
DOJ Directive Threatens Availability of Penalty Mitigation Approach

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A June 5, 2017, Department of Justice (DOJ) [policy directive](#) threatens the ongoing availability of Supplemental Environmental Projects (SEPs) in civil environmental settlements. SEPs have traditionally provided a means by which regulated entities may receive penalty mitigation for committing to projects related to the underlying violation and that result in a net environmental benefit. Based on the directive, DOJ is expected to issue guidance that could limit or eliminate the use of that important tool. Businesses should be on the lookout for follow-up guidance issued by DOJ and how it may implicate settlement negotiations in environmental cases.

The Announcement

“Effective immediately,” Attorney General Jeff Sessions announced in the directive, “Department attorneys may not enter into any agreement on behalf of the United States in settlement of federal claims or charges, including agreements settling civil litigation, accepting plea agreements, or deferring or declining prosecution in a criminal matter, that directs or provides for a payment or loan to any nongovernmental person or entity that is not a party to the dispute.”

Although not explicitly identified in the directive, SEPs are likely to be affected by its broad prohibition against payments to third parties. The directive includes a narrow exception for payments that “directly remed[y] the harm that is sought to be redressed” by settlement, including environmental harm, but that exception likely extends to only a small subset of the projects previously eligible for treatment as SEPs. Agreements where alleged violators pay third parties to conduct environmentally beneficial projects which have a nexus to, but do not address directly, the underlying violation may not fall within that exception.

Background

The US Environmental Protection Agency (EPA) SEP Policy was developed with input from DOJ to provide an alternative approach to settle environmental cases, primarily under the Clean Air Act and the Clean Water Act. The policy dates to the 1990s and has been updated several times, [most recently in 2015](#).

SEPs are typically performed or overseen by regulated entities, and sometimes performed by third parties on behalf of the alleged violator. EPA's SEP Policy requires that a project qualify in at least one of eight categories: public health, pollution prevention, pollution reduction, environmental restoration and protection, emergency planning and preparedness, assessments and audits, environmental compliance promotion, and "other" projects that have environmental benefits and meet all other criteria for EPA approval. State SEP policies typically have similar categorical requirements. Neither actions taken to comply with environmental law nor previously planned facility upgrades qualify as SEPs.

Use and Benefits of SEPs

SEPs have become firmly entrenched in federal settlement policy and in settlement policies and practices of the majority of states.

EPA tracks the value of SEPs performed, and the expected cost of a particular SEP is often a term of settlement. EPA estimates that since 1998, it has negotiated SEPs with more than \$1 billion in total value.¹

State authorities often favor SEPs because the projects directly benefit communities, improve human health, and contribute to local economies. For example, to resolve claimed waste disposal violations, a Massachusetts town created a "hazardous waste collection day" as part of a settlement with the commonwealth, and to address alleged impacts to wetlands, a golf course developer funded construction of several tidal marshes and osprey nest platforms as part of a settlement with New Jersey.

In many instances, SEPs provide tangible benefits beyond what could be achieved through compliance with environmental law. Pollution abatement technologies have enjoyed particular success in the SEP context, with many facilities committing to adopting such controls earlier or more extensively. Businesses often favor SEPs in conjunction with the payment of penalties because of the positive message often associated with such projects.

What About Penalties?

SEPs do not take the place of penalties, and performance of a SEP should not be misconstrued as a "get out of jail free" card. Settlements that include a SEP must always include a penalty commensurate with the gravity of the violation, and must also account for any economic benefit a violator gained from noncompliance with the law. However, performing a SEP can serve to mitigate the overall penalty amount imposed on a company.

A SEP must include an element of environmental benefit; it is not simply a substitute cash payment for a penalty. Under EPA's SEP Policy, "[c]ash donations to community groups, environmental organizations, state/local/federal entities, or any other third party" do not qualify as SEPs. However, providing funding to third parties to perform environmental projects, purchasing environmental credits, or making other environmentally beneficial investments have in the past qualified as acceptable parts and/or forms of SEPs.

With or without SEPs, the regulated community will continue to seek to minimize penalty amounts in civil settlements, but SEPs provide private entities and the government with an element of flexibility. Exactly what DOJ says in any future guidance, and how the Department chooses to implement Attorney General Sessions' announced settlement policy, will influence the continued viability of that tool.

Conclusion

The performance of SEPs has generated goodwill for many companies, as well as significant environmental, community and human health benefits. Widespread use of SEPs as a feature of civil environmental settlement agreements has fostered collaboration between regulators and the business community, and realigned some settlement discussions to focus on community needs and potential environmental benefits, in addition to the assessment of penalties. Depending on how DOJ implements the Attorney General's directive to limit the use of SEPs, it could present a dramatic shift in the way regulators and the regulated community have approached environmental settlements for decades. Businesses, NGOs and communities all will be watching as DOJ develops SEP-specific guidance.

¹ See EPA compliance reports: archive.epa.gov/enforcement/annual-results/web/pdf/eoy2002.pdf, archive.epa.gov/enforcement/annual-results/web/pdf/eoy2005.pdf, archive.epa.gov/enforcement/annual-results/web/pdf/eoy2012.pdf, www.epa.gov/sites/production/files/2016-12/documents/fy16-enforcement-annual-results-data-graphs.pdf#page=13.

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