

The Return of the Supplemental Environmental Project

May 16, 2022

This article was originally published in Wiley's The WELL blog.

On Thursday, May 5, 2022, the Department of Justice (DOJ) in coordination with the Environmental Protection Agency (EPA) issued a “Comprehensive Environmental Justice Enforcement Strategy” which, most notably, restored the use of supplemental environmental projects (SEPs)—an invaluable and highly popular enforcement tool used by the EPA for 30 years until it was abandoned by the DOJ during the Trump administration.

SEPs are environmentally beneficial projects that are not required by law, but that companies can agree to undertake as part of the settlement of enforcement cases relating to violations of environmental laws or regulations. According to the EPA, SEPs are designed to help rectify environmental violations by providing tangible environmental or public health benefits in the communities or environments affected by the environmental violation at issue. For example, past SEPs in EPA settlements have included projects related to lead abatement in public housing, the installation and operation of air filtration systems, the development of a publicly available eLearning course on the requirements of FIFRA and its associated regulations, the establishment of a conservation endowment for the future maintenance and improvement of agricultural lands to reduce pesticide runoff, etc.

Prior to the Trump administration, and in alignment with EPA's 2015 Update to the 1998 U.S. EPA Supplemental Environmental Projects Policy (the SEP Policy), the voluntary agreement to perform a SEP was one factor that the EPA considered in determining, and sometimes mitigating, settlement penalties. For this reason, SEPs were popular

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among regulated entities who favored the projects as a means of lowering penalties while making real-world improvements. Likewise, many environmentalist organizations supported the use of SEPs on the grounds that they advance environmental justice by targeting improvements at local communities directly affected by pollution. Even government enforcement teams favored SEPs as a tool to speed up settlement negotiations.

Despite their widespread appeal, SEPs were disallowed under the Trump administration. Starting in 2017, the Attorney General and DOJ's Environmental and Natural Resources Division (ENRD) issued a series of memoranda restraining DOJ and EPA from reaching settlements including payments to third-parties. This culminated in a March 2020 memo expressly prohibiting DOJ from agreeing to any settlements including SEPs on the grounds that SEPs violate the Miscellaneous Receipts Act, which requires that penalties received by the government go to the treasury for Congressional appropriation.

Shortly after Biden took office, ENRD withdrew the March 2020 memo and began the complicated process of reintroducing the use of SEPs. On May 5, 2022, the DOJ announced that it "is issuing an Interim Final Rule that, subject to new limitations set forth in a separate memorandum from the Attorney General, will restore the Department's ability to use SEPs in appropriate circumstances as part of settlements with defendants who have violated federal environmental laws." This "separate memorandum," which was also published on May 5, 2022, was designed to ensure that SEPs used today are not being used to inappropriately fund projects unrelated to the harm involved in the underlying enforcement action. It includes the following guidelines and limitations for the use and implementation of SEPs:

- SEPs must define with particularity the nature and scope of specific project(s).
- SEPs must have strong connections to underlying violation(s) of the federal law. More specifically, SEPs must be consistent with and advance at least one objective of the statute being enforced and be designed to reduce the detrimental effects of violation(s) and the likelihood of future violation(s).
- The DOJ and its client agencies shall not propose the selection of any particular third party to receive payments to implement any SEP or a specific entity to be the beneficiary of any SEP.
- SEPs must be executed before an admission or finding of liability in favor of the United States and the DOJ and its client agencies must not retain post-settlement control over any funds or projects.
- No SEP shall be used to satisfy statutory obligations of the DOJ or any other federal agency or provide them with resources for activities for which they have received specific appropriation.
- No SEP shall require payments to non-governmental third parties solely for general public educational or awareness projects; solely in the form of contributions to generalized research, including at a college or university; or in the form of unrestricted cash donations.

In practical terms, it is difficult to assess the degree to which the EPA's use of SEPs in enforcement actions will be different under DOJ's new memorandum, which is largely consistent with EPA's existing SEP Policy. We do note, however, that DOJ's explicit declaration that payments cannot be made to third-parties for "general public educational or awareness projects" may make it more difficult for certain industries to take advantage of SEPs. To be sure, EPA's existing SEP Policy also lists "general public educational or public environmental

awareness projects” as projects not acceptable as SEPs. Nonetheless, it was not uncommon for EPA to allow SEPs related to the development of specific training and education programs. These kinds of programs made it possible for industries to take advantage of the SEP program in relation to violations of environmental laws (often FIFRA, TSCA, and EPCRA) that were not pollution based and thus, could not be rectified by clean-up or conservation-related projects in specific localities. Now, in light of DOJ’s new memorandum, it is possible that industry will face heightened agency reticence to educational projects of any kind. Apart from this issue, we anticipate that EPA’s use of SEPs under the existing SEP Policy will likely remain the same going forward. For example, EPA’s requirement that enforcement settlements involving SEPs must include stipulated penalties in the event that the SEP is not satisfactorily completed, will remain in place.

In any event, the immediate impacts of the return of EPA’s use of SEPs may be felt most directly in communities harmed by pollution. By restoring the use of SEPs, DOJ increases the likelihood that violators will direct significant funds to communities affected by pollution. Additionally, the resurrection of SEPs will undoubtedly lead to the more efficient resolution of enforcement actions, thereby reducing the resources expended by both the EPA and regulated entities in negotiations and other enforcement proceedings.

The Interim Final Rule can be found [here](#) and both the Rule and DOJ’s new memorandum, setting forth the Department’s guidelines for allowing SEPs going forward, will be available for public comment until July 11, 2022.