

# New Developments in Environmental Enforcement

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# Civil Penalty Inflation Adjustment

## 40 CFR Part 19

U.S. Code Citation	Environmental Statute	Statutory civil penalties, as enacted.	Penalties for violations that occurred after 11/2/15, where penalties are assessed on or after 8/1/16 but before 1/15/17	Penalties for violations that occurred after 11/2/15, where penalties are assessed on or after 1/15/17 but before 1/15/18	Penalties for violations that occurred after 11/2/15, where penalties are assessed on or after 1/15/18
42 U.S.C. 7413(b)	CLEAN AIR ACT (CAA)	25,000	93,750	95,284	97,229
42 U.S.C. 7413(d)(1)	CAA	25,000/200,000	44,539/356,312	45,268/362,141	46,192/369,532
42 U.S.C. 7413(d)(3)	CAA	5,000	8,908	9,054	9,239
42 U.S.C. 7524(a)	CAA	25,000/2,500	44,539/4,454	45,268/4,527	46,192/4,619
42 U.S.C. 7524(c)(1)	CAA	200,000	356,312	362,141	369,532
42 U.S.C. 7545(d)(1)	CAA	25,000	44,539	45,268	46,192

# Civil Penalty Inflation Adjustment

## 40 CFR Part 19

- ▶ Amendments to the EPA's Civil Penalty Policies to Account for Inflation (effective January 15, 2018) and Transmittal of the 2018 Civil Monetary Penalty Inflation Adjustment Rule, (U.S. EPA January 11, 2018)

# Third-Party Settlement Payments

- ▶ Memorandum for All Component Heads and United States Attorneys, Prohibition on Settlement Payments to Third Parties, (Office of the Attorney General, June 5, 2017)
- ▶ Settlement Payments to Third Parties in ENRD Cases, (Office of the Acting Assistant Attorney General, ENRD, January 9, 2018)
  - ▶ Third-party payment allowed if it directly remedies the harm that is sought to be redressed.
  - ▶ Policy applies to agency administrative actions if DOJ approval required.
- ▶ Issuance of the 2015 Update to the 1998 U.S. Environmental Protection Agency Supplemental Environmental Projects Policy (U.S. EPA March 10, 2015)
- ▶ Securing Mitigation as Injunctive Relief in Certain Civil Enforcement Settlements (2nd edition)(U.S. EPA Nov. 14, 2012)

# Third-Party Settlement Payments

United States District Court for the District of Columbia,  
United States v. Harley-Davidson, Inc.  
Civil Action 1:16-cv-01687 (EGS)

# Third-Party Settlement Payments

## Harley-Davidson Timeline

- ▶ Consent decree lodged on August 18, 2016: Harley-Davidson agreed to pay a civil penalty of \$12 million, cease sale of defeat devices, offer to buyback existing defeat devices, and engage in other compliance-related activities directly related to sale and use of the defeat devices; also agreed to spend \$3 million on an Emissions Mitigation Project to reduce emissions from wood-fired stoves in the northeast. Project to be implemented by American Lung Association.
- ▶ DOJ Policy issued June 5, 2017. Replacement consent decree was lodged on July 20, 2017. This new consent decree omitted the previous Mitigation Project, on basis that the project did not comply with the new DOJ Policy due to its limited geographic scope, but contained all the other terms of the previous consent decree. There was no new substitute for the Mitigation Project.

# Third-Party Settlement Payments

## Harley-Davidson Timeline

- ▶ On December 11, 2017, the United States moved to enter the revised consent decree. In its motion to enter the United States reiterated its position that the Mitigation Project in the original decree did not comport with current DOJ policy on payments to third parties.
- ▶ After the motion for entry was filed, several of the commenters filed notices of intent to submit amicus briefs. In a January 8, 2018 order, the Court required submission of the amicus briefs by January 31, 2018, with the government to respond by March 1, 2018. One day after the order, on January 9, the ENRD Policy was issued.

# EPA Enforcement Policies

- ▶ Informal Enforcement Pilot Program
- ▶ Interim OECA Guidance on Enhancing Region-State Planning and Communication on Compliance Assurance Work in Authorized States (U.S. EPA January 22, 2018)



# EPA Enforcement Policies

## Factors for EPA Involvement in Enforcement

- ▶ a) Program audits indicate a need for the EPA to fill a gap until the State program deficiency is addressed.
- ▶ b) Emergency situations or, situations where there is significant risk to public health and the environment.
- ▶ c) Significant noncompliance that the State has not timely or appropriately addressed.
- ▶ d) Actions that require specialized EPA equipment (e.g., infrared camera) and/or expertise.
- ▶ e) Federal and State owned/operated facilities.
- ▶ f) Actions to consistently address widespread noncompliance problems in a sector/program (such as the National Enforcement Initiatives), to address companies with facilities in multiple States, or where there are cross-boundary impacts affecting other States, tribes, or nations.
- ▶ g) Program oversight inspections.
- ▶ h) Responses to State requests for assistance in a specific situation, or broader work-sharing arrangements in which the EPA takes the lead in particular sub-programs, sectors, or geographic areas.
- ▶ i) Serious violations that need to be investigated and addressed by the EPA 's criminal enforcement program.

# DOJ Policy on Agency Guidance

- ▶ Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases (Office of the Associate Attorney General, January 25, 2018)
- ▶ DOJ Policy also contains the standard disclaimer found on all government policies, i.e. it is not intended to create rights enforceable by any party to a government enforcement action.

# Corporate Officer Individual Liability for Environmental Violations Upheld by the Texas Supreme Court

- ▶ State of Texas v. Morello, No. 16-0457 (Texas Supreme Court, February 23, 2018)
- ▶ The court held that an individual who personally engages in acts that constitute violations of the law may be held liable, regardless of their status as a corporate officer. In so holding the Texas Supreme Court joined numerous other state and federal courts that have held that a person's status as a corporate officer does not shield them from liability if they personally participate in the wrongful conduct.