

SEParating from Tradition: Justice Department Prohibits Use of Supplemental Environmental Projects to Resolve Civil Enforcement Actions and Eyes Additional Policy Change

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Key Points

- Effective March 12, 2020, the U.S. Department of Justice is no longer including supplemental environmental projects (“SEPs”) in the settlement of civil enforcement actions brought by the U.S. Environmental Protection Agency.
- Targets of environmental enforcement actions will face stiffer penalty amounts with little opportunity to mitigate environmental harm and reputational damage through the settlement process.
- The Justice Department is considering the viability of the use of SEPs in citizen suit settlements and is also turning its sights on the use of similar projects in the context of resolving criminal cases.

In a move that reversed a decades-long policy favored by many in both industry and government alike, the Environment and Natural Resources Division (ENRD) of the U.S. Department of Justice (DOJ) announced that it will no longer incorporate supplemental environmental projects (SEPs) into the resolution of civil enforcement actions.¹ Effective March 12, 2020, no ENRD attorneys negotiating consent decrees or compromise settlements in cases involving the U.S. Environmental Protection Agency (EPA) may include SEPs in those settlements as an exercise of prosecutorial discretion. While this policy will not impact any cases already settled, it applies to all cases moving forward, including those currently in the midst of settlement discussions. Notably, ENRD’s new policy does not apply to SEPs specifically authorized by statute, such as those used by the U.S. Army and Navy to satisfy penalties assessed by EPA.²

SEPS are “environmentally beneficial” projects or activities that, while not required by law, are used in settlement agreements to facilitate the resolution of enforcement actions.³ In general, EPA recognizes seven broad categories of SEPs: public health, pollution prevention, pollution reduction, environmental restoration and protection, assessments and audits, environmental compliance promotion, and emergency planning and preparedness.⁴ For decades, defendants have agreed to fund and

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implement SEPs in each of these areas, with past projects requiring, for example, blood lead level testing in communities impacted by pollution, modification of equipment to prevent pollution at its sources, wetland or watershed restoration, compliance audits of small businesses, seminars helping the regulated community ensure compliance with water pretreatment requirements, and provision of chemical emission detection or HAZMAT equipment to local emergency response teams.⁵

EPA and other state and federal agencies have long incorporated these projects into settlements to require alleged violators of environmental laws to “take action to remedy the harm or risk caused by past violations.”⁶ In particular, proponents of SEPs view them as a useful tool to deliver environmental benefits to communities that are harmed or otherwise disadvantaged by alleged violations. Because SEPs can afford alleged violators substantially reduced civil penalties and an opportunity to mitigate both internal and external reputational harms, industry generally views them favorably. Likewise, regulators oftentimes find them to be an effective tool to spur productive settlement negotiations and directly support agency missions.⁷

In the memorandum announcing ENRD’s policy change, Assistant Attorney General Jeffrey Bossert Clark derides the tool as a violation of federal laws prohibiting government officials from diverting cash from the U.S. Treasury or expending funds in excess of congressional appropriations.⁸ Noting that EPA policy allows SEPs to reduce civil penalties by up to 80 percent, Clark finds that they represent impermissible “conversions” of penalty dollars that would go to the government into dollars allocated to third parties.⁹ In addition, Clark argues that ENRD has “compelling public policy considerations” for banning SEPs, including to respect Congress’s appropriations authority and to adhere to the general separation of powers set forth in the U.S. Constitution.¹⁰

Beyond targeting SEPs used to settle civil enforcement actions, Clark suggested during a recent teleconference that he also is considering whether SEPs “should [continue to] be permissible in citizen suits,” suggesting that nongovernmental environmental groups should not “be able to wield such tools to gain, especially not for themselves, SEPs or SEP-like third-party relief.”¹¹ While it is not yet clear whether this means ENRD will object to the use of SEPs in the settlement of citizen suits, we may see such a policy change in the future.

Despite acknowledging their widespread use and favorable views among many proponents, Clark focuses on the controversial history of SEPs to support his conclusion that SEPs are ultimately “particularly problematic” and thus worthy of an immediate ban.¹² This decision stands in contrast to decades of ENRD practice and previously asserted arguments advanced in favor of SEPs as a settlement tool. For example, former chief of the ENRD’s Environmental Crimes Section, David Uhlmann, has testified that SEPs can address harms that otherwise “cannot be addressed by restitution,” such as generalized harms to the environment and public health associated with pollution in localized communities.¹³ While noting that SEPs may appear to encroach on legislative authority, Uhlmann finds that carefully crafted policies—such as requiring a nexus between third-party payments and alleged violations—can ensure that alleged violators remedy harms suffered in the specific communities where regulatory violations have occurred.¹⁴

Regardless of its legal or political underpinnings, ENRD’s new policy has immediate and long-term consequences. Parties currently negotiating civil settlements with EPA

through ENRD will have to modify their negotiating strategies and adjust accordingly stakeholders' expectations.¹⁵ Meanwhile, parties accused of regulatory violations in the future may find themselves facing stiffer penalty amounts with fewer opportunities to mitigate reputational damage through the settlement process. Environmental groups may also face objections from ENRD when attempting to settle future citizen suits involving alleged violations of federal environmental laws.

¹ Memorandum from Jeffrey Bossert Clark, Assistant Attorney General, U.S. Department of Justice, to ENRD Deputy Assistant Attorney Generals and Section Chief ("March 2020 Clark Memorandum"), (Mar. 12, 2020), available at <https://www.environmentallawandpolicy.com/wp-content/uploads/sites/452/2020/03/DOJ-SEP-Policy.pdf>.

² *Id.* at 18.

³ U.S. Env'tl. Prot. Agency, EPA Supplemental Environmental Program Policy 2015 Update, U.S. EPA ("2015 EPA SEP Policy") (Mar. 10, 2015), available at <https://www.epa.gov/sites/production/files/2015-04/documents/sepupdatedpolicy15.pdf>.

⁴ *Id.* at 11-16.

⁵ *Id.*

⁶ *Id.* at 1.

⁷ See 2015 EPA SEP Policy at 3 (finding SEPS can further EPA's mission to "protect public and the environment, which includes, but is not limited to, protecting children's health, ensuring environmental justice, promoting pollution prevention, encouraging the development of innovative technologies. . .and addressing climate change.").

⁸ See March 2020 Clark Memorandum at 3 (arguing that SEPs violate the Miscellaneous Receipts Act and the Antideficiency Act).

⁹ *Id.* at 2.

¹⁰ *Id.* at 16-18.

¹¹ Michael Phillis, "Enviros' Favored Settlement Tool May Be in DOJ's Sights," Law360 (Mar. 27, 2020), https://www.law360.com/environmental/articles/1257164/enviros-favored-settlement-tool-may-be-in-doj-s-sights?nl_pk=ff7cdb10-9f9a-4ece-a16f-239d22a68bc7&utm_source=newsletter&utm_medium=email&utm_campaign=environmental&read_more=1&attachments=true.

¹² *Id.*

¹³ "The Essential Role of Community Service in Addressing the Harm Caused by Environmental Crimes and Other Regulatory Offenses," Testimony of David M. Uhlmann before the U.S. House of Representatives Judiciary Committee Subcommittee on Regulatory Reform, Commercial, and Antitrust Law (Apr. 28, 2016), available at https://www.law.umich.edu/newsandinfo/Documents/Uhlmann_Testimony_Community_Service_Environmental_Crimes.pdf.

¹⁴ *Id.* at 7.

¹⁵ In his memorandum, Clark notes that he will next review the "use of SEP-like devices in the criminal sphere."

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