



## Bye, Bye SEPs

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The United States Department of Justice has terminated its policy of allowing companies to perform supplemental environmental projects (SEPs) in lieu of paying civil penalties for violations of federal environmental laws. The new policy was announced in a March 12, 2020 memo by Jeffrey Clark, Assistant Attorney General for the Environment and Natural Resources Division (ENRD). The policy does not, however, affect SEPs that are already approved under a Consent Decree.

SEPs are environmentally beneficial projects included as part of a settlement with EPA or a state environmental agency for alleged violations of environmental laws. They are voluntary projects that, by definition, cannot be compelled or required, and they are in addition to what the alleged violator is required to do to come back into compliance. Under EPA and state SEP policies, an alleged violator will generally pay lower civil penalties if it voluntarily agrees as part of a settlement to undertake a SEP closely related to the violations being resolved. In this way, SEPs can provide benefits to citizens and the environment that go above and beyond those otherwise expected under the law

The recent death of SEPs is the culmination of a concern within DOJ about the use of settlements to make payments to third parties. That concern began in 2017 and was addressed by DOJ policies issued in 2017 and 2018 prohibiting such payments. At the time, SEPs were excepted from these policies.

That changed to a degree in August 2019 when Mr. Clark issued a memo to ENRD attorneys. The memo expressed concern that SEPs were being misused in Clean Water Act settlements with local governments over alleged violations at their wastewater treatment plants. It noted that the Attorney General had issued a directive in November 2018 prohibiting settlements with municipalities if the settlement extracts a form of relief that could not be obtained from litigating the alleged violations to judgment. SEPs fall into that category. The memo went on to say that SEPs appear to intrude on local government accountability by allowing local governments to commit to funding projects not otherwise authorized by local laws. The memo concluded by saying that, going forward, any CWA settlements with local governments that included a SEP would be subject to “close, case-by-case scrutiny.”

Although not addressed in the memo, an unstated concern and the reason for increased scrutiny was that environmental groups were using SEPs as a means to accomplish pet projects. The allegation was that environmental groups would file a citizen suit against a local government, and then the (often friendly) local government would agree to a settlement that involved funding a project desired by the environmental groups.

In the March 2020 memo doing away with SEPs across the board, DOJ noted that such “in-kind payments in exchange for a reduction of a penalty are as problematic as direct cash payments to third parties.” DOJ also noted that EPA’s SEP policy allowed defendants to reduce their civil penalties by as much as 80% in return for performing a SEP. This, said DOJ, circumvents the Miscellaneous Receipts

Act, a statute that prevents money from settlements with the United States from being diverted to third parties.

This action was not unexpected. The Trump Administration has long contended that the Obama Administration looked the other way while environmental groups put pressure on companies and local governments to use SEPs to fund Environmental Groups' projects. Still, it seems likely that SEPs are not gone forever. A future administration could very well bring them back because SEPs have widespread support on both sides of the aisle.

EPA has used SEPs for years in its administrative settlements, and DOJ's new policy does not bind EPA. So does that mean EPA will keep using SEPs? The agency has not said anything official yet, but we doubt it. That's a shame because SEPs can provide real environmental benefits when used correctly. With this said, though, we expect many states will continue using SEPs in state enforcement actions as long as they are legally able to do so.

[\*Supplement Environmental Projects in Civil Settlements With Private Defendants\* Memorandum by Jeffrey Bossert Clark, Assistant Attorney General \(March 12, 2020\).](#)

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