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MEMORANDUM

To: ENRD Deputy Assistant Attorneys General and Section Chiefs

From: Jeffrey Bossert Clark, Assistant Attorney General (ENRD)

Re: Additional Recommendations on Enforcement Discretion

Date: January 14, 2021

Earlier today, I issued a memorandum entitled "Enforcement Principles and Priorities," which is largely a restatement of the principles and practices that this Division has followed throughout my tenure as Assistant Attorney General. In addition, I wanted to share with you three additional points that I commend to you to consider in exercising your enforcement discretion.

Consideration #1
Enhance the Principles of Federalism.

Federalism is a cornerstone of our constitutional system. It is also a principle embedded in federal environmental law that guides ENRD enforcement activities. Under most federal environmental statutes, States and tribes share responsibilities with the United States as co-regulators and enforcers. This so-called cooperative federalism runs through many federal commerce clause statutes, and federal law undoubtedly is preeminent under the Supremacy Clause. But the universe of federalism is not defined by situations in which Congress has opted to provide for cooperative federalism. *See New York v. United States*, 505 U.S. 144, 167 (1992) (describing "cooperative federalism" in terms of federal statutory regimes "where Congress has the authority to regulate private activity under the Commerce Clause" but nevertheless offers "States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation").

Federalism is larger and more fundamental than individual statutory allocations of power. It is part of the liberty-preserving structure of the Constitution. Respecting federalism therefore should involve more than mere cooperation or coordination with States. Rather, a full respect for federalism counsels that we begin with the premise that States, as sovereigns, have the legal means, the interest, and the familiarity with local concerns and details to address most environmental violations within their jurisdictions, particularly those that do not involve multiple States. We should also be mindful of the fact that sometimes States have a sphere of authority to act exclusively on intrastate matters that do not rise to the level of interstate commerce.[1] Thus, when possible, many kinds of environmental violations can be, and in my view should be, addressed and resolved *without* federal involvement, or alternatively, with comparable due regard for the principle of subsidiarity.

Before bringing any enforcement action (whether civil and therefore already investigated and referred for federal enforcement by the client agency, or criminal), I recommend that Division attorneys should consider if there are reasons for *abstaining* from the use of federal power. Sometimes, constraints on the use of federal power are statutorily based. *See*, *e.g.*, 33

[1] *See Printz v. United States*, 521 U.S. 898, 918-19 (1997) ("Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty,' THE FEDERALIST No. 39, at 245 (J. Madi-son)."). *Contrast* Heather K. Gerken, *The Federalis(m) Society*, 36 HARV. J. L. & PUB. POL'Y 941, 944 (2013) ("[Sovereigntists] miss how much power is wielded by the servant when state officials administer *the federal empire*, when they *play the agent* to the national government's principal.") (emphasis added). It is true that the Fed-eralist Papers also recognized that state officials "have an essential agency in giv-ing effect to the federal Constitution." THE FEDERALIST No. 44, p. 312 (E. Bourne ed. 1947) (J. Madison). But Professor Gerken's mistake is in failing to recognize that having "*an* essential agency" is not the same as a state official operating as a mere agent of federal power. Conflating federalism with cooperative federalism makes that same mistake.

U.S.C. § 1319(g)(6). When such statutory constraints may be present, any request to commence an enforcement action would do well to identify the potentially applicable statutory provision and explain why it does not control in the case at hand.[2] Such pre-commencement analysis should strongly consider exploring arguments both supporting and opposing federal jurisdiction. And, even if there are no potentially applicable statutory constraints on the use of federal power, I also recommend that memoranda seeking permission to commence an enforcement action explain (in view of the presumption referenced in the previous paragraph) why federal involvement is appropriate. If employed, these kinds of exercises would ensure that we are giving due consideration to important points that are sometimes easy to pass over in the day-to-day work of litigation.

Finally, where federal involvement is appropriate, it should be recognized that some civil statutes require notification to affected States before the initiation of federal enforcement action. Beyond such legally mandated coordination, ENRD policies and practices call for coordinating with affected States and tribes as much as practicable. In my view, we also should continue to consider filing joint civil complaints. Where appropriate, joint federal-state enforcement actions are commonplace and have proven effective. Reflecting our Division's strong commitment to joint actions, ENRD partnered with the National Association of Attorneys General to prepare guidelines for how to conduct joint civil environmental enforcement litigation.[3] ENRD attorneys should continue to consult these guidelines. If a joint

[2] This is already required in some Clean Water Act matters. *See* Assistant Attorney General Jeffrey Bossert Clark, Civil Enforcement Discretion in Certain Clean Water Act Matters Involving Prior State Proceedings (July 27, 2020), *available at* https://www.justice.gov/enrd/page/file/1297781/download.

[3] Guidelines for Joint State/Federal Civil Environmental Enforcement Litigation (Jan. 2017), *available at* https://www.justice.gov/file/928531/download.

civil filing is not feasible, ENRD attorneys should endeavor to be transparent with, and seek the views of, the relevant State or tribal regulatory agencies, where practicable.

Consideration #2
Pragmatic Decision-Making Should Consider Both the Benefits and Costs of Bringing a Particular Enforcement Action.

Part of that calculus is whether the benefits expected to be achieved by a successful enforcement case are worth its costs. Before taking office, Acting Attorney General Jeffrey Rosen championed expanding the use of cost/benefit analysis in regulatory actions.[4] I advice that such analysis should be part of the enforcement attorney's toolkit as well.

Simply put, traditional societal benefits of enforcement such as deterrence, incapacitation, and retribution should be weighed against the societal and individual costs of enforcement, as well as opportunity costs. Felony convictions of individual offenders, for example, can negatively affect a family's economic and social stability, a cost shared by the offender's dependents as much as the offenders themselves. When the offender is a corporation or other business entity, enforcement actions may cause employees to lose jobs, suppliers to lose contracts, and pensioners to lose their incomes. For many violations of federal environmental laws, these costs are justified by the benefits of enforcement. But we cannot lose sight of the fact that in some situations the benefits of enforcement may be outweighed by its associated costs.

[4] *See, e.g.*, Jeff Rosen, *Putting Regulators on a Budget*, NATIONAL AFFAIRS (Summer 2019), available at https://www.nationalaffairs.com/publications/detail/putting-regulators-on-a-budget.

This, in my view, is not a departure from any past principle, but only a different way of stating that enforcement should be focused on cases that are most deserving and that will be the best use of our scarce resources.

Consideration #3
Be Cautious in Alleging Wrongdoing Based on Legal Interpretations That Seek Deference to Agency Interpretations of Statutory Language That Has a Dual Civil and Criminal Application.

Much of this Division's work involves not only statutory language, but also agency interpretations of that language. As Former Attorney General Barr explained in a speech commemorating Constitution Day, we should not seek to "get" wrongdoers by advocating for stretched or questionable interpretive theories.

> *The rule of law requires that the law be clear, that it be communicated to the public, and that we respect its limits. We are the Department of Justice, not the Department of Prosecution.*
>
> *We should want a fair system with clear rules that the people can understand. It does not serve the ends of justice to advocate for fuzzy and manipulable criminal prohibitions that maximize our options as prosecutors. Preventing that sort of pro-prosecutor uncertainty is what the ancient rule of lenity is all about. That rule should likewise inform how we at*

> *the Justice Department think about the criminal law.*[5]

In many cases, both in defensive litigation and in enforcement cases, agency interpretations may be entitled to judicial deference. In *Chevron*, the Supreme Court explained that such deference is appropriate because, as a matter of statutory interpretation, ambiguous statutory language should be construed as a delegation of interpretive authority to the agency about how best to implement Congress's overarching policy goals.

Such deference does not obtain, however, in the context of criminal statutes. *See Abramski v. United States*, 573 U.S. 169, 191 (2014) ("criminal laws are for courts, not for the Government, to construe"). It may be equally inappropriate in the civil context when the statutory text at issue also has criminal applicability. As Judge Sutton has observed, "a statute is not a chameleon. Its meaning does not change from case to case." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 730 (6th Cir. 2013); *Clark v. Martinez*, 543 U.S. 371, 380 (2005) (In interpreting statutory language, "lowest common denominator, as it were, must govern" all of its applications.).

This remains a matter of judicial disagreement. Several courts of appeals have deferred to agency interpretations of dual purpose statutes. *See, e.g.*, *United States v. Flores*, 404 F.3d 320, 326–327 (5th Cir. 2005); *United States v. Atandi*, 376 F.3d 1186, 1189 (10th Cir. 2004); *In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000); *National Rifle Assn. v. Brady*, 914 F.2d 475, 479, n. 3 (4th Cir. 1990). And the Supreme Court, for its part, has issued inconsistent opinions on the question. *Compare Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703–04 (1995) (deferring to the Secretary of the Interior's definition of the term "take" in the Endangered Species Act of 1973, despite the fact that violations of the ESA are subject to both civil and

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[5] Remarks by Attorney General William P. Barr at Hillsdale College Constitution Day Event (Sept. 16, 2020), https://www.justice.gov/opa/speech/remarks-attorney-general-william-p-barr-hillsdale-college-constitution-day-event.

criminal penalties) *with Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004) (If a dual purpose statute "lacked clarity, we would be constrained to interpret any ambiguity in the statute" against the government; "we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."). *See also Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1024 (6th Cir. 2016) *rev'd sub nom. Esquivel-Quintana v. Sessions*, 137 S. Ct. 156 (2017) (discussing the **issue).**

While it may be appropriate to pursue deference in a particular case involving a dual-purpose statute, I would nevertheless urge caution as you exercise your enforcement/prosecutorial discretion, especially since this issue carries with it some litigation risk and may open the Division up to charges of unfairness.

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This memorandum relates only to internal procedures and management of ENRD. It does not create any right or benefit, substantive or proce-dural, enforceable at law by any party against the United States, its agen-cies, officers, or any other person. Appropriate Division personnel shall make a version of this memo publicly available on the Division's website. Additionally, as noted above, this memorandum sets out considerations for you to consider in your sound discretion.