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**PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL JONATHAN BRIGHTBILL DELIVERS REMARKS AT THE 2020 ANNUAL PENNSYLVANIA CHAMBER ENVIRONMENTAL VIRTUAL CONFERENCE**

***U.S. Department of Justice Update on Litigation Involving Federal Energy and Environmental Policy***

***Remarks as Prepared for Delivery***

Thank you, Kevin, for that kind introduction.

I am happy to be back home in Pennsylvania — in a sense — and have the opportunity to speak with the Pennsylvania Chamber of Business and Industry. Since this organization’s founding in 1916, this Chamber has advocated for job creation and greater prosperity for all Pennsylvanians. It represents almost 50 percent of Pennsylvania’s private workforce with a membership of 10,000 businesses ranging from sole proprietors to Fortune 100 companies.

It’s a real honor to come and speak to you now as the lead environmental litigator of the United States. And talk specifically about the Department of Justice’s (DOJ) Environment and Natural Resources Division, or “ENRD” as we call it, and its role in enforcing the Nation’s federal environmental and natural resources laws and defending regulatory reform.

I currently serve as the Principal Deputy Assistant Attorney General of ENRD. I joined DOJ in July 2017. Our Assistant Attorney General (AAG), Jeffrey Bossert Clark, later took office in November 2018. At the beginning of this September, President Trump appointed AAG Clark to serve as Acting Assistant Attorney General of the DOJ’s Civil Division.

As the Principal Deputy, I, in turn, am now performing the duties of the AAG of ENRD. It has been an incredible honor to work the last several years with Attorney General Barr, before him Attorney General Sessions, AAG Clark, and the rest of the department’s leadership, as well as the talented career staff of ENRD lawyers, and support staff.

And, as a person who loves the art of litigation, it’s been a pleasure to do so in a role that still lets me get into the courtroom. I often personally appear to represent the United States and its agencies in appellate and district courts, and have done so over the past few years in courts from Pasadena, California to Boston, Massachusetts. This has included the defense of the highest priority regulatory reforms of this administration, such as the Affordable Clean Energy or ACE Rule and Navigable Waters Protection Rule (NWPR), which I will talk about.

Just last Friday, I appeared in the Ninth Circuit Court of Appeals to defend EPA’s authority to establish uniform, national safety and labeling requirements under FIFRA — the pesticide regulation statute — and so help farmers and small businesses keep cost-effective access to pesticides and herbicides they need to protect their crops and investments.

ENRD is a special component of DOJ in which to work, and it has an interesting history. Though our nation has had an attorney general since the Washington Administration, it was not until 1870, during the presidency of Ulysses S. Grant, that Congress created the Department of Justice.

ENRD was then established in the first several decades thereafter, in 1909, at the beginning of the Taft Administration. Originally, we were called the “Public Lands Division.” The focus was on “the Public Land Law,” and also enforcing and protecting Indian rights. The original staff constituted only six attorneys and three stenographers. ENRD’s responsibilities grew with the Nation. Eventually, the name was changed to the Environment and Natural Resources Division to better reflect the Division’s modern responsibilities.

Today, ENRD has a staff of over 600 people. Approximately 425 of those are lawyers who handle around 6,500 active cases and matters. ENRD is divided into 10 sections, which are listed here on this slide. Our primary, overarching responsibility is representing the United States in *federal* courts in cases relating to the protection of the environment and natural resources. But we also handle cases in many state courts. The 10 sections have varying roles and responsibilities, which, to name just a few, include enforcing the pollution control laws, land acquisition, and defending federal regulatory reform.

The two pie charts on this slide help give you an idea of the work we do. The pie chart on the left shows the breakdown of the federal agencies we filed new cases on behalf of during the fiscal year 2019. The pie chart on the right shows a breakdown of what types of cases those new filings represented.

ENRD represents virtually every federal agency in cases arising in all 50 states, the District of Columbia, and in the United States territories. But, as the pie chart on the left suggests, we have a handful of client agencies — the U.S. Environmental Protection Agency, the Department of the Interior, and the Department of Defense — that we do most of our work for. As you can also see, from the pie chart on the right, we do both defensive litigation for the United States, as well as affirmative civil and criminal enforcement.

Now as I mentioned, ENRD is defending the United States and its agencies’ efforts to reform or eliminate burdensome and unnecessary regulations. These include a number of regulatory reforms that you may have heard about, some of which directly affect the businesses of the participants of this virtual conference.

I’ve mentioned EPA’s Affordable Clean Energy or “ACE” rule, and its Navigable Waters Protection Rule redefining Waters of the United States (WOTUS) under the CWA. Other major reforms include the new National Environmental Policy Act or “NEPA” regulations, as well as the Safer Affordable Fuel Efficient Vehicle or “SAFE” rules.

Administrator Wheeler may discuss a few of these from a policy perspective, but I will discuss the litigation of these rules.

Our work on the Affordable Clean Energy or “ACE” Rule is a good example of how ENRD defends a change in administrative position. This concept cuts across much of our defensive work.

During the previous administration, EPA promulgated a Clean Air Act (CAA) regulation entitled the “Clean Power Plan.” This was, in effect, a nationwide electricity production directive — developed by EPA — whereby Washington outlined how it wanted to see coal-fired and clean burning natural gas-fired electricity generation replaced with new renewable electricity assets in the future, then backed into carbon dioxide emissions caps based on that Washington plan. These caps were intended to force States, State public utility commissions, and private businesses to either shut down existing assets, spend money to build new generation plants, or subsidize their competitors and neighboring states so as to look something like Washington’s Power Plan in the future.

The Supreme Court issued an unprecedented stay of an EPA environmental regulation to allow judicial review of this Power Plan before it took effect.

Then, in March 2017, the President’s Executive Order on “Promoting Energy Independence and Economic Growth” (E.O. 13783) directed the EPA to review the Clean Power Plan and to conduct any appropriate rulemaking to repeal or revise the rule as soon as practicable. In July 2019, Administrator Wheeler and EPA took three distinct regulatory actions. These were to:

* Repeal Washington’s Power Plan;
* Issue new guidelines for State plans to reduce carbon dioxide emissions from existing coal-fired power plants (the ACE Rule); and
* Updated certain EPA general implementing regulations for emission guidelines.

All environmental reform is, of course, challenged. And that’s where ENRD comes in.

We’ve explained to courts that the Clean Power Plan violated and exceeded EPA’s authority under the Clean Air Act. It took a little-used provision of the CAA intended to cost-effectively improve the emissions technology and techniques of an existing source, and to provide deference to *state* planning considerations and respect for past investments in existing assets, and it then perverted this to claim the ability to engage in nationwide electricity sector planning, run by EPA in Washington.

I appeared in the D.C. Circuit to defend EPA’s repeal and replacement of this regulation a couple weeks ago. It was a record breaking — for recent times — nine-hour appellate argument. Among the dozen advocates, I argued on the record for almost two of those hours.

Unfortunately, I cannot offer any opinion or prediction about what this panel of judges may do. But the case is now submitted for decision. We look forward to the outcome.

Another regulatory issue that has been important to farmers, property owners, and small businesses stretching back to my time at Pennsylvania DEP — and before — is whether the federal Clean Water Act covers depressions and drainages in farmers’ fields, roadside ditches, and when federal permits are needed for property owners and developers to fill and level portions of their land. You may have heard of this as the debate about the definition of “waters of the United States,” or WOTUS.

In 2005, the United States Supreme Court was asked to settle this long running issue in the case of *Rapanos v. United States*. *Rapanos* consolidated two separate cases involving real estate development. In one case, a landowner was alleged to have filled wetlands without a permit required by Section 404 of the Clean Water Act. This is a permit that allows the dredging and filling of waters of the U.S. In the other case, the landowner challenged the denial of his Section 404 permit to fill wetlands on his property. In each case, the developer maintained the United States did not have federal jurisdiction under the Clean Water Act.

In the *Rapanos* decision, five Justices did agree that there are statutory limits to the Clean Water Act. And that Congress did not intend to assert authority over all waters and wetlands in the country that conceivably may touch commerce. But one of the five Justices disagreed about the test for that limit. And so confusion continued.

In 2015, EPA and the Army Corps of Engineers issued their first WOTUS definitional rule in almost 30 years. This rule sought to end the confusion by arbitrarily declaring any water or wetlands within certain distances of scourings of the land reflecting the flow of water to the sea are all federal waters of the United States.

This 2015 rule attempted to extend federal permitting jurisdiction no matter how far the marks are from the sea, and even if the channels were dry most of the time and flowed only in response to rainfall. Litigants against the 2015 WOTUS rule, included the U.S. Chamber of Commerce, the National Farm Bureau and many State Farm bureaus, and many states, challenged this 2015 WOTUS rule. This rule, too, was enjoined across the country.

In February 2017, the President’s Executive Order “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule” (E.O. 13778) directed the EPA and Corps of Engineers to reconsider the 2015 WOTUS rule and whether to rescind or revise the rule. In October 2019, EPA and the Army Corps first issued a repeal of the Clean Water Rule. They admitted what courts in the country had been saying: the 2015 WOTUS Rule had been arbitrary and unlawful.

In April 2020, the EPA and Army Corps then published a new Navigable Waters Protection Rule. This rule maintains federal Clean Water Act Jurisdiction over navigable waters, their tributaries, and adjacent wetlands. It is based on scientific principles — not arbitrary numbers — and gives greater clarity and certainty regarding the outer limits of federal jurisdiction under the Clean Water Act. It gives greater authority to States to regulate their waters and lands. And it no longer asserts that ditches in the ground that collect water merely in response to rain — and lands and ponds on private land distant from rivers — are “navigable waters” of the United States.

The 2020 WOTUS rule was immediately challenged, with plaintiffs seeking a nationwide injunction against this regulatory reform.

I also appeared to defend this reform on behalf of the EPA and Army Corps. After three and half hours of argument, the judge issued an extremely thoughtful and entirely correct legal decision the next day. The court denied a nationwide injunction and this important policy reform came into effect.

I will similarly appear in the 10th Circuit Court of Appeals in a few weeks to defend the NWPR. A district court in Colorado, who did not take oral argument, has delayed implementation of the NWPR in Colorado alone. But this decision is based on an erroneous reading of the law — as I will explain to the 10th Circuit.

ENRD is defending another important regulatory reform to allow the United States to upgrade and expand critical infrastructure projects needed to support our economy, our businesses, and workers.

In July 2020, the Council on Environmental Quality (CEQ) — an agency of the Executive Office of the President — issued regulations reforming implementation of the National Environmental Policy Act or “NEPA.” NEPA requires that federal agencies assess the environmental impacts of their proposed actions prior to making decisions and inform the public. This can cover a broad range of activities such as permit approvals, infrastructure projects, and federal land management actions. The purpose of NEPA is to ensure informed decision making by federal agencies. And this Administration fully supports that.

But under NEPA and the CEQ regulations, federal agencies assess the environmental impacts of tens of thousands of federal actions each year. As many of you have probably experienced, NEPA compliance has resulted in unintended and unexpected consequences for the agriculture sector, small businesses, energy development, and infrastructure projects. These consequences include – but by no means are limited to – increased delays, costs, and other burdens for project proponents and stakeholders that rely on federal agency approvals. This results in reduced and deferred public benefit — primarily to the benefit of concentrated special interests.

For example, environmental impact statements or “EISs” for federal highway projects average over seven years to complete. Across the federal government, all reviews average four and a half years.

EISs also average over 600 pages. They are so long as to no longer serve their intended purpose of promoting better decision-making and succinctly informing the public. These unintended consequences have persisted despite the actions of many Presidents and Congress to address the quagmire of regulatory uncertainty and lawsuits.

In August 2017, the President’s Executive Order “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects” (E.O. 13807) directed the CEQ to enhance and modernize the federal environmental review and authorization process. The newly published regulations provide for greater efficiencies without weakening any substantive environmental requirements.

These long overdue regulatory reforms will benefit our environment and our economy. They will accelerate and focus environmental reviews, to modernize the NEPA process for the 21st century.

ENRD is now defending against five separate challenges to the CEQ regulations in the federal district courts of California, D.C., New York and Virginia. Before moving to the Civil Division, Assistant Attorney General Clark appeared to defend this important regulatory reform. There again, the motion for a nationwide preliminary injunction was defeated — bringing the new NEPA rules into effect.

A final regulatory reform critical to businesses, farmers, and consumers I would like to discuss relates to the availability of inexpensive, safe, yet fuel-efficient cars.

Again responding to a Presidential Order, EPA and the National Highway Traffic Safety Administration (NHTSA) jointly issued a two-part rule focused on reforming fuel economy and greenhouse gas emission standards for passenger cars and light trucks. These rulemaking efforts are referred to as the Safer Affordable Fuel-Efficient Vehicle (SAFE) rules. They were issued in two parts.

The first part included a rulemaking by the National Highway Traffic Safety Administration and administrative action by EPA. These actions affirm that federal law requires one, national set of standards to prevent the inefficiency and expense of manufacturers and buyers of having multiple jurisdictions, creating multiple fuel economy and emission standards for cars and light trucks across the country. The SAFE 1 rule (aka. the “One National Program” rule) was finalized in September 2019.

We are wrapping up briefing of challenges to this first rule in the D.C. Circuit Court of Appeals now. It will be set for argument shortly thereafter. I expect to appear for the United States to argue this case in the next few months.

A second part then revised federal greenhouse gas emission (GHG) and Corporate Average Fuel Economy (or CAFE) standards for light-duty vehicles. In this rule published in April, EPA amends its tailpipe GHG standards for model years 2021-2026, while NHTSA amends its CAFE standards for model year 2021, and sets new fuel economy standards for the other years.

The final rule will continue to improve the fuel economy of our nation’s light duty vehicle fleet, and reduce their greenhouse gas emissions, by increasing the stringency of CAFE and CO2 emissions standards by 1.5 percent each year through model year 2026. But EPA and NHTSA determined that the 5 percent increases that were issued back in 2012 have proven infeasible. They would have inappropriately raised costs for business, consumers, and really everyone who needs to purchase new cars and light trucks.

Last week, the D.C. Circuit issued a schedule for this portion of the SAFE joint rulemaking. Briefing to that court will conclude next summer.

Now I would like to turn to our environmental enforcement programs at DOJ and the Environment Division. A few themes run through our enforcement actions.

The first theme is our commitment to ensuring that America’s environmental laws are complied with. ENRD enforcement cases send a clear message: the United States will enforce its pollution laws and protect the environment and public health. And if you break those laws, you will pay.

A second theme is that whether we are bringing a civil or criminal enforcement case, we seek to adhere to the impartial rule of law. We are committed to ensuring that our citizens — across the country — are treated justly and fairly, and that like cases and facts result in like enforcement and punishment regardless of who and where you are. We also strive to ensure that intentionally bad and that harmful violations are treated more harshly than negligent failings of limited environmental or health impact.

At the Department of Justice, we take an oath to preserve, protect, and defend the Constitution of the United States. So we must be committed to our Constitution’s promise of due process and equal protection. We therefore strive to exercise appropriate prosecutorial discretion — tailored to the facts of each case.

We do not go into our enforcement cases necessarily trying to obtain the longest possible criminal sentence, or to extract the highest calculable penalty in every case. We are not trying to win it all at all costs. We are pursuing twin goals — first, to enforce our nation’s environmental laws and deter their violation, but, second, to ensure that our citizens are treated justly and fairly.

And as we protect the environment, we strive to ensure an even playing field in the marketplace — thus promoting economic growth, competition, and environmental protection. Those who violate our environmental laws must not be given a competitive advantage by doing so. If there are no consequences for violating these laws, honest businesses who spend capital to comply with these laws cannot compete fairly. Society suffers.

A third key of our enforcement program is that we are committed to working collaboratively with the states and our peers in the federal government. We work with states to investigate violations of environmental laws, and seek their input and perspective on cases to prioritize. We also often bring our cases jointly with States. I will provide some examples of that.

Now one question we are often asked is why we pursue some cases as civil enforcement cases, yet pursue other somewhat similar cases as criminal prosecutions. It is hard to articulate as a general matter — across all of the environmental statutes — whether a particular case should fall on the “criminal side” or “civil side.” In fact, many federal environmental statutes authorize administrative, civil, and criminal enforcement.

So, as I earlier referenced, we at DOJ, in conjunction with our client agencies, must exercise judgment and use our discretion when deciding whether to pursue criminal prosecutions or to leave a matter in the civil enforcement realm. Generally, we reserve criminal prosecution for what we deem to be the worst offenders.

In recent years, the division’s philosophy has been to bring criminal enforcement actions where the underlying conduct would be criminal in any context, regardless of what the specific environmental statute might allow. These cases include situations where the defendants’ underlying conduct amounts to lying, cheating, and stealing, as well as those cases in which prior civil enforcement attempts have gone unheeded.

With that context in mind, let’s talk about some recent examples illustrating the types of enforcement work we do at ENRD.

One of our most talked about set of enforcement efforts in recent years has been the division’s efforts to address motor vehicle emissions cheating. These cases reflect our prioritization of enforcement against those who are not just out of compliance with our environmental laws, but knowingly evading them for profit.

Air pollutants — like nitrogen oxides — emitted from the operations of motor vehicles are regulated under the Clean Air Act. These pollutants can have many adverse effects on human health. These include severe respiratory and cardiovascular impacts, as well as premature death. They also contribute to acid rain, smog, and haze.

The division and EPA have been committed to identifying motor vehicle manufacturers and affiliated entities that scheme to cheat America’s emissions laws. The most recent example of these efforts — and one of the most significant environmental enforcement actions of ENRD in the past several years — is our settlement with Daimler AG and its affiliated entity, Mercedes-Benz USA LLC. Today, I will refer to these entities collectively as “Daimler.”

On Sept. 14th, DOJ and EPA announced a proposed consent decree between the United States, the California Air Resources Board, and Daimler with the federal district court in the District of Columbia. Our complaint alleged that Daimler violated parts of Section 203 of the Clean Air Act in connection with the sale of approximately 250,000 diesel passenger vehicles and utility vans. These vehicles contained certain undisclosed software systems that caused them to operate differently when subject to federal emissions tests than in on-road conditions. The onboard computers were programmed to reduce emissions when the car was in the lab. But the computer would then reduce the emissions control settings once the car was out being driven on the road.

Under the proposed settlement, Daimler will recall and repair the emissions systems in Mercedes-Benz diesel vehicles sold in the United States between 2009 and 2016. It will pay $875,000,000 in civil penalties and roughly $70,300,000 in other penalties. This equates to about a $3,500 penalty for each vehicle that was sold in the United States. That is the largest per-vehicle civil penalty judgment ever imposed for a mobile source emissions violation under the Clean Air Act. Taken together with various injunctive and equitable relief, the settlement is valued at about $1.5 billion.

Of course, as I described before, our enforcement efforts are not limited to mobile source emission cases. Another recent example of our enforcement work relates to protecting the integrity of the Clean Air Act’s Renewable Fuels Program, or RFS program. The first case is a criminal matter, *United States v. David Dunham, et al*.

Through the Renewable Fuels Program, Congress mandates the use of biofuels to reduce American dependence on foreign sources of oil and improve the environment. Under the RFS, renewable fuel producers generate Renewable Identification Numbers, or “RINs,” every time they produce a certain amount of renewable fuel.

In this case, the defendant, his co-defendant Ralph Tommaso, and the companies they operated defrauded the Renewable Fuel Standards program. In the RFS program, RINs act like a currency—obligated parties under the RFS can buy and sell RINs to satisfy their compliance obligations. Mr. Dunham ran a multi-million dollar conspiracy to defraud individuals and the United States.

For about two years, Mr. Dunham and Mr. Tommaso operated companies that falsely claimed to have produced and sold renewable fuel for which they misappropriated $50 million in payments, subsidies, and other benefits. They also claimed RIN credits for renewable fuels that they never actually produced. By doing so, they defrauded the RFS program and stole tens of millions of dollars from the United States.

A jury convicted Mr. Dunham in May 2019 on 54 counts, including conspiracy, false statements, wire fraud, tax fraud, and obstruction. In August, Dunham was sentenced in the Eastern District of Pennsylvania to 84 months’ incarceration, three years supervised release, and $10,207,000 in restitution.

Another interesting aspect of our enforcement work relevant to Pennsylvanians is our effort to combat illegal logging and the associated trade — or “timber trafficking.”

The United States is one of the largest producers of timber and timber products in the world, but it is also the largest importer of timber and timber products, only behind China. As a major consumer, we want to ensure that wood entering our markets is legal. And as a major producer, we want to promote the legal trade of wood around the world.

Many people are aware of the negative environmental and ecological impacts of illegal logging. But illegal logging is also a major source of funding for criminal operations. A 2017 report identified the trade in illegally logged timber as the third most lucrative form of transnational crime worldwide, following only counterfeiting and illegal drug trafficking. The international police organization INTERPOL has identified the value of forestry crimes, including illegal logging and related corporate crimes, at $51-152 billion USD annually. Revenues from illegal logging have been used to fund terrorist and other international criminal syndicates, and are associated with money laundering, drug trafficking, government corruption, and all manner of other traditional criminal enterprises.

So the U.S. has made combatting illegal logging and ensuring our trading partners live up to their commitments a priority in this administration.

In 2017, the President’s Executive Order “Enforcing Federal Law with Respect to Transnational Criminal Organizations and Preventing International Trafficking” (E.O. 13773) specifically included wildlife trafficking — which includes timber trafficking — as one of the illicit activities by transnational criminal organizations that the United States would work to combat.

The United States also is working to improve legal trade in forestry by the connections we make through trade agreements. For example, the United States renegotiated the North American Free Trade Agreement (NAFTA), which was superseded by the agreement between the United States, Mexico, and Canada (USMCA). The treaty made many improvements over NAFTA, including new environmental provisions that include specific commitments to address illegal logging and associated trade.

ENRD’s enforcement actions have also had a significant impact on improving legal compliance and garnered global attention. One of the most well-known is the criminal prosecution of Lumber Liquidators. This company illegally imported and sold hardwood flooring products manufactured in China from wood that had been illegally logged from far eastern Russia — including the habitat of the last remaining Siberian Tigers and Amur leopards in the world. In addition to millions of dollars of criminal fines and forfeitures, Lumber Liquidators had to implement a long term environmental compliance plan as part of its conditions of probation.

One of our goals in this enforcement effort is to help ensure a level playing field for producers of timber and wood products around the globe, including U.S. industry.

A recent enforcement initiative of note has been our part of an interagency effort to stop the illegal smuggling of cancelled, restricted use, or unregistered pesticides in violation of the Federal Insecticide, Fungicide, and Rodenticide Act or “FIFRA.” This began in response to increased smuggling of unauthorized pesticides that have been linked to illicit marijuana cultivation on public and private land.

For example, one of the common pesticides smuggled into the United States is carbofuran. Carbofuran is a systemic insecticide and nematicide that was used to control pests in soil and on leaves in a variety of field, fruit, and vegetables crops.

In 2009, the EPA determined carbofuran was ineligible for reregistration because it posed unreasonable adverse effects on human health due to the dietary risks from ingestion and worker health through skin adsorption. It also posed unacceptable ecological risks to the environment. This is just one example, however, of the numerous illegal pesticides that have been the subject of this smuggling.

Currently, 38 individuals face charges related to smuggling pesticides into the United States. These include conspiracy, smuggling goods into the United States, failure to declare under the customs duties, the unlawful sale and/or distribution of an unregistered pesticide, and the illegal manufacture of marijuana.

Now earlier, I told you about our three principles of enforcement. We want to aggressively pursue those who violate our nation’s environmental laws, but also ensure the just and fair administration of the law.

In that vein, this Administration has also been undertaking a number of important enforcement policy reforms. We recognize our oaths to the Constitution. And part of that is our recognition that the Legislature writes the laws and limits by which our cases are brought.

In particular, we are conscious that DOJ should not use the awesome enforcement resources of the federal government to pressure defendants into agreeing to special settlements and relief that the government could not otherwise obtain by pursuing cases to judgment. DOJ must respect the federal government’s separation of powers and recognize that it is Congress that appropriates monies from the Treasury.

In the past year, AAG Clark issued two memoranda addressing and ultimately barring the pursuit and use of Supplemental Environmental Projects (SEPs) in civil enforcement settlements.

Generally, there are two types of relief that the Congress has authorized DOJ to seek in enforcement actions — monetary and equitable. Monetary relief includes fines and penalties, natural resource damages, and cost recovery. Equitable relief includes prospective compliance measures, mitigation, and cleanup actions. Environmental mitigation often takes the form of environmental projects to cleanup or otherwise rectify the harms to the environment specifically caused by prior emissions of polluters. The Department of Justice continues to pursue environmental mitigation of environmental harms.

So we sometimes get the question: what are SEPs? And what has changed? SEPs were “supplemental” environmental projects. They were defined by an EPA policy as an environmentally beneficial project or activity, agreed to by settlement, that a violator is *not* otherwise legally required to perform. So they were additional special projects that—unlike mitigation — were specifically not remedying the particular environmental harm caused by an enforcement violation. And because the violator was not otherwise legally required to perform such a project or activity, SEPs could only be obtained by settlements. They could not be obtained by actual prosecution and enforcement of the environmental laws to judgment.

And, most pernicious of all, SEPs were not simply provided out of the goodness of a defendant’s heart. Defendants agreed to fund these special projects in exchange for reductions in the civil and other monetary penalties that otherwise would have flowed to the Treasury. So instead of paying fines that deter disregard of our environmental laws, violators were given discounts from those penalties. They were instead allowed to spend that money on projects that bought them goodwill in local communities — fines and penalties were traded for marketing. This also put unelected government enforcers and prosecutors in the position of effectively reallocating where federal tax dollars are spent.

Because SEPs are a way of circumventing Congressional appropriations processes and bringing concentrated benefits to special interests, SEPs were undoubtedly popular with regulators, those benefited, and even the regulated community. But they were also long controversial throughout their use. Questions about SEPs and concerns about their legality have continued since their inception.

EPA similarly announced that it will no longer permit SEPs in future administrative settlements that are conducted by EPA, without DOJ. We consider stopping SEPs an important policy reform for ensuring DOJ’s commitment to the rule of law and faithful adherence to the Constitution’s Separation of Powers.

But this SEP reform policy will not impact our ability to have violators remedy the negative environmental consequences of their conduct. First of all, most settlements of civil penalty cases did not include SEPs. Second, ENRD will continue to seek equitable relief such as mitigation and other forms of projects and activities that directly remedy the environmental harms that resulted from a violation.

Congress may choose to authorize the executive branch to redirect monies otherwise payable to the treasury. And in one specific provision and for one specific purpose Congress did. But beyond that, ENRD will not.

The last topic I’d like to discuss with you today is another enforcement policy reform. This reform was just issued in July 2020 in a policy memorandum. It is aimed at stopping the practice of “over-filing” in the context of the Clean Water Act.

The Clean Water Act has an expansive scope, but it also includes restrictions designed to prevent over-enforcement and double recovery. For example, the statute specifies that EPA can pursue enforcement actions for oil spills under Clean Water Act § 309(d) or § 311(b), but not both.

In addition, the Department of Justice has other internal policies that are meant to prevent over-enforcement. The most obvious of these is the “Petite Policy,” which precludes successive criminal prosecutions except in a narrow set of cases where the appropriate Assistant Attorney General determines that doing so is necessary to vindicate a substantial federal interest.

There is good reason behind preventing over-enforcement, which is also referred to as “anti-piling on.” Piling on deprives the regulated community of the benefits of certainty and finality that is ordinarily available through full and final settlement. It is harder to get defendants to take responsibility for their misconduct if they don’t know where it will end.

The new policy that was issued in July addresses what the United States will do when there is already a state enforcement action for civil penalties pending with underlying facts that could also lead to a federal enforcement action under the Clean Water Act.

Congress was careful to preserve the States’ role as primary regulator of their own water. Congress had already expressly precluded federal civil penalty actions when a state has (1) started and is diligently prosecuting; or (2) has successfully pursued a state proceeding pursuant to a state law regime “comparable” to the federal administrative penalty regime. But, oddly, nothing in the statute afforded similar preclusive effect to state civil judicial enforcement actions.

Under the new policy, civil actions seeking penalties under the Clean Water Act will be strongly disfavored if a state has already initiated or concluded its own civil or administrative proceeding for penalties under an analogous state law arising from the same operative facts. In fact, to bring a federal action in such situations, there will now need to be prior written approval to proceed.

And pre-approval will be granted only in a few limited circumstances, such as:

* If the prior state enforcement action alone amounts to an unfair windfall for the would-be defendant;
* If the state is not diligently prosecuting an initiated civil enforcement action;
* Or, if the state has requested in writing, citing reasons for doing so, that the United States pursue a separate enforcement action and that request, considering all circumstances, would not amount to unfair piling on.

Like the SEP policy, we believe that this new policy will help promote fairness in the application of our enforcement powers.

So, as you can see, the work of the Environment and Natural Resources Division is broad and complex. This Administration takes very seriously the enforcement of our nation’s environmental and natural resource laws. But I am also extremely proud of the work that ENRD has done to defend important regulatory reforms of the past several years.

It has been a privilege to work on behalf of the United States and the American people in these matters. Thank you once again to the Pennsylvania Chamber for inviting me to share some aspects of our environmental and natural resource enforcement work with you. I am happy to use the remaining time to answer your questions.

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