

Status of DOJ and EPA Policies on Supplemental Environmental Projects

By Gary Pasheilich

A critical tool in crafting settlement agreements in environmental enforcement cases with DOJ and U.S. EPA has been reauthorized.

There have been numerous policy changes at the U.S. Department of Justice (“DOJ”) and U.S. EPA during President Biden’s first term. Along with an increased attention to enforcement generally, the policies governing resolution of enforcement actions have likewise been reviewed and revised. Among these policies is the offices’ authorization of “supplemental environmental projects.”

In a standard settlement of an environmental enforcement case, DOJ and EPA require defendants to achieve and maintain compliance with federal environmental laws and regulations, remediate the harm or risk of harm caused by past violations, and pay a civil penalty. Supplemental Environmental Projects, or “SEPs,” are defined as “environmentally beneficial projects which a defendant agrees to undertake in settlement of an enforcement action, but which the defendant, or any other third party, is not otherwise legally required to perform.” Thus, the primary focus of a SEP is to obtain environmental benefits not otherwise provided for in a standard settlement. That being the case, SEPs may more directly address needs or issues of concern within the community. By conducting a SEP, a defendant can credit up to 80% of the costs of the SEP against its settlement.

SEPs cover a wide range of subject matter. For example, EPA has authorized projects such as riverbank restoration and preservation; distribution of emergency response equipment to local fire departments in order to address chemical releases; wood stove retrofit programs; residential property lead-based paint testing and remediation programs; stormwater retrofit programs to reduce discharges to target watersheds; installation of supplemental pollution control equipment to reduce particulate matter; solar projects on municipal buildings, and numerous others.

Settlements Involving DOJ

In late 2020, the Trump administration issued internal DOJ rules preventing the use of SEPs (arguing that SEPs violated the Miscellaneous Receipts Act). However, in May 2022, the Biden DOJ reversed the Trump-era rules banning the use of SEPs and rescinded related Trump-era policies. DOJ issued new guidelines for the use of SEPs that impose new limits on use, requiring that the project must have a “strong connection” to the underlying violation and be consistent with the underlying statute being enforced. The policy change was implemented in conjunction with a companion DOJ memorandum addressing the Administration’s environmental justice enforcement strategy, which emphasizes the use of SEPs directed towards environmental justice priorities.

EPA Settlements not Involving DOJ

While EPA generally followed DOJ's lead barring SEPs during the Trump administration, it retained the authority to include SEPs in administrative settlements that did not involve DOJ or a court. EPA's April 2021 memorandum clarified that SEPs may be used, but in a limited capacity in conjunction with DOJ's review of the SEP policy. At that time, the only SEP that EPA would authorize was the diesel emission reduction SEP, which is provided for by statute. However, in light of the release of the 2022 DOJ guidelines and the rescinding of the internal DOJ rules preventing the use of SEPs, EPA is no longer limited to just diesel emission SEPs. EPA currently posts the 2015 SEP guidance on its enforcement website.

For those parties subject to environmental enforcement, a SEP can provide an opportunity to craft a more appropriate resolution and offer an element of flexibility in settlement discussions with DOJ and EPA. Although a defendant will still need to make a requisite expenditure towards the SEP to resolve the case, the expenditure can be structured in a manner that reduces the financial impact to the defendant, and at the same time ensures that any SEP expenditures are directed towards meaningful environmental and public health benefits.

For more information, please feel free to contact any of Roetzel's EHS professionals.

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