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DOJ ENRD Memo Blog Series– Enforcement Principle 1: "Adhering to the Impartial Rule of Law"

April 30, 2018

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On March 12, 2018, a U.S. Department of Justice ("DOJ") memorandum was issued by Jeffrey H. Wood, DOJ's Acting Assistant Attorney General ("AAG") for the DOJ's Environment and Natural Resource Division ("ENRD") titled "Enforcement Principles and Priorities" (the "Wood Memorandum"), as noted in our ***April 19, 2018 post***. The Wood Memorandum mentioned seven enforcement principles for the ENRD. The first principle, which will be the subject of this post, is "Adhering to the Impartial Rule of Law."

This principle appears to signal a tightening in the government's approach to environmental enforcement, stemming from concerns that enforcement was increasingly based itself on guidance documents, policy statements, and other resources lacking the legal authority of statutes, regulations, and case law. Reorienting enforcement to the "rule of law" does not necessarily prohibit the use of guidance that interprets or defines an undefined term in a regulation or statute, but rather, deters enforcement activity based on a policy that is tantamount to an un-promulgated rule (i.e., a policy that was not subject to notice-and-comment rulemaking). AAG Wood expressly acknowledged this change in approach, stating that federal environmental laws will only be effective if the ENRD "adheres faithfully to the Constitution and the fundamental principle of the rule of law." AAG Wood's expression of the principle parallels the constitutional principle of textualism – a commitment to enforcing the law "as Congress has written it and within the limits that Congress has established."

In support of his discussion regarding the impartial rule of law, AAG Wood cites a January 25, 2018 DOJ memorandum issued by former Associate Attorney General Rachel Brand providing that civil and criminal charges should be premised on the violation of federal statutes and regulations (not upon agency guidance documents), which "avoids rulemaking by enforcement." AAG Wood appears to signal that ENRD's role in enforcement proceedings should be ensuring the proper execution of existing law as opposed to creating new law, which is the exclusive domain of the legislative branch. Going forward, AAG Wood stated that ENRD attorneys may only file complaints and indictments that are "well-founded in law and fact" and

that seek relief permitted by law.

Further, AAG Wood cites two DOJ memoranda discussing the use of third-party settlement payments. AAG Wood views settlement payments to third parties as another DOJ practice worth adjusting to require stricter adherence to the law because the outcomes obtained (payments to non-parties and non-victims) are wholly untethered to the genesis of the underlying case. Instead of issuing settlement payments to third-party nongovernmental organizations that were neither victims nor parties to the proceeding, AAG Wood instead encourages settlement payments that "directly remed[y] the harm that is sought to be addressed, including, for example, harm to the environment." Finally, he notes that mitigation may be an important remedy in environmental cases, but it is not a penalty in and of itself. Otherwise stated, the ENRD should be permitted to address the extent of actual harm in environmental cases, but it "must not be used as an additional means of penalizing a defendant."

As the regulated community works with ENRD's enforcement officials going forward, we can expect this first principle to serve as a helpful guidepost in defining the scope of government investigations. When embroiled in enforcement proceedings, the cooperation of parties will be less likely to extend to an exploration of adherence to a policy or guidance document that does not have a "rule of law" effect. Information requests from the government will need to be tailored accordingly. Policy and guidance documents will, instead, be used to drive important discussions surrounding the evolution of the regulatory framework, as dictated by the legislative role of Congress and the rulemaking function of the agencies to act within their statutory authorization.

Likewise, settlement talks with ENRD are apt to focus penalty calculations on environmental harm. While this removes a means of relieving pressure on the penalty itself, it anchors the enforcement scheme to environmental harm as opposed to feeding the defendant's resources to a third party, non-victim who might have been in a position to provide environmental benefit to the region. The broad and highly discretionary authority of EPA's penalty policies will remain a challenge, particularly when set in this new context. AAG Wood's other principles and future memoranda might be expected to address that tension.

Our next blog post in this series of posts will focus on the second and third principles espoused in the Wood Memorandum: "Enhancing Cooperative Federalism" and "Exercising Pragmatic Decision-making."

As noted in our April 19, 2018 post, many of these enforcement-related topics will be discussed at our Spring 2018 Environmental Law Seminar on May 9, 2018 at Bracewell's Houston office. The seminar will feature discussions with Ann Navaro, Counselor to the Solicitor at the U.S. Department of the Interior, and Dr. Michael Honeycutt, Director of the Toxicology Division at TCEQ and Chair of EPA's Science Advisory Board, as well as other speakers and Bracewell attorneys. Panel topics will include:

- *Interior: An Inside Look at Policy and Regulatory Developments*
- *EPA's Science Advisory Board: A New Era*
- *Singles and Doubles: What's on Deck for NSR Reform*
- *Infrastructure: The Legal and Political Challenges to Stimulating and Streamlining Development*
- *Trends in Transactions*

For those interested in learning more about the Spring 2018 Environmental Law Seminar or determining if you are eligible to register for the event, please contact Christy Kobeski at christy.kobeski@bracewell.com or (206) 204-6224.