

DOJ Terminates Use of Supplemental Environmental Projects

Alert

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On March 12, 2020, the U.S. Department of Justice's Environment and Natural Resources Division (ENRD) published a memorandum that ceases the future use of Supplemental Environmental Projects (SEP) in settlement agreements to resolve federal civil enforcement actions. Prior to this memo, SEPs were a very common enforcement tool allowing private parties to develop and implement environmentally beneficial projects to defer a portion of civil penalties. The memo follows up an August 2019 ENRD memo concluding that Congress did not authorize the use of SEPs and promising a more comprehensive review of the SEP policy.

The memo finds the use of SEPs inconsistent with the law and a departure from sound enforcement practices. It also conveys ENRD's position that SEPs contravene principles prohibiting diversion of funds away from the Treasury Department (where mitigated penalties would otherwise be paid), and violates public policy by "generating goodwill by funding projects benefitting some portion of the communit[y]" in contrast to the "cold reality of paying a monetary fine to the Treasury."

The memo applies to DOJ and ENRD. It is not clear whether the Environmental Protection Agency will act consistent with the memo and stop using SEPs as part of administrative settlements that do not involve ENRD approval. The memo is effective immediately, but does not impact prior settlements that include SEPs.

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