



DOJ-ENRD Issues Policy Memorandum Ending Use of SEPs in Environmental Settlements

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On March 12, 2020, Jeffrey Bossert Clark, the Assistant Attorney General in charge of the Environment & Natural Resources Division of the U.S. Department of Justice (“DOJ-ENRD”) issued a policy memorandum formally ending the use of Supplemental Environmental Projects (“SEPs”) in civil settlement agreements negotiated by DOJ-ENRD. SEPs are an enforcement mechanism that have been used by EPA and DOJ-ENRD to allow settling parties to agree to perform environmentally beneficial projects in exchange for lowered or even waived monetary penalties. Typically, SEPs are projects intended to provide a tangible environmental or public health benefit and involve the same pollutant, violation, or public health effect that is the subject of the enforcement action, but are projects that could not be compelled by EPA and are not otherwise legally required. SEPs are thus intended to provide environmental benefits that go beyond compliance obligations.

SEPs have been in use since the 1980s, and have played a part in prominent environmental enforcement actions. For example, EPA recently settled an enforcement action against Volkswagen arising out of Volkswagen’s use of “defeat devices” to circumvent emissions testing for automobiles with diesel engines, resulting in pollutant emissions higher than the legal limits; a key component of that settlement was a SEP in the form of a multi-billion dollar mitigation fund that allocated money to states, the District of Columbia, and other jurisdictions to be used for projects that reduced the type of pollutants emitted by Volkswagen’s diesel engines. As recently as 2015, EPA revised its SEP policy – in collaboration with DOJ-ENRD – in order to encourage the use of SEPs and clarify EPA practices regarding their implementation. SEPs are also generally popular with industry, as they typically allow the payment of a smaller total penalty in exchange for an environmentally beneficial project.

However, SEPs have not been without controversy, and Clark’s memorandum details past efforts to rein in the use of SEPs. In 2017, the House of Representatives passed the “Stop Settlement Slush Funds Act,” which was aimed at preventing most or all SEPs and similar settlements of enforcement actions in non-

environmental fields, but the bill did not pass the Senate. In 2016, the Justice Department opposed passage of a similar bill, and no law has been passed that specifically prohibits SEPs. Now, however, Clark's memorandum asserts that SEPs are prohibited by the Miscellaneous Receipts Act, which requires federal officers who receive funds on behalf of the United States to deposit them in the Treasury, where they are subject to Congress's appropriations authority. EPA's SEP Policy contains guidance that seeks to address the Miscellaneous Receipts Act in several ways, including by requiring that EPA not play any role in managing or controlling funds for SEPs. But according to the Clark memorandum, these measures are insufficient, as SEPs by their nature simply substitute payments to third parties for payments to the Treasury, thereby circumventing Congress's Constitutional power of the purse.

While the debate over the appropriateness of SEPs will no doubt continue, for the present it appears that SEPs will no longer be a component of any civil settlements that involve DOJ-ENRD. However, it is important to note the limited scope of the Clark memorandum. First, it does not affect past settlements, so existing SEPs will remain in place, and it applies only to civil settlements, not settlements of criminal liability. Second, the memorandum explicitly exempts injunctive relief that directly addresses the environmental violation at issue (for example, funding of payments to a wetland mitigation bank as a means of resolving a violation of the Clean Water Act's prohibition on filling wetlands without a permit). Third, it does not appear to apply outside of DOJ-ENRD. EPA has its own administrative enforcement powers and, presumably, may continue to negotiate SEPs while utilizing those; in fact, it is possible that this will result in increased enforcement by EPA that does not involve DOJ-ENRD. It is also unclear whether the offices of the United States Attorneys will follow the Clark memorandum when settling environmental cases. Fourth, it does not apply to the states, which also implement environmental laws and frequently enter into settlements that include SEPs. And finally, Congress may also act to specifically authorize SEPs in the future. In fact, legislation passed in 2008 specifically authorizes SEPs for diesel emissions reduction such as the Volkswagen SEP; Congress could similarly authorize specific types of SEPs or SEPs as an enforcement mechanism more generally. All of these factors suggest that SEPs will likely continue to be used in settlements of environmental enforcement actions, although they will be more limited than they have been to date.

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