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United States Environmental Protection Agency (EPA) issues guidance to clarify supplemental environmental projects (SEP) settlement policies

On March 10, 2015, the United States Environmental Protection Agency (EPA), through Assistant Administrator Cynthia Giles, issued the “2015 Update to the 1998 United States Environmental Protection Agency Supplemental Environmental Projects Policy” (the “2015 Guidance”). This guidance is important to any party that may negotiate a settlement with the EPA where the party may be able to propose a “supplemental environmental project,” or SEP, as a tool to reduce the financial penalty the party would otherwise need to pay.

The link to the 2015 Guidance is: <http://www2.epa.gov/sites/production/files/2015-04/documents/sepupdatedpolicy15.pdf>.

EPA has stated that the goal of the 2015 Guidance is to “facilitate and streamline the inclusion of SEPs in civil enforcement settlements whenever appropriate.” EPA has also specifically identified four priorities it wishes to promote through the policy: children’s health, environmental justice, innovative technology and climate change. The 2015 Guidance provides clarity and structure for the use of SEPs, and also may well influence the opportunity to use alternative actions in settlements at the state level. SEPs can be a win-win-win for (i) the EPA (which can recognize positive attention to select causes), (ii) the regulated party (who can do well (saving in the payment of forfeitures) while doing good), and (iii) the environment and public, who benefit from the effects of the SEP.

A SEP is defined by the EPA as “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.” EPA states in the recently promulgated guidance that “SEPs are projects or activities that go beyond what could legally be required in order for the defendant to return to compliance, and secure environmental and/or public health benefits in addition to those achieved by compliance with applicable laws.”

When a violation of an environmental law is subject to enforcement by the EPA, the agency’s range of actions to address the violation include requiring the violator to come into and achieve continuing compliance with applicable law, taking action to address any harm caused by the violation(s), and paying a civil penalty. These violations may become known to the EPA through various means, including by an EPA inspection of the violator’s operations or by a regulated party’s voluntary disclosure of the condition following a self-audit (see <http://www.epa.gov/region05/enforcement/audit/> for further information).

Beginning in 1998, EPA agreed to consider and accept the performance of SEPs that could be justified as promoting environmental and public health benefits as a component in the overall settlement of a civil enforcement matter. EPA’s 1998 SEP policy has served as the roadmap

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for many years of settlements, but during that time, EPA's priorities have evolved. Likewise, the opportunities to realize positive impact from SEPs on the areas of priorities identified by the agency have increased over these years.

To qualify as a SEP, a project must be "environmentally beneficial," meaning that it must "improve, protect, or reduce risks to public health or the environment." A project only qualifies as a SEP if the regulated party commits to perform the action in a legally enforceable settlement document, the EPA has had the opportunity to review and comment on the action before it is performed, and the action is not performed until after the violation is known to the agency. Finally, a defendant cannot have another legal burden to perform the action that is proposed as a SEP.

In addition to the foregoing underlying criteria, any SEP must have a "sufficient nexus" to the underlying violation, and may not be inconsistent with any provision of the statutes that are the basis of the related enforcement action. Ideally, a SEP will reduce the likelihood that similar violations will occur in the future and will reduce the public health and environmental impacts and risks that the violation otherwise caused.

As stated in the 2015 Guidance, the specific areas for which EPA seeks particular attention in proposed and approved SEPs include:

- *Children's Health.* Pursuant to a 1997 Executive Order, each federal agency must "identify and assess environmental health risks and safety risks that may disproportionately affect children . . ." Therefore, the recently promulgated guidance states that "projects that reduce children's exposure to, or health impacts from, pollutants, and/or that reduce environmental risks to children in the community impacted by a violation are actively sought and encouraged" through SEPs.
- *Environmental Justice.* Environmental justice is defined as "the fair treatment and meaningful involvement of all people, regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations and policies." To achieve environmental justice, parties settling environmental enforcement matters are encouraged to consider SEPs in communities with environmental justice concerns.
- *Pollution Prevention.* According to the Pollution Prevention Act of 1990, pollution "should be prevented or reduced at the source whenever feasible; pollution that cannot be prevented should be recycled in an environmentally safe manner, whenever feasible; pollution that cannot be prevented or recycled should be treated in an environmentally safe manner whenever feasible; and disposal or other release into the environment should be employed only as a last resort." Therefore, a proposed SEP that will effectively develop and implement pollution prevention techniques and practices will be favorably received by EPA.
- *Innovative Technology.* EPA also wants to encourage SEPs that "develop and demonstrate new technologies that may prove more protective of human health and the environment than existing processes and procedures." Such approaches "can assure that future industry and other commercial practices are sustainable, reflect the best available technology, and lead to continued long-term pollution reductions and improved public and environmental health."
- *Climate Change.* Projects that address the causes of climate change and reduce or prevent emissions of climate change pollutants and greenhouse gases, such as carbon dioxide, may qualify as SEPs. The 2015 Guidance seeks to create incentives to reduce greenhouse gas emissions through energy efficiency projects that "reduce emissions by reducing energy demand can contribute to reducing climate change."

In addition to these target priority areas, a project may qualify as a SEP if it falls into one (or more) of the following seven categories, or in the additional catchall "other" category (as long as a defendant can justify the "environmentally beneficial" nature of the legally enforceable action).

1. *Public Health.* Public health projects "include those that provide diagnostic, preventative and/or health care treatment related to the actual or potential harm to human health caused by the violation."
2. *Pollution Prevention.* As stated previously, a pollution prevention project includes any practice that reduces the quantity and/or toxicity of pollutants entering a waste stream prior to recycling, treatment or disposal.
3. *Pollution Reduction.* A pollution reduction project is one "which results in a decrease in the amount and/or toxicity of any hazardous substance, pollutant or contaminant entering any waste stream or otherwise being released into the environment by an operating business or facility by a means which does not qualify as 'pollution prevention.'"

4. *Environmental Restoration and Protection.* An environmental restoration and protection project is one “which enhances the condition of the ecosystem or immediate geographic area adversely affected by the violation.”
5. *Assessments and Audits.* EPA recognizes three types of projects in the assessments and audits SEP category: (a) pollution prevention assessments (systematic, internal reviews of specific processes and operations designed to identify and provide information about opportunities to reduce the use, production and generation of toxic and hazardous materials and other wastes); (b) environmental quality assessments (investigations of: (i) the condition of the environment at a site not owned or operated by the defendant; (ii) the environment impacted by a site or a facility regardless of whether the site or facility is owned or operated by the defendant; or (iii) threats to human health or the environment relating to a site or a facility regardless of whether the site or facility is owned or operated by the defendant); and (c) compliance audits (independent evaluations of a defendant’s compliance status with environmental requirements at a given point in time (note that credit is only given for the costs associated with conducting the audit, while no credit is given for remedying the violation since there is already a requirement to achieve and maintain compliance with environmental regulations)). These assessments and audits are only acceptable as SEPs when the defendant agrees to provide the EPA with a copy of the report and the results are made available to the public, except to the extent they constitute confidential business information.
6. *Environmental Compliance Promotion.* An environmental compliance promotion project “provides training or technical support to other members of the regulated community in order to: (a) identify, achieve, and maintain compliance with applicable statutory and regulatory requirements or (b) go beyond compliance by reducing the generation, release, or disposal of pollutants beyond legal requirements.”
7. *Emergency Planning and Preparedness.* An emergency planning and preparedness project provides assistance, through equipment and training, to a responsible state or local emergency response or planning entity.
8. *Other Types of Projects.* Projects that do not fit within one of the seven categories above, but have environmental and/or public health benefits and are otherwise fully consistent with all other provisions of the Policy may nevertheless qualify as SEPs.

Certain projects are never eligible as SEPs, including, without limitation: general public educational or public environmental awareness projects; contributions to environmental research at a college or university; cash donations to community groups, environmental organizations, state/local/federal entities or any other third party; projects for which the defendant does not retain full responsibility to ensure satisfactory completion, projects which, though beneficial to a community, are unrelated to environmental protection; studies or assessments without a requirement to address the problems identified in the study; projects funded with federal loans, federal contracts, federal grants, or other forms of federal financial or non-financial assistance; projects that are expected to become profitable to the defendant within the first five years of implementation; projects that provide raw materials only; and actions that a third party is legally required to perform by any federal, state, or local law or regulation.

The 2015 Guidance identifies the following critical factors for EPA to consider in agreeing to include a SEP to mitigate the civil penalty otherwise owing by the violator: (a) the significant and quantifiable reduction in impact to the environment and reduction in risk to public health; (b) the environmental justice benefits; (c) community input; (d) the use of innovative processes, technologies and/or methods which reduce pollutants, conserve natural resources, restore and protect ecosystems, protect endangered species, promote compliance, or improve climate change preparedness and resilience; (e) the ability of the proposed project to “reduce emissions to more than one medium and ensure that pollutant reductions are not being achieved by transferring pollutants from one medium to another;” and (f) how the SEP will “develop and implement pollution prevention techniques and practices that reduce the generation of a pollutant.”

Most importantly, the 2015 Guidance sets forth the process by a SEP will affect the potential penalty otherwise available. Noting that “penalties promote environmental compliance and help protect public health by deterring future violations by the same violator and other members of the regulated community . . . [and] help maintain a national level playing field,” the 2015 Guidance states that:

Settlements that include a SEP must always include a settlement penalty that recoups the economic benefit a violator gained from noncompliance with the law, as well as an appropriate gravity-based penalty reflecting the environmental and regulatory harm caused by the violation(s). SEPs are not penalties, nor are they accepted in lieu of a penalty. However, a violator’s commitment to perform a SEP is a relevant factor for the EPA to consider in establishing an appropriate settlement penalty. All else being equal, the final settlement penalty will be lower for a violator who agrees to perform an acceptable SEP, compared to the violator who does not.

In settlements in which defendants commit to conduct a SEP, and with limited exceptions, the final settlement penalty must equal or exceed the greater of either:

- a. The economic benefit of noncompliance (i.e. what the violator avoided paying during its period of noncompliance) plus 10 percent of the gravity component; or
- b. 25 percent of the gravity component of the penalty only (the “gravity component” includes such considerations as the scope of the violation, harm to the environment, efforts to comply and ability to pay).

The amount of penalty mitigation given for a SEP should not exceed 80 percent of the estimated cost to implement the SEP. Penalty mitigation in light of a SEP is within the EPA’s discretion; there is no presumption as to the correct amount of mitigation.

EPA does identify certain exceptions to general penalty mitigation approach, specifically: for defendants that are small businesses, government agencies or entities, or non-profit organizations, or, for any defendant, if the SEP implements pollution prevention technologies or practices which reduce or eliminate the generation of a pollutant at its source, the penalty mitigation credit may be set as high as 100 percent of the estimated SEP cost if the defendant can demonstrate the project is of outstanding quality. In addition, where a SEP provides significant benefits to a community with environmental justice concerns, EPA may give higher penalty mitigation credit for projects of outstanding quality.

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In any enforcement action where the EPA is seeking civil forfeitures, the defendant/violator/settling party should seek to utilize a SEP or SEPs as a means of reducing the monetary outlay component of the settlement. The 2015 Guidance on use of SEPs should enable broader use of SEPs because it better clarifies the agency’s goals and preferences in employing SEPs.

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