

DOJ Puts Supplemental Environmental Projects Back on the Negotiating Table

Alert

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The Biden administration hit the ground running on its initiative to “confront the climate crisis.” On January 20, 2021, President Biden signed Executive Order 13,990 (EO), which directed all federal agencies to “immediately review, and as appropriate and consistent with applicable law, take action to address” any agency actions taken during the previous four years that conflicted with the new administration’s environmental policy.

Yesterday, responding to the EO directive, the U.S. Department of Justice’s Environment and Natural Resources Division (ENRD) withdrew several 2018-2021 policy documents which had established the prior administration’s enforcement priorities and settlement policies. Specifically, ENRD overturned documents which had [forbidden the use of Supplemental Environmental Projects \(SEPs\)](#) as a tool in settling environmental liability, despite the long-standing policies of the U.S. Environmental Protection Agency (EPA) favoring SEPs. Since 2019, EPA had interpreted the now-overturned documents as preventing EPA from considering SEPs in both judicial and administrative enforcement actions.

Since the repeal takes effect immediately, private parties and state and local governments may, once again, consider the option to fund local environmental projects to offset a portion of a proposed federal penalty when negotiating potential liability with EPA. EPA’s 2015 SEP Policy clarifies that to qualify for partial settlement of an enforcement action, the SEP proposed must: (1) be an action the facility is not legally required to perform; (2) improve, protect, or reduce risks to the public health or the environment; (3) benefit the community affected by the alleged violations; and (4) have a nexus to the alleged violation and specific human or environmental health concerns at issue.

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Reinstating the SEP Policy revives the ability of businesses facing environmental penalties to work with EPA to use some of the funding to implement an environmentally beneficial project that could improve energy efficiency, promote renewable energy projects, prevent pollution, or address issues related to environmental justice—providing direct benefits to the local community beyond the facility's return to compliance.

The return of SEPs could be a positive change for both businesses and the environment, and, while not cited in the ENRD memo, can be directly related to EPA's environmental justice platform.

Our team is experienced in negotiating environmental settlements and working with clients to develop SEPs. We are equipped to handle your most complex environmental concerns with an eye toward the regulatory changes of the future.

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