

DOJ Formally Ends Use of Supplemental Environmental Projects in Settlements

Companies should be aware that Supplemental Environmental Projects (SEPs)—voluntary environmental or public health benefit projects in lieu of payment of civil penalties for violation of federal environmental laws—will no longer be available in discussions to resolve and reduce liability for environmental law violations as of March 12, 2020.

In a policy shift to narrow agency discretion in settlement of environmental violations, the Environment and Natural Resources Division (ENRD) of the U.S. Department of Justice (DOJ) issued a memorandum formally terminating its policy permitting the use of SEPs. Relying on potential separation of power concerns under the Appropriations Clause of the U.S. Constitution and Miscellaneous Receipts Act, 31 U.S.C. § 3302, the new policy builds on ENRD's August 21, 2019, memorandum barring SEPs in settlement with state and local governments. It supersedes and withdraws the ENRD's January 9, 2018, memorandum that excepted SEPs from DOJ's current prohibition on payment or loans to non-governmental third parties in settlements. Despite raising potential constitutional and policy concerns, the new policy states that it is not retroactive and does not affect prior settlements or oversight of SEPs being carried out under existing settlements.

What Does This Change in Enforcement Policy Mean for Companies?

As a result of this policy shift and absent congressional action to expressly allow the use of SEPs by ENRD, companies should prepare accordingly. This could include the following:

- **Navigating Potential Changes to Post-March 12/Ongoing Settlement Negotiations.** While the memorandum is not retroactive, it provides that from March 12 forward, ENRD attorneys negotiating consent decrees or compromise settlements in EPA cases should not include SEPs in those settlements. The memorandum acknowledges the disruption this new policy could have on existing cases where proposed settlements include SEPs. While the new policy simply provides guidance to ENRD, given the footnote reference that violations of the Miscellaneous Receipts Act could result in removal from office, there appears to be a high bar to negotiate inclusion of a SEP post-March 12—although time will tell how ENRD decides to implement this policy.
- **Changes to Existing Settlements.** The new policy states that it does not require the reopening of settlements that have already been signed or approved, but instead the policy is forward-looking. However, it is unclear how ENRD will address any changes or modifications to existing SEPs.
- **No Change to Payments That Directly Remedy Harm.** In a footnote, the policy memorandum states that this prohibition does not apply to payments that "*directly* remed[y] the harm that is sought to be redressed [in a case], including, for example, harm to the environment. . ." consistent with the attorney general's third-party payment prohibition policy. The memorandum construes the term "directly" strictly to refer to forms of injunctive relief intended to remediate the harm actually at issue in the matter under review. By way of example, the memorandum states that settlement provisions resolving Clean Water Act

Section 404 claims requiring payment to a mitigation bank, or funding or undertaking of projects to mitigate the actual harm caused by the underlying wetlands violation would not be affected by this policy.

- **Limited Reduction to Civil Penalties.** The policy shift will likely change how government lawyers work out and reach settlements with the private sector. Historically, SEPs have been used to mitigate civil penalties by letting parties perform environmentally beneficial projects in exchange for lower fines. However, the new policy takes this option off the table in settlement negotiations.
- **Effect to Non-ENRD Settlements.** It is unclear whether the policy will extend to EPA settlements that do not involve ENRD. For example, the March 12 policy provides that it is "intended to govern the staff of the United States Department of Justice, Environment and Natural Resource Division, in their handling of enforcement actions," however, it is unclear to what extent EPA will continue to use SEPs or will generally follow suit with the March 12 policy. EPA has not revoked its 2015 [SEP policy](#) with respect to administrative settlements.
- **Potential Changes to Criminal Penalties.** The March 12 memorandum concerns civil penalties but, in a footnote, indicates the use of SEP-like devices in the criminal sphere will be under review next.
- **Internal Environmental Audits/Safeguards.** Given this change in policy, companies may want to reevaluate internal environmental auditing policies and procedures and confirm environmental compliance safeguards are in place to assist with timely identification and resolution of potential violations.

Notwithstanding this change in policy, ENRD invites the U.S. Congress to provide further authorization and direction under the Miscellaneous Receipts Act or its authority under the Appropriations Clause. It remains to be seen whether Congress will take such action and given 2018 attempts by the U.S. House of Representatives to pass legislation to prohibit SEPs, such action to reverse ENRD's policy appears unlikely.

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Authors



[Stephanie M. Regenold](#)

Partner

SRegenold@perkinscoie.com [503.727.2000](tel:503.727.2000)

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