

Supplemental Environmental Projects: How Will New Federal Policy Affect Use of SEPs and CEPs in Pennsylvania?

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By Caleb J. Holmes | [September 24, 2019](#) | [The Legal Intelligencer](#)

On August 21, 2019, the Justice Department issued a memorandum—Using Supplemental Environmental Projects (“SEPs”) in Settlements with State and Local Governments—which curtails the use of supplemental environmental projects (SEPs) in consent decrees and settlement agreements with state and local governments. The new policy will directly impact settlements with municipalities in Pennsylvania, while also reducing the flexibility of settling parties in multi-party cleanups in which a municipal entity is a responsible party.

What are Supplemental Environmental Projects?

Supplemental Environmental Projects, or SEPs, permit a defendant to undertake an environmentally-beneficial project in lieu of paying penalties, or in exchange for reduced penalties. The projects may be incorporated as part of a consent decree or settlement agreement with any defendant, not only with state and local parties subject to the August 21, 2019 memorandum. The projects go beyond what is required by existing environmental laws, with the goal of achieving environmental and public benefits that otherwise would not be possible. SEPs must still relate to the underlying violation: they must be designed to reduce similar violations, reduce impacts to public health and the environment which the violation contributes to, or reduce the overall risk from such impacts.

Prior guidance emphasized strong support for the use of SEPs, while also highlighting Agency priorities that could be addressed through SEPs, including children’s health, environmental justice, innovative technology and climate change. EPA has identified seven categories of projects: (1) public health, (2) pollution prevents, (3) pollution reduction, (4) environmental restoration and protection, (5) assessments and audits, (6) environmental compliance promotion, and (7) emergency planning and preparedness. Projects that are *not* permissible as SEPs include, but are not limited to (1) general educational or public awareness projects, (2) contributions to research, (3) donations, (4) projects unrelated to environmental protection, and (5) projects over which the defendant does not retain full responsibility. SEPs must demonstrate a strong nexus between the violation and the project, and generally the SEP must have some connection to the contaminant and/or the harm caused by the violation.

EPA has been using SEPs since 1984, and has subsequently updated its Policy on the Use of Supplemental Environmental Projects in 1991, 1995, 1998 and 2015. The Policy identifies permissible projects, how SEPs may be incorporated into a settlement to satisfy EPA settlement criteria, and how to calculate penalty mitigation to reflect the project’s benefits.

Pennsylvania has developed a state version—Community Environmental Projects (CEPs). Pennsylvania defines a CEP as “[a] project which substantially improves, protects, restores or remediates the environment, or which improves, protects or reduces risks to the public health or safety.” The policy enables the Pennsylvania Department of Environmental Protection (DEP) to consider, in determining the amount of civil penalties to collect, the use of a CEP as an exercise of its enforcement discretion. DEP has also identified seven categories of acceptable CEPs, which generally overlap with the seven categories for SEPs identified by EPA.

As with EPA and SEPs, DEP may not actively solicit CEPs; instead, DEP may notify the person or regulated entity that a CEP may be an option. Also mirroring the policy of SEPs, DEP will generally not approve a CEP in situations in which the violation is intentional or the result of gross negligence, in which the harm is unusually extreme, or in which the entity has a poor compliance history.

Implications of Memorandum

The August 21, 2019 Memorandum precludes SEPs from being included in consent decrees and settlements with municipalities. The August 21 Memorandum continues the Trump Administration’s trend of limiting the applicability of SEPs.

In June 2017, the Department of Justice issued a memorandum entitled “Prohibition on Settlement Payments to Third Parties.” The 2017 memorandum prohibits payments to non-governmental, third-party organizations in settlement agreements. Although the existing SEP Policy already prohibits cash donations to third parties, the 2017 memorandum’s prohibition on “directing or providing” payment to third-party entities may limit previously allowable SEPs, including the purchase of renewable energy credits, the purchase and management of watershed areas, paying third parties to conduct remediation activities, and other SEPs that may rely on payments to third parties.

In November 2018, the Department of Justice issued a memorandum, which limits the use of settlement agreements and consent decrees with state and local governments. The memorandum’s unstated purpose was to limit the DOJ’s use of consent decrees to address police departments’ civil rights abuses. However, the policies have implications for all consent decrees with state or local governments. The memorandum requires, in some circumstances, the approval of the Deputy Attorney General or the Assistant Attorney General before engaging in negotiations for a consent decree with a state or local government. Furthermore, the memorandum requires a sunset provision—with a suggested 3-year maximum.

When taken together, these policies place substantial substantive and procedural impediments on, not just the use of SEPs by municipalities, but in reaching a settlement in many contexts. In many EPA enforcement situations, there are multiple responsible parties. Certainly not all parties must sign the same settlement agreement, but in practice reducing settlement flexibility for one party at a site will reduce the flexibility of all parties at a site, and will require additional work crafting separate settlement agreements and/or consent decrees.

The November 2018 memorandum could slow up any settlement at a site in which a state or local entity is a responsible party. In the context of multi-party environmental cleanups, adding additional roadblocks to reaching settlement—and ones that in practice will affect any settling entities, not just state and local entities—make a long, slow, difficult process that much more difficult. For the same reason, the SEP policy—while it explicitly only addresses settlements with municipal entities—in practice may limit the use of SEPs in multi-party cleanups.

In Pennsylvania, these issues will affect any federal site in which a municipal entity is a party. A tool that may be appealing to both plaintiffs and defendants has been removed in some instances, and made more difficult in others—i.e., multi-party sites in which there is a municipal defendant. The implication from that is that reaching settlement has just become more difficult in many circumstances.

In addition to that reduction in flexibility for the parties responsible for the environmental harms at sites around the Commonwealth, the Commonwealth also will no longer reap the public benefits reaped by SEPs. The benefits of an SEP must not just flow to the party performing the SEP; therefore, there must be a public benefit. Those public health and environmental benefits have now been foreclosed in some circumstances, and made much more difficult to achieve in others.

The Department of Justice's memorandum, of course, does not affect the availability of CEPs. Entities facing civil penalty enforcement by DEP, under the Air Pollution Act, the Clean Streams Law, or the Solid Waste Management Act, for example, may seek the use of CEPs to reduce penalties. Although CEPs have been available for some time, the fact that DEP issued its most recent policy in 2014 suggests that DEP has continued interest in parties exploring the use of CEPs.

The Department of Justice has enacted roadblocks for the use of SEPs in a broader way than perhaps it even intended. Despite those far-reaching implications, entities still may pursue SEPs—although settling parties may need to be more creative in crafting settlements—as well as CEPs. Going forward, both enforcement agencies and the regulated community must make additional efforts in order to complete these environmentally-beneficial projects.

About the Author:

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