a settlement between non-federal entities or as part of a citizen suit settlement. Moreover, the Policy Memo still preserves the inclusion of SEPs in a settlement of a federal enforcement action – so long as the SEP being funded by the settlement otherwise directly remedies the environmental harm in question.

On June 5, 2017, U.S. Attorney General Jeff Sessions issued a one-page memorandum broadly prohibiting Department of Justice attorneys from approving, as part of a settlement agreement, a payment or loan to any third-party non-governmental person or entity. Effective immediately, the narrowed policy applies to all civil and criminal matters 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.

In the context of environmental suits brought by the federal government, this new policy has raised the concerns of those who believe that it will effectively end the practice of allowing a settling defendant to fund a third-party environmental group's SEP as part of a federal environmental enforcement settlement. A SEP is generally defined as an environmentally beneficial project or activity such as a clean-up action, restoration project, or other environmental improvements or habitat enhancement that a defendant agrees to undertake as part of the settlement of an enforcement action. While a SEP funded by a defendant's settlement payment is sometimes implemented directly by either the plaintiff or the settling defendant, in many cases, the defendant will designate a third-party entity to administer the SEP as part of its settlement, often in lieu of a portion of any civil or criminal penalties the defendant may have incurred.

Although the Policy Memo ultimately does place limits on settlement payments that may be made to third-party non-governmental organizations, it is not an absolute prohibition on the inclusion of SEPs in a settlement of an environmental claim. The Policy Memo still leaves open other ways in which the funding of SEPs administered by third-parties may be considered in a settlement.

Settlements with non-federal entities not affected, including citizen suits

First, the Policy Memo does not affect settlement agreements for environmental suits involving non-federal entities, including citizen suits. The Policy Memo limits its application to all civil and criminal cases litigated under the direction of the [U.S] Attorney General and only precludes U.S. Department of Justice attorneys from entering into any agreement on behalf of the United States in settlement... that directs or provides for a payment or loan to any non-governmental person or entity that is not a party to the dispute. On the other hand, a defendant settling environmental claims with entities not represented by the U.S. Department of Justice – i.e. a state government, non-governmental organization, or any other non-federal entity – is not subject to the Policy Memo's limitations.

While Department of Justice attorneys must approve certain settlement agreements related to environmental suits between non-federal entities – e.g. a settlement agreement to a Clean Water Act citizen suit – the Policy Memo appears to apply only to Department of Justice attorneys that directly litigated in the proceeding on behalf of the United States. In other words, a Department of Justice attorney's involvement in approving a settlement between non-federal entities is unlikely to trigger the prohibitions set forth in the Policy Memo.

A settlement that directly remedies the [environmental] harm is still permissible

Second, the Policy Memo does not categorically prohibit all settlement agreements that include payments to non-governmental, third party organizations as a condition of settlement with the United States. Rather, it contains three limited exceptions to this prohibition – (i) payments or loans that provide restitution to a victim **or that otherwise directly remedies the harm that is sought to be redressed, for example, harm to the environment** or from official corruption; (ii) payments for legal or other professional services rendered in connection with the case; or (iii) payments expressly authorized by statute, including restitution and forfeiture. This language suggests that under the Policy Memo, a settlement payment could still conceivably fund a SEP, so long as the payment and SEP can be characterized as directly remed[ying] the [environmental] harm sought to be redressed.

This means that any proposed settlement agreement that includes a payment to a third-party non-governmental organization for a SEP must be crafted to ensure that the payment directly addresses the harm to the environment. For example, a settlement proposal that allows the settling party to provide funds in support of a third-party's SEP created to provide environmental health monitoring in San Diego County may not be sufficiently direct in remedying the harms sought to be redressed if the suit was related to a Clean Water Act claim in the Santa Clara River. But a settlement proposal providing that the settling party make payments to a third-party to fund a SEP created to remediate the Santa Clara River may be sufficiently direct in remedying the environmental harm at issue under the Policy Memo. Whether the proposed settlement payment/funded SEP is sufficiently direct in redressing the harm to the environment will likely be a point of contention in settlement negotiations with the federal government under this policy going forward.

The Department of Justice anticipates issuing additional guidance in the near future that may further clarify the permissibility of using settlement payments to fund SEPs administered by third-party non-governmental

organizations. For now, the Policy Memo will likely, as a practical matter, curb the availability of settlement payments to third-parties to fund SEPs in settlement agreements with the federal government.