



Acting Assistant Attorney General signed memorandum (“June 5 memorandum”) to all Department of Justice (DOJ) component heads and U.S. Attorneys entitled, “Prohibition on Settlement Payments to Third Parties.” This Environmental and Natural Resources Division (ENRD or the Division) memorandum provides guidance concerning the application of the June 5 memorandum to the “settlement of federal claims charges” in ENRD civil enforcement and criminal cases.

The June 5 memorandum establishes an important DOJ policy that affects ENRD settlement practices by disallowing settlement payments to third-party organizations that were neither victims nor parties to the lawsuit. As set forth below, however, the June 5 memorandum permits the limited use of certain types of third-party payments in some environmental cases in appropriate circumstances. Such third-party payments should only be included in a settlement agreement or consent decree after thorough and careful review to ensure consistency with this DOJ policy. Use of such payments will not be routine in ENRD matters and is subject to restrictions and prohibitions set forth in this memorandum. The Assistant Attorney General (AAG) must in all cases approve any third-party payment before any such provision may be included in any ENRD agreement or decree.

Section 1. General Prohibition Against Settlement Payments to Third Parties

In accordance with the June 5 memorandum, ENRD attorneys shall not enter into any agreement on behalf of the United States in settlement of federal claims charges — including agreements settling civil litigation, accepting plea agreements, deferring or declining prosecution in a criminal matter — that directs or provides for a payment or loan to any non-governmental person or entity that is not a party to the dispute unless (1) the payment meets one of the three limited exceptions set forth in the June 5 memorandum, and (2) the appropriate advance approval has been obtained as discussed below.

This prohibition applies to any civil or criminal agreement or consent decree entered into on behalf of the United States in any ENRD case, matter, or appeal and must be followed



addressed in the following examples. A third-party payment provision must incorporate specific requirements to ensure that the payment will directly remedy the harm that is sought to be redressed. Any payment must be subject to express requirements to ensure that the “directly remedy” standard is met, and the materials prepared for AAG approval must provide additional detail to demonstrate that the standard is met. Thus, for example, a provision stating in general terms that monies will fund habitat improvements by a particular third-party organization will not contain sufficient specificity to ensure that the standard is met.

- a. In an enforcement case under section 404 of the Clean Water Act, the “harm that is sought to be redressed” would generally refer to the harm resulting from unpermitted discharge of dredged or fill material into waters of the United States. In such cases, it would be consistent with the June 5 memorandum to incorporate an otherwise lawful payment (e.g., to an approved mitigation bank-lieu fee program) to directly remedy that harm through preservation, creation, and/or restoration of wetlands (or other waters) at the site or generally within the same watershed as the impacted site and where it is

of harm through the funding of actions at the source or in the same airshed as the source. Care should be taken to ensure that the projects do not mitigate harm out of proportion with the harm that resulted from the unlawful conduct. For this and the other examples in this section, ENRD's clients, such as EPA, may have applicable policies that may further inform decisions involving the selection of projects to mitigate the harm in question.

- e. In a Clean Air Act enforcement case involving mobile source pollution, it would be consistent with the June 5 memorandum to incorporate a full payment that directly rem

appropriation, for use only to restore, ~~and~~, or acquire the equivalent of such [injured] natural resources.” 42 U.S.C. § 9607(f)(1). Section 1006(f) of the Oil Pollution Act similarly requires trustees to retain NRD recovered “without further appropriation, for use only to reimburse ~~pay~~ the costs incurred ~~by~~ the trustee under subsection (c) of this Section [i.e., ~~assessing~~ NRD and developing and implementing a plan for the restoration, rehabilitation, ~~repair~~, or acquisition of the equivalent of the injured resources].” 33 U.S.C. § 2706(f) ~~general~~, payments to third parties to implement NRD restoration will constitute payments to directly remedy environmental harm. Payments of NRD monies that ~~comply~~ with the foregoing statutory standards also are “payments expressly authorized ~~by~~ statute” and are permissible under the June 5 memorandum for that reason.

- h. In a wildlife trafficking case, a third-party ~~payment~~ to directly remedy harm must focus on protection and recovery for the affected ~~species~~, preferably the affected ~~population~~

Branch. These features can suffice to render a congressionally chartered entity a governmental actor for some purposes.<sup>4</sup> Another key attribute of NFWF and similar instrumentalities is that Congress has expressly authorized them to “manage, accept, and administer private gifts of property” in connection with their operations. 16 U.S.C. § 3701(b)(1). NFWF also reports annually to Congress on its activities, providing an additional source of accountability. Although NFWF and other similar entities may be viewed as “governmental entities” for these purposes, the Division will only agree to a third-party payment to such entities if the “directly remedy” standard of the June 5 memorandum is met.

#### Section 4. Selection of Third Parties

When inclusion of a third-party payment provision is appropriate and consistent with the June 5 memorandum, care should be taken in the selection of the third party. In no case should a third party be selected on the basis of political affiliation, personal relationship with or financial interest of any person or entity involved in the case or any other improper basis. Any third-party payment must also comply with all applicable DOJ regulations and policies, including but not limited to those related to conflicts of interest.

Factors governing the selection of third parties should include, among other things, experience with the kind of work necessary to remedy the environmental harm at issue in the case; ability of the third party to complete the remedy project in a timely and cost-effective manner; and minimization of administrative overhead costs. To ensure transparency and accountability, appropriate measures should be included in the third-party payment provisions to allow for DOJ (or the client agency) to verify compliance with this policy and completion of the remedy project in a timely and cost-effective manner.

In civil cases involving a third-party payment, the defendant will, as a general rule, propose an appropriate third party, subject to ENRD approval (with client agency concurrence, where appropriate). Where a third party is not specifically identified at the time a case is resolved, the settlement instrument will generally provide objective criteria to guide both the defendant’s selection of such a party and the government’s review and approval, in a manner consistent with this policy.

In criminal cases, when community service payments are determined to be an appropriate part of a sentence, Environmental Crimes Section (ECS) prosecutors will generally designate one or more governmental entities and/or congressionally chartered corporations as recipients of the community service payments. In the unusual case in which a community service payment to directly remedy harm to the environment is effectively directed to a non-governmental third-party entity, ECS prosecutors shall follow existing Department and Division policies and applicable laws and regulations in selecting the third party, as well as the provisions of this memorandum. As a rule in criminal cases, third party will be selected prior to sentencing.

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<sup>4</sup> The Supreme Court has found that a congressionally chartered entity with these attributes is sufficiently “governmental” in character that its actions are constrained by the First Amendment. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 398 (1995).

Section 5. Inclusion by States or

Section 7. General Terms and Conditions



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