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Environmental Law Alert - Same Tune, New Steps: Dancing Through U.S. EPA's Update To Its Policy On Supplemental Environmental Projects

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Settling federal environmental enforcement actions is one of the most important environmental legal challenges faced by regulated entities, be they multi-national corporations, small family businesses, public institutions, individuals, or municipalities. Regulated entities seeking amicable and optimal settlements with the U.S. Environmental Protection Agency (EPA) and Department of Justice (DOJ) must navigate complex substantive and procedural issues, negotiate stipulated penalties, monetary penalties, response costs and damages, and injunctive relief, and always account for financial assurance, insurance, monitoring, potential third-party claims, and other requirements that structure the parties' post-settlement relationship. In short, the dance steps are multifarious and multifaceted - and your dance partner may not always appear to be the most coordinated or cooperative.

That said, one particular corner of federal environmental enforcement policy provides an opportunity to generate 'win-win' components of a settlement and create real environmental value for affected communities - Supplemental Environmental Projects (SEPs).

As explained by the EPA, a SEP "is an environmentally beneficial project or activity that is not required by law, but that a defendant agrees to undertake as part of the settlement of an enforcement action." As part of resolving either administrative or judicial enforcement actions, a defendant may perform a SEP to offset a portion of the monetary penalty imposed, and, in doing so, can redirect penalty funds from general federal coffers to confer real environmental benefit to the affected community and improve relations with regulators and the public.

SEPs have long been available in federal environmental enforcement settlements, however, EPA guidance and policies applicable to SEPs have historically been scattered throughout a number of interrelated (and not always seamlessly interlocking) documents issued by various offices over the past two decades. The underlying policies have been characterized by various connected and complicated analyses, distinct lines of DOJ and EPA approvals (both at the Region and Headquarters and from various program offices), different sets of required and precluded project characteristics, and tangential legal restrictions derived from both environmental and fiscal federal laws and regulations. With an already complicated policy further obfuscated by its embodiment in scattered Agency sources, SEPs are likely under-utilized.

This dispersion and diversion of Agency instruction on SEPs has, thankfully, come to an end.

On March 10, EPA's Office of Enforcement and Compliance Assurance

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(OECA) issued a memorandum entitled "[2015 Update to the 1998 U.S. Environmental Protection Agency Supplemental Environmental Projects Policy](#)," (the "SEP Policy Update"). Lest there be any confusion, the SEP Policy Update does not fundamentally change the approval analyses or substantive requirements for acceptable SEPs. Nor does it change in any dramatic way the underlying dynamics that will render a SEP workable and desirable in a given settlement context.

The SEP Policy Update is framed as "[c]onsolidating the wealth of existing SEP guidance," and in that capacity alone it is of great value. The consolidation and organization of SEP policy and guidance documents is especially helpful on this issue because the possible use of SEPs in any given settlement is frequently only raised during more advanced stages of negotiation, and often in relation to specific monetary penalty proposals that EPA and DOJ choose to provide once other terms are negotiated. As such, delays or debates over how Agency policy should apply to potential SEP proposals can derail agreements or cause parties to abandon potentially fruitful, if administratively complicated, SEPs.

The SEP Policy Update goes further than simply collating existing documents; rather, it improves and explains Agency policy on SEPs in several important respects:

- For the first time, the SEP Policy Update specifically instructs EPA case teams to suggest SEP ideas to defendants and encourages more proactivity among EPA and OJ attorneys in channeling community input on possible SEPs.
- The SEP Policy Update expressly identifies USEPA priority areas that should be targeted for favorable SEP treatment by the Agency, including children's health, Environmental Justice, pollution prevention, innovative technology, and climate change.
- There are robust and detailed (if somewhat overlapping) provisions related to SEP "implementers" and "recipients" – third parties that may, under certain circumstances, be involved in carrying out the SEP. As before, the settling party must always remain ultimately liable for SEP performance since the SEP will reduce the monetary payment that must be paid.
- More detailed respondent certifications relating to information provided about the SEP to evaluate its appropriateness and worth under the SEP Policy are explained and required in settlement documentation.
- The SEP Policy Update offers a nuanced menu of SEP stipulated penalty provisions and model settlement provisions that may be used to require a SEP in lieu of a monetary stipulated penalty as to compliance with other settlement agreement provisions in limited circumstances.
- The SEP Policy Update walks through issues arising from SEPs performed in multi-defendant cases and the implementation of interlocking SEPs required under separate settlements with distinct defendants.
- The SEP Policy Update retains and explains specific SEP policies applicable to particular types of cases, such as Clean Water Act

settlements with municipal entities.

The SEP Policy Update is an important, if under-appreciated, achievement by EPA. Simply consolidating and tightening the diffuse and cumbersome universe of all relevant Agency policies related to SEPs is a boon to both regulator and regulated - it provides an authoritative source to guide SEP negotiations and hopefully expedite and encourage the use of this beneficial and dynamic enforcement settlement tool. Better still, the SEP Policy Update clarifies and hones the Agency's policies in several important ways that should render SEPs more targeted, impactful, accessible, and useful than ever before.

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