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U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Telephone (202) 514-2701

TO: ENRD Deputy Assistant Attorney Generals and Chiefs of the Environmental Enforcement, Environmental Defense, Environmental Crimes, Natural Resources, and Wildlife & Marine Resources Sections

CC: Chiefs of All Remaining ENRD Sections

FROM: Jeffrey Bossert Clark, Assistant Attorney General

SUBJECT: Using Supplemental Environmental Projects ("SEPs") in Settlements with State and Local Governments

DATE: August 21, 2019

In November 2018, the Attorney General announced a new policy governing civil consent decrees and settlement agreements with state and local governments.[1] Among other things, the Attorney General directed that consent decrees "must not be used to achieve general policy goals or to extract greater or different relief from the defendant than could be obtained through agency enforcement authority or by litigating the matter to judgment." Nov. 2018 Memo at 5. The Policy was structured in part to ensure that the authority to determine state and local policy goals remains with democratically accountable state and local institutions. *Id*. at 2-3. Our understanding from the Associate's Office is that the converse is also true: namely, a related goal of the Policy was to avoid encouraging state and local governments to use federal consent decrees to circumvent any legal constraints they may face when they engage in new undertakings, such as the need to pass new legislation, issue new municipal ordinances, or obtain requisite funding.

This Policy has important implications for the use of Supplemental Environmental Projects ("SEPs") in settlements with state and local governments because, by definition, SEPs are projects agreed to in settlements that *go beyond* what is required under federal, state, or local laws. *See* U.S. Environmental Protection Agency Supplemental Environmental Projects Policy 2015 Update,

[1] *See* Memorandum from the Attorney General, Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities (Nov. 7, 2018) ("Nov. 2018 Memo" or "Policy"), *available at* https://www.justice.gov/opa/press-release/file/1109621/download. Although the Deputy Attorney General or Associate Attorney General may grant exceptions to the Policy's substantive requirements, any exceptions are not intended to swamp the rule.

at 6 (Mar. 10, 2015) ("2015 SEP Policy").[2] Because SEPs exceed what is required by law, proposed consent decrees and settlements containing them are generally precluded by Section III.C.5 of the Policy, absent approval of an exception under Section III.C.

Nevertheless, it has been argued that SEPs categorically should be exempted from this Policy because Congress allegedly (and implicitly) approved of their use in America's Water Infrastructure Act of 2018, P.L. 115-270, 132 Stat. 3765, which amended the Clean Water Act to authorize municipalities operating sewer and stormwater systems to undertake an integrated-planning process to streamline Clean Water Act compliance obligations. It also has been argued that the Policy itself excludes SEPs from its substantive requirements because EPA will agree to them in its non-judicial administrative settlements.

For the reasons explained herein, these arguments that SEPs should be exempted from the November 2018 Policy are unpersuasive. Especially in light of the statutes referenced in Background Section A, for a congressional enactment to be read as endorsing SEPs, Congress' intent to delegate its exclusive constitutional power of the purse needs to be clearly and unmistakably expressed. And, as explained below, America's Water Infrastructure Act of 2018 does not demonstrate a clear intent to authorize SEPs in enforcement actions involving municipal sewers. Nor do the terms of the Policy itself exclude SEPs from the Policy's substantive requirements. SEPs involving state and local government defendants therefore unambiguously fall within the core of the Attorney General's November 2018 Policy, and are precluded, absent the granting of an exception based on other considerations.

BACKGROUND

A. Legislation protecting Congress' exclusive power of the purse: the Miscellaneous Receipts and Anti-Deficiency Acts

Violations of federal environmental laws such as the Clean Water Act often result in the assessment of monetary penalties in enforcement actions against the violator. The Clean Water Act itself does not specify where monetary penalties are to be paid (except for penalties received under Section 311 that flow into the Oil Liability Trust fund). But several courts have held that monetary penalties received for Clean Water Act violations must be deposited in the United States Treasury as miscellaneous receipts. *See, e.g., Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 82 (3d Cir. 1990) (collecting cases).[3] Once

[2] https://www.epa.gov/sites/production/files/2015-04/documents/sepupdatedpolicy15.pdf ("SEPs are projects or activities that *go beyond* what could legally be required in order for the defendant to return to compliance, and secure environmental and/or public health benefits in addition to those achieved by compliance with applicable laws.") (emphasis added). Although a precursor policy was first issued in 1984, EPA first issued its SEP policy in 1991. The policy was substantially revised in 1995 (interim revised policy) and 1998 (final revised policy), and last revised in 2015.

[3] Legislative history is to the same effect. *See* S. Rep. No. 92–414, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3745, 1971 WL 11307 ("any penalties imposed would be deposited as miscellaneous receipts and not be recovered by the complainant.").

deposited, the Constitution gives Congress the exclusive authority in the first instance to determine whether and how to spend the monies. *See* Article I, Section 8, Clause 1 (Taxing and Spending Clause); Article I, Section 9, Clause 7 (Appropriations Clause).

To protect its constitutional power of the purse against intrusion from the Executive Branch, Congress has enacted statutes such as the Miscellaneous Receipts Act and Anti-Deficiency Act. *See generally* Todd David Peterson, *Protecting The Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 B.Y.U. L. REV. 327, 332-52 (2009) (explaining how prior attempts to evade Congress' appropriations authority led Congress to enact the Miscellaneous Receipts Act and the Anti-Deficiency Act).[4] The Miscellaneous Receipts Act provides that government officials "receiving money for the Government from any source shall deposit the money in the Treasury." 31 U.S.C. § 3302(b). The Anti-Deficiency Act prohibits government officials from expending funds (or incurring financial obligations) in excess of appropriations. *See* 31 U.S.C. § 1341.

B. Office of Legal Counsel Opinion on the Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General

The Attorney General has broad discretion when settling litigation, including the discretion to agree to settlement terms which a court would not have the power to order.[5] In exercising this broad authority, the Attorney General will in many instances defer to the policy judgments of the client agency.[6] But, of course, the Attorney General's settlement authority must be exercised consistent with any restrictions imposed by Congress or the Constitution.[7]

In 1980, the Office of Legal Counsel (OLC) issued an opinion concluding that a proposed settlement in *In re Complaint of Steuart Transportation Co.* (E.D. Va. No. 76-697-N), violated 31 U.S.C. § 484, which (as a predecessor statute to the Miscellaneous Receipts Act) required all money received for the use of the United States be deposited in the Treasury.[8] OLC opined that the requirements of § 484 must be broadly applied, noting that the Government Accountability

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[4] Mr. Peterson was an official in the Clinton Administration's OLC. Since the Clinton-era OLC is the one that first began to greenlight SEPs (in effect), Mr. Peterson was apparently a dissenter from that view.

[5] *See The Attorney General's Role as Chief Litigator for the United States*, 6 Op. O.L.C. 47, 59-60 (1982), *available at* https://www.justice.gov/sites/default/files/olc/opinions/1982/01/31/op-olc-v006-p0047.pdf.

[6] *Id.* at 55.

[7] *See Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion*, 23 Op. O.L.C. at 136, 140 (1999), *available at* https://www.justice.gov/file/19516/download.

[8] *See Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General*, 4B Op. O.L.C 684, 684-85 (1980), *available at* https://www.justice.gov/olc/opinions?f%5B0%5D=field_opinion_post_date%3A1980&f%5B1%5D=field_opinion_post_date%3A1980-06.

Office (GAO) finds exceptions to the application of that statute "only when supported by a clear expression of congressional intent." *Id.* at 686-87.

Under the terms of the proposed settlement in *Steuart,* the state and federal governments would share entitlement to damages for the death of waterfowl, which would be donated by the defendant to a waterfowl organization. *Id.* at 685. In its opinion, OLC offered theories for defending the settlement as proposed, including a theory that under the terms of the proposed settlement no money was received. *Id.* at 687. But OLC rejected the no-money-received theory, finding it insufficient to override the legislative mandate of § 484, stating that "the fact that no cash actually touches the palm of a federal official is irrelevant for purposes of § 484, if a federal agency could have accepted possession and retains discretion to direct the use of the money." *Id*. at 688. OLC concluded that "money available to the United States and directed to another recipient is constructively 'received' for the purposes of § 484." *Id.* OLC therefore concluded the statute barred the proposed settlement. *Id.*

C. Supplemental Environmental Projects (SEPs)

Most federal actions for failure to comply with the Nation's environmental laws, including the Clean Water Act, are resolved through settlement agreements or consent decrees. Those settlements or decrees usually stipulate the amount of the penalty. The United States Environmental Protection Agency ("EPA") and DOJ determine the amount they are willing to settle for by considering several factors, including whether the alleged violator has agreed to perform SEPs. *See* 2015 SEP Policy at 21-24. Under EPA's SEP Policy, an alleged violator will generally (all other things being equal) pay a lower civil penalty than it would otherwise pay by voluntarily (as part of a settlement) agreeing to undertake an environmentally beneficial project that is closely related to the violation being resolved, but goes beyond what is required under federal, state, or local laws. *Id*. at 21.

EPA's use of SEPs to reduce what it would otherwise demand in negotiations as a monetary penalty to the government (and disputes over the device's propriety) is long-running. In 1992, the GAO concluded that some SEPs were unlawful because they had no nexus to the violation at issue, and instead allowed the agency to carry out the agency's other statutory goals, thereby permitting the agency to improperly augment its appropriations for these other purposes, in circumvention of the congressional appropriations process. *See* Peterson, *supra*, at 352-54. Following GAO's opinion, until the issuance of EPA's final revised SEP policy in 1998, EPA worked with ENRD and OLC to impose several limitations on SEPs with the intention of avoiding clashes with the Appropriations Clause and the Miscellaneous Receipts Act. *Id.* at 354-57. These limitations include requirements that any SEP have a nexus to the violation at issue, but not be otherwise required by law. EPA's self-imposed limitations also include specific restrictions against augmenting appropriations and a prohibition on EPA managing or controlling any funds. *See* 2015 SEP Policy at 7-11. (But note the conceptual similarity to the no-money-received theory that OLC rejected in 1980.) EPA also does not allow cash donations to third-party groups of the type found inappropriate in the 1980 OLC opinion. *See* 2015 SEP Policy at 17.

Despite these limitations, SEPs remain controversial. In 2017, the United States House of Representatives passed the Stop Settlement Slush Funds Act. *See* H.R. 732, 115th Cong., 1st Sess.

(2017). No similar bill passed the United States Senate. While the bill did not become law, it would have prohibited government officials from entering into settlements that provide for payments or loans to persons other than the United States, except for payments that directly remedy the actual harm caused by the violation at issue (e.g., restitution). *See* H.R. Rep. 115-72, at 2 (2017), 2017 WL 1185293. The House Committee Report summarizes the legal disputes underlying SEPs, which both the majority and dissenting members contemplated could fall within the bill's prohibition on third-party payments. *Id.* at 5-6, 37-44. The dissenting members described SEPs as beneficial projects that the bill would jeopardize if in-kind payments such as those in SEPs were interpreted as "payments." *Id.* at 37-44. On the other hand, the majority described SEPs as Miscellaneous Receipts Act circumvention devices, *id.* at 5-6, and rejected amendments to the bill that would have exempted SEP-like provisions in settlements addressing indirect harms from violations of certain environmental laws, *id.* at 14-15.[9] One failed amendment to the bill would have authorized CWA-side SEPs and another failed amendment would have authorized CAA-side SEPs. *See id.*

D. 2018 Clean Water Act Amendments: Integrated Plans

Entities subject to monetary penalties under the Clean Water Act include municipalities and other local governmental entities that own and operate wastewater treatment plants and sewer systems. To avoid monetary penalties, these entities must comply with numerous requirements from distinct provisions of the Act, which in totality can have tremendous impacts on municipal operations and the community's financial health. To address these concerns, EPA, in 2012, adopted a policy that allows municipalities to design an "integrated plan," allowing municipalities to collect up all applicable requirements in one place and to prioritize them in a manner that seeks to maximize the environmental benefit from the available resources.[10]

In the portion of the integrated planning policy discussing enforcement actions against municipalities for noncompliance with the Act, the EPA 2012 Policy notes that "[a]ll or part of an integrated plan may be able to be incorporated into the remedy of a federal or State enforcement action." EPA 2012 Policy at 7. This includes "[e]nvironmentally beneficial projects that are

[9] In June 2017, the Attorney General announced a policy that, by its terms, largely tracks the Stop Settlement Slush Funds Act by prohibiting third-party payments or loans in settlements to non-governmental entities. *See* https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-ends-third-party-settlement-practice. The use of SEPs in settlements must be consistent with the Attorney General's June 2017 policy, as well as the Division's January 2018 memorandum on "Settlement Payments to Third Parties in ENRD cases." *See* https://www.justice.gov/enrd/page/file/1043726/download. I am considering revocation of (or revisions to) the January 2018 memorandum to make it more closely adhere to the November 2018 Policy and its connection to the legislative aims of the Stop Settlement Slush Funds bill. Revisions may include a clarification that the prohibition in the Attorney General's 2017 policy on "payments" to third parties includes in-kind payments such as those in SEPs.

[10] *See* EPA Memorandum on Integrated Municipal Stormwater and Wastewater Planning Approach Framework (June 5, 2012) ("EPA 2012 Policy"), *available at* https://www3.epa.gov/npdes/pubs/integrated_planning_framework.pdf.

identified in an integrated plan and which the municipality is not otherwise legally required to perform" as long as the project is "consistent with EPA's Supplemental Environmental Projects Policy." *Id.*

While integrated planning was intended to assist municipalities in reducing their economic burdens, many communities were not able to take advantage of the integrated planning process because of a lack (actual or perceived) of statutory authorization for EPA to use the process. Thus, in 2018, Congress enacted America's Water Infrastructure Act ("2018 Clean Water Act amendments"), which, among other things, added Sections 309(h) and 402(s) to the Clean Water Act to authorize the use of the integrated planning process. *See* 33 U.S.C. § 1319 (Section 309), and § 1342 (Section 402). The President signed the amendments into law on January 4, 2019.

The new law defines an integrated plan as a plan developed under EPA's 2012 Policy. *See* 33 U.S.C. § 1342(s)(1). In general, the law requires that each municipality be informed by their federal or state permitting authority that it has the opportunity to develop an integrated plan that can be incorporated into its Clean Water Act permit. *See id.* § 1342(s)(2). The new law also allows integrated plans to be developed by municipalities in enforcement actions, and municipalities that develop integrated plans can request that their enforcement orders or decrees be modified based on the provisions in the integrated plans. *See* 33 U.S.C. § 1319(h).

DISCUSSION

The use of SEPs in consent decrees with state and local governments contravenes the prohibition on using consent decrees to "extract greater or different relief from [a state or local government] than could be obtained through agency enforcement authority or by litigating the matter to judgment." *See* Nov. 2018 Memo at 5. By definition, a SEP goes beyond what is required under federal, state, or local laws, *see* 2015 SEP Policy at 6, and thus exceeds what could be obtained through agency enforcement authority or by litigating a matter to judgment. A clearer example of a form of relief that falls within the prohibition in the November 2018 Policy is difficult to imagine.

I. The 2018 Clean Water Act amendments do not justify creating an exception for SEPs in enforcement actions against state or local governments.

There is an argument that Congress, when it enacted the 2018 Clean Water Act amendments, approved the use of SEPs when DOJ and EPA settle enforcement actions. As the argument goes, because the new law defines an integrated plan with reference to the EPA 2012 Policy and one provision of that policy states that SEPs included in an integrated plan may be incorporated into an enforcement-action remedy, Congress intended to allow the use of SEPs in enforcement actions.

Initially, it should be noted that, at most, the 2018 amendments would authorize only SEPs in the limited context of an enforcement action involving a municipal sewer. It would not authorize the use of SEPs in consent decrees with state and local governments for other purposes. But even in the limited context of municipal sewer systems, the argument that Congress authorized the use of SEPs in enforcement actions is unpersuasive.

SEPs are debated devices that many members of Congress and academic commentators view as mechanisms for sidestepping the power of the purse. *See* H.R. Rep. 115-72, at 5-6. As discussed below, the language of the 2018 Clean Water Act amendments is far from clear. Any claim that these amendments somehow address SEPs must be supported by a clear statement from Congress, for two reasons. First, SEPs can be seen as implicating Congress' constitutional power over appropriations. Under this view, congressional enactments should not be viewed as authorizing the use of SEPs to reduce the monetary penalties that might otherwise flow into the fisc unless there is a clear statement of Congress' intent to do so.[11] Furthermore, a reading of the 2018 Clean Water Act amendments that somehow overrides the November 2018 Policy would intrude on the authority of the Attorney General to control and resolve litigation. Although Congress can constrain this authority, it should again be expected to speak clearly if it is attempting to do so.

While the first instance of the clear statement rule was handed down to guide interpretation of statutes that significantly alter the "'usual constitutional balance between the States and the Federal Government,'" *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)), the rule also has been applied to statutes that significantly alter the constitutional balance between Congress and the Executive. *See, e.g., Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991). The need for a clear statement of congressional intent to protect the power of the purse is especially apparent in view of the Miscellaneous Receipts Act and the Anti-Deficiency Act—two statutes that Congress found it necessary to enact because of past attempts to dilute the legislature's exclusive appropriations power.[12] Indeed, OLC has noted that GAO also finds exceptions to Miscellaneous Receipts Act "only when supported by a clear expression of congressional intent." 4B Op. O.L.C at 686-87. Thus, if Congress wishes to delegate its power of the purse, it must make its intention to do so 'unmistakably in the language of the statute.'" *Gregory*, 501 U.S. at 460-61 (quoting *Atascadero State Hosp.*, 473 U.S. at 242); *see also Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001) (applying a clear statement rule to assess the propriety of an administrative interpretation of the Clean Water Act invoking the outer limits of Congress' Commerce Clause powers, because it would have altered the traditional federal-state balance of powers over land and water use).

A similar, but somewhat distinct basis for this conclusion is that Congress is not understood

[11] For example, clear statements to use funds to continue the construction of border barriers by the

[12] The application of the clear statement rule is also appropriate as a tool to test the argument that the 2018 Clean Water Act amendments effectively exempt SEPs in municipal-sewer settlements from the application of a broad-based Department of Justice policy intended to preserve the constitutional state-federal balance and prevent efforts that would effectively allow States or localities to skirt their own limited grants of authority from their legislatures or ordinance-making bodies.

to intrude on the authority of the Attorney General to control settlements in the absence of a clear statement. Only "explicit statements" by Congress will be construed to constrain the Attorney General's broad control over settlements. *See* 6 Op. O.L.C. at 60. "In general . . . limits on the Attorney General's presumptively broad settlement power must take the form of clear statutory directives in order to be effective." *See* 23 Op. O.L.C. at 140. Thus, the 2018 Clean Water Act amendments should not be construed to intrude on the Attorney General's authority to impose limitations and restrictions on Departmental settlements through the November 2018 Policy in the absence of a clear statement in those amendments evincing such an intent.

The 2018 Clean Water Act amendments do not provide a clear statement. In fact, the amendments do not refer to SEPs at all. While the law references EPA's 2012 Policy on integrated planning, that policy is not about SEPs *per se*, but about integrated plans. The 2012 Policy primarily discusses the principles underlying integrated plans and describes their elements. *See* EPA 2012 Policy at 2-6. The EPA 2012 Policy contains only one reference to SEPs and does not discuss them in detail. *Id*. at 7. Instead, that policy includes only a hyperlink in a footnote to an outdated version of EPA's SEP Policy. *Id*. at 7 n.4 (linking to the 1998 version of EPA's SEP policy).

Without a clearer statement from Congress, it is untenable to conclude that Congress intended in the 2018 Clean Water Act amendments to authorize the use of SEPs in enforcement actions uniquely involving municipal sewers (and it especially cannot be inferred that Congress intended to adopt the 2015 EPA SEP policy, which did not exist at the time of the 2012 EPA memo on integrated planning that the 2018 Clean Water Act amendments reference). In other words, Congress does not "hide elephants in mouseholes." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (internal citation and quotation omitted). If Congress had intended to authorize the use of controversial miscellaneous-receipt-circumvention devices such as SEPs (the elephant), it would not have done so without mentioning SEPs by name. Instead, two layers removed from the statute, Congress merely referred to an integrated planning policy (the first mousehole) that does not discuss SEPs, but simply refers to another policy discussing them (the mousehole within a mousehole). It would therefore be inappropriate to use this legislation to create an exception to the unambiguous directive of the Attorney General prohibiting consent decrees that extract relief from a municipality that could not be obtained by litigating the matter to judgment.

II. The 2018 Clean Water Act amendments do not authorize retroactive permit amendments.

Even assuming *arguendo* that Congress intended to approve of the use of SEPs in some fashion involving municipal sewer matters, it did so only in situations where the municipality already has an integrated plan and permit that includes SEPs at the time of a violation. The Clean Water Act amendments do not authorize EPA to amend a violator's permit retroactively for the purpose of including SEPs in the permit so the SEPs can thereby be included in a consent decree (as some have argued). At best, as a textual matter, the 2018 amendments authorize EPA to include SEPs from an approved integrated plan in a municipality's *permit*, 33 U.S.C. § 1342(s)(2), and if so included, the SEPs can be incorporated into consent decree *modifications*, *id*. § 1319(h).

"The starting point for [the] interpretation of a statute is always its language." *Community*

for Creative Non–Violence v. Reid, 490 U.S. 730, 739 (1989); *see also Williams v. Taylor*, 529 U.S. 420, 431 (2000) ("We start, as always, with the language of the statute."). The newly added Section 402(s) states, in relevant part:

> **(s) Integrated plans**
>
> **(1) Definition of integrated plan**
>
> In this subsection, the term "integrated plan" means a plan developed in accordance with the Integrated Municipal Stormwater and Wastewater Planning Approach Framework, issued by the Environmental Protection Agency and dated June 5, 2012.
>
> **(2) In general**
>
> The Administrator (or a State, in the case of a permit program approved by the Administrator) shall inform municipalities of the opportunity to develop an integrated plan that may be incorporated into a permit under this section.

33 U.S.C. § 1342(s)(2).

And the newly added Section 309(h) reads as follows:

> **(h) Implementation of integrated plans**
>
> **(1) In general**
>
> In conjunction with an enforcement action under subsection (a) or (b) relating to municipal discharges, the Administrator shall inform a municipality of the opportunity to develop an integrated plan, as defined in section 1342(s) of this title.
>
> **(2) Modification**
>
> Any municipality under an administrative order under subsection (a) or settlement agreement (including a judicial consent decree) under subsection (b) that has developed an integrated plan consistent with section 1342(s) of this title may request a modification of the administrative order or settlement agreement based on that integrated plan.

33 U.S.C. § 1319(h).

As the above text demonstrates, the statutory provisions instruct EPA to inform municipalities of the "opportunity to develop an integrated plan that may be incorporated into a permit," *id.* § 1342(s)(2), either before a violation under Section 402(s)(2) or after a violation in

the context of an enforcement action under Section 309(h)(1). If a municipality, however, has not developed an integrated plan that contains SEPs to include in its permit or consent decree modification, then the 2018 Clean Water Act amendments do not authorize the SEPs.

If during the course of an enforcement action a municipality develops a plan with SEPs to include in its permit, then Section 309(h)(2) provides the city with the opportunity to "request a modification of the administrative order or settlement agreement based on that integrated plan." *Id.* § 1319(h). At best, this would allow the use of SEPs in consent decrees for new violations going forward. This prospective interpretation might be seen as harmonizing the provisions of the 2018 Clean Water Act amendments with the Miscellaneous Receipts Act. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (interpreting statutes to produce the harmonious result). But such an interpretation remains hypothetical at the moment and how it would surmount the hurdles of the applicable clear statement rules (i.e., as to delegations of Congress' appropriations or disturbances of the Attorney General's settlement powers) would need to be analyzed in the future if the necessary steps under Section 309(h)(2) are followed.

Taking the argument an additional step, one might also argue that this "request a modification" language—in combination with the language in Section 309(h)(1) allowing municipalities the opportunity to develop an integrated plan "[i]n conjunction with an enforcement action"—authorizes EPA to *retroactively amend* the permit to include a municipality's proposed SEPs in a consent decree resolving the enforcement action for its past violations. Not so.

While SEPs included in an integrated plan that is developed in an enforcement action may be relevant to new violations going forward, the newly added SEPs cannot retroactively alter the permitting regime against which any current violations based on the legal *status quo ante* are assessed. Section 309(h)(2) allows modifications of consent decrees based on newly developed integrated plans, but it would be a mistake to view those modifications as allowing a reduction in penalties for a violation of the original permit, at least not without yet another type of clear statement from Congress. "Retroactivity is not favored in the law." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). It is therefore presumed that agencies do not have the authority to promulgate retroactive rules unless that power is conveyed by Congress in express terms. *Id.*[13] In the same light and consistent with the clear statement rule expressed above, it should be presumed that agencies do not have authority to retroactively amend a permitting regime in a

[13] In APA terms a "permit" is a "license," 5 U.S.C. § 551(8) and licenses are "orders," *id.* § 551(6). Furthermore, agency processes for the formulation of orders are "adjudications." *Id.* § 551(7). And adjudications, of course, are typically understood to have retrospective effect. *See, e.g., Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 94 (1993). But licenses are a unique form of adjudications and licenses inherently have *prospective effect*. Unless and until one receives a driver's license, for instance, one cannot lawfully drive. *See also* BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added) (defining "license" as "**1.** A privilege granted by a state or city upon the payment of a fee, the recipient of the privilege *then being authorized to do some act or series of acts that would otherwise be impermissible* …. **2.** A permission, usu. revocable, to commit some act that would otherwise be unlawful … [for example, a permit for] hunting game." To complete the analogy, an 18 year-old first receiving a driver's license would not, upon receipt of that authorization, find any violations for illegally driving back when the minor was age 13 expunged.

manner that does not authorize the underlying offending conduct. This is especially true where retroactive permit amendment can be seen as diverting funds from the United States Treasury without congressional authorization. As discussed above, Congress has not spoken clearly on any of these issues.

III. SEPs cannot be extracted through agency enforcement authority and thus fall within the substantive requirements of the November 2018 Policy.

As mentioned, the November 2018 Policy, among other things, prohibits consent decrees that "extract greater or different relief from the defendant than could be obtained through agency enforcement authority or by litigating the matter to judgment." *See* Nov. 2018 Memo. at 5. It has recently been argued that this language excludes SEPs from the Policy because SEPs allegedly are part of EPA's "agency enforcement authority." This argument is flawed.

First, this argument misunderstands that the term "agency" as used in the Policy refers to the Department of Justice, and not to outside agencies such as EPA. By its terms, the Policy is an internal document only "directed at Department components and employees." Nov. 2018 Memo at 2 n.3. Thus, "agency enforcement authority" is referring to authority over matters of civil law where the Department is the civil enforcement agency, which is the case, for instance, in antitrust matters. *See, e.g.*, 15 U.S.C. § 1311(e) (under the Antitrust Civil Process Act the "term 'antitrust investigator' means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any antitrust law").

Even if the term "agency" in this provision pertained to outside agencies such as EPA, such a revelation still would not mean that SEPs fall outside the terms of the November 2018 Policy. EPA lacks the enforcement authority to extract a SEP from a defendant in any setting. This is true whether that setting is an administrative or a judicial one. The term "extract" typically indicates that something is forcibly taken "by much effort from someone unwilling." *See Extract*, MERRIAM-WEBSTER DICTIONARY ONLINE (2019).[14] But SEPs are defined as *voluntary* projects that "go beyond what could be legally required" under the law. *See* 2015 SEP Policy at 1, 6. By design, SEPs exceed the relief that EPA forcibly could extract from an unwilling defendant through its enforcement authority. Moreover, the phrase "could be obtained through agency action" must be read *in pari materia* with the subsequent phrase "by litigating the matter to judgment" to refer to relief that can be achieved directly through final adjudication of an administrative action. The phrase "could be obtained through agency action" does not cover relief that can be procured only indirectly through settlement. SEPs therefore fall within the terms of the November 2018 Policy.

Finally, particularly in light of the important public policy considerations underlying the Policy discussed in the subsequent section of this document, it is untenable to read the "agency enforcement provision" of the November 2018 Policy as permitting a consent decree to extract relief from a state or local government that otherwise has no basis in federal, state, or local law. If an outside agency cannot extract the sought-after relief in an administrative proceeding against a state or local government, then the Department cannot extract such relief in a consent decree either.

[14] *Available at* https://www.merriam-webster.com/dictionary/extract.

IV. Sound public policy generally favors disapproving of SEPs in cases against governmental entities, pending my broader review of the SEP Policy.

The Attorney General's November 2018 Policy promotes respect for local democratic processes, ensuring that local officials are held accountable for using local taxpayer funds on otherwise unrequired projects, without clear authorization in state or municipal law to do so. If state or local officials want certain projects undertaken in their communities, they should seek authorization through local democratic processes rather than by acquiescing in a consent decree with a federal agency that is supervised by a federal court.[15] SEPs could intrude on state and local accountability, by allowing the Executive Branch to commit state and local taxpayers to funding projects that are not otherwise required by their laws. They also give oversight of these voluntary projects to a federal court, and subject SEP violations to the contempt power. There also is the potential that state or local officials could commit to projects that are contrary to the express or implied will of the state or local legislative branches, respectively.

On the other hand, it has been argued that SEPs do not deprive elected representatives of the people control of their government, because SEPs are discrete projects representing a small component of any overall settlement in terms of duration, dollar amounts and scope of work. It also has been argued that SEPs are an important enforcement tool in settlements with governmental entities that are highly resistant to paying penalties; that the inability to do SEPs may well impede settlements; and that SEPs are highly favored by the localities that are the subject of the enforcement action, because they result in lower penalties and bring benefits to the local community. I also recognize that before the Attorney General announced the November 2018 Policy significant effort was expended negotiating for SEPs in settlements and consent decrees.

Taking these competing concerns into consideration, and pending my broader review of the SEP policy, SEPs in cases against governmental entities should be subject to close, case-by-case scrutiny if EPA wishes to pursue an exception to the Section III.C.5 restriction under the November 2018 Policy in any particular situation. SEPs for which approval will be sought in this interim period should comport with the following limitations, in addition to those currently in the Attorney General's November 2018 Policy, the Attorney General's 2017 policy on payments to third parties, and existing SEP and all other policies:

1. The SEPs must be discrete projects representing a small component of the overall settlement in terms of duration, dollars and scope of work.

2. The SEPs should be included only as a matter of last resort. For SEPs negotiated *before* the issuance of the November 2018 Policy, any memorandum requesting authorization of a settlement that includes SEPs must demonstrate that the previously negotiated SEPs cannot be removed from the nearly completed agreement without jeopardizing

[15] This also ensures that, if such a state law were to pass authorizing the project that a SEP would otherwise embrace, such enactments would in many instances not be enforceable in federal court (absent diversity jurisdiction and waiver of Eleventh Amendment immunity) but only in the courts of the applicable state sovereign. *Cf. Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) ("it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.").

the agreement or harming the interests of the United States. For SEPs negotiated *after* issuance of the November 2018 Policy, any memorandum requesting authorization of a settlement that includes SEPs must demonstrate that the settlement would not be possible without the inclusion of SEPs.

3. The SEPs should provide broad benefits to the community, and not individuals.

4. The governmental defendant should certify that the SEPs do not violate any direct or implied restriction imposed by local, state or federal law.

Even if the proposed SEPs satisfy these limitations, there is no guarantee that I will recommend approval of a settlement with a state or local government that includes SEPs to other officials in the Department. SEPs easily fall within the plain terms of the prohibition set out in Section C.III.5 of the Policy. Although I will attempt to remain open to approving of SEPs in some situations pending my broader review of SEPs (with due consideration given to SEPs negotiated before the November 2018 Policy was announced), exceptions to the Policy are meant to be rare because of the important considerations underlying the Policy which are intended to achieve the appropriate constitutional balance between federal and state governments and ensure accountability at all levels of government.

Further, limiting the use of SEPs in consent decrees promotes respect for the constitutional balance between Congress and the Executive. SEPs can be seen as challenging the congressional power of the purse by, in essence, redirecting funds from the United States Treasury in exchange for projects that Congress has not approved. Perhaps if asked, Congress would authorize funds for diesel emission reduction projects, to take one example. *See* 42 U.S.C. § 16138 (authorizing EPA to accept diesel emissions reduction SEPs). But Congress may also prefer to spend those funds on, say, a new aircraft carrier or on ending the opioid epidemic. Absent a clearly expressed intention from Congress to delegate money-redirection authority to the Executive Branch, *see supra* n.11, Congress' wishes should be respected.

The bottom line is that Congress has not expressly authorized the use of SEPs, either generally or specifically, in Clean Water Act enforcement actions against municipalities operating sewer systems. In the absence of congressional approval, there are compelling legal and policy reasons militating against the use of SEPs in settlements or consent decrees with state and local governments. There is therefore no reason to create a broad exemption from the Attorney General's unambiguous November 2018 Policy for SEPs.[16]

[16] ENRD can make two simple points to explain the policy announced herein: (1) declining to negotiate for SEPs merely leaves Congress' prerogatives to decide how to spend money contained in the fisc undisturbed; and (2) if Congress wants to delegate to the Executive Branch the power to negotiate for and settle for SEPs, it can do so as long as (a) it provides a clear statement of its intent to do so, and (b) it specifies the standard "intelligible principle" necessary to guide Executive action under a delegation of congressional power. *See Whitman v. Am. Trucking Associations*, 531 U.S. 457, 472 (2001).