

DOJ Returns to Using Supplemental Environmental Projects Including to Mitigate Harms to EJ Communities

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On May 5, 2022, the US Department of Justice (DOJ) announced its new environmental justice (EJ) strategy, which has been a priority to the Biden Administration.

While the strategy is comprehensive and involves many federal actions and agencies, as [previously discussed](#) in our blog, one initiative deserves specific attention: DOJ's long-anticipated reintroduction of supplemental environmental projects (SEPs) as part of environmental enforcement action settlements.

For 30 years, SEPs were used to allow settling parties to mitigate a portion of a civil penalty in exchange for performance of environmentally beneficial projects. They were highly favored by government enforcement teams, the regulated community, and the local communities that benefited from these projects. However, during the Trump Administration, [DOJ issued two memorandums](#) that established a comprehensive policy decision to disallow SEPs use in any settlements.

While reinstating the use of SEPs as a means of achieving equitable settlements has been on the Biden Administration's radar for some time, reintroducing the use of SEPs required a somewhat complicated process. In December 2020, the Trump Administration issued a "Midnight Rule" codifying DOJ's decision to disallow SEPs in settlements at 28 C.F.R. § 50.28, meaning that the Biden Administration must go through a formal rulemaking to revoke the Trump-era policy. The Biden Administration, as part of its comprehensive EJ policy, is doing just that by [rescinding](#) the previous DOJ memorandums and publishing an [Interim Final Rule](#) to rescind 28 C.F.R. § 50.28 and invite public comment on the new policy.

Supplemental Environmental Projects

SEPs are a tool settling parties may use to mitigate a portion of a civil penalty in exchange for performance of environmentally beneficial projects. These projects typically benefit the local community that was negatively impacted by the underlying violation. SEPs help further the aims of

federal environmental laws by working to directly remedy the harms to communities most affected by violations of those laws.

While SEPs are again permissible, the new SEP policy adds new guidelines for their use, differing from pre-Trump Administration practices. The goal of these additional requirements is to ensure that the SEPs are not being used to inappropriately fund projects unrelated to the harm involved in the underlying enforcement action. These requirements include:

- Defining the SEP with particularity regarding its nature and scope;
- Requiring the SEP to have a strong connection to the underlying violation, including that the SEP must advance at least one of the objectives of the statute underlying the dispute;
- Prohibiting DOJ from proposing the selection of any particular third party to receive payments to implement any SEP carried out under a settlement;
- Prohibiting the use of an SEP to satisfy any statutory obligation of the DOJ or another federal agency; and
- Prohibiting a settlement to require payments to a non-governmental third party solely for public education or awareness projects or solely in the form of contributions for generalized research or unrestricted cash donations.

DOJ made clear in its recent [EJ-focused announcement](#) that it will prioritize cases where environmental violations have effected overburdened communities. In a statement, US Attorney General Merrick B. Garland [said](#) that “[a]lthough violations of our environmental laws can happen anywhere, communities of color, indigenous communities, and low-income communities often bear the brunt of the harm caused by environmental crime, pollution, and climate change.”

SEPs can be a great tool to begin to right wrongs occurring in overburdened communities and provide the opportunity for the community to receive some measure of direct justice to compensate for a past environmental violation.

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National Law Review, Volume XII, Number 129

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