

DOJ's Cautious Return To Supplemental Enviro Projects

By **Aaron Flyer, Timothy Webster and Justin Savage** (June 1, 2022)

On May 5, U.S. Attorney General Merrick Garland lifted the U.S. Department of Justice's ban on negotiating supplemental environment projects, or SEPs, with defendants as a part of settlements of alleged violations of federal environmental laws in civil and criminal judicial cases.[1]

While the Trump administration limited, and then prohibited, the use of SEPs to settle civil and criminal environmental enforcement cases, the DOJ's new SEP guidance aims to restore past practices that had been in place for decades.

Yet the process and delay around this announcement suggest that SEPs may be limited under the Biden administration. In this article, we discuss the key points of the DOJ's new SEP policy.

What the Policy Does and Does Not Do

Garland's announcement directs the DOJ to revise the Justice Manual to allow for the use of SEPs involving nongovernmental organizations in civil and criminal environmental enforcement settlement negotiations, subject to certain limitations discussed below. Relatedly, the department has also issued an interim final rule revoking the midnight Trump regulation banning such SEPs.[2]

The announcement and associated policy restores the DOJ's discretion to consider SEPs in appropriate cases, but it does not mandate them in any particular case. The substantial delay in Garland's announcement, coupled with certain procedural requirements for approval, suggest that the department may be hesitant in approving SEPs.

Furthermore, as discussed below, the policy does not apply to purely administrative settlements with the U.S. Environmental Protection Agency, nor does it impact the many state and local environmental agencies that have used SEPs as a settlement tool for years.

Like the Trump administration's ban on SEPs, the new policy and associated interim final rule are focused specifically on SEPs with NGOs, and not other forms of SEPs — such as SEPs performed directly by defendants, or those that benefit governmental entities. But the implication is that all forms of SEPs are back.

Effective Date of the Policy and Potential Challenges

Although the policy is effective immediately, the DOJ chose to offer public comment on the associated interim final rule. That step is surprising, because the Trump administration's midnight rule banning SEPs was never subject to public comment, under the theory that it stated only "agency organization, procedure, or practice" exempt from prior notice and comment under the Administrative Procedure Act.



Aaron Flyer



Timothy Webster



Justin Savage

Regardless, it is difficult to imagine a member of the public having standing to challenge the interim final rule, when all it states is a policy making it possible in some future case that a SEP would be memorialized in a settlement or plea subject to judicial approval.

In view of these circumstances, the call for public comment — and associated continuing delay — suggests an administration that takes a fairly conservative view of litigation risk.

Of course, someone might try to challenge a case-specific use of SEPs in a settlement or plea. Because a defendant must consent to inclusion of a SEP in a civil or criminal settlement, only a third party would be able to challenge use of a SEP — and it is hard to know how such an entity could establish standing to do so, and otherwise meet the criteria for intervention in the matter at issue.

Most opposition to SEPs is likely to be less formal, i.e., adverse comments during a public comment period on proposed consent decree that includes a SEP.

The Trump administration's official position in prohibiting the use of SEPs was based on the argument that conferring a benefit to an NGO, whether through cash or in-kind payment, violated the Miscellaneous Receipts Act, which requires any funds received on behalf of the U.S. to be deposited into the Treasury.[3]

That administration was also concerned that SEPs were improper policy as they allocate budgetary discretion to officials not officially designated to do so. The undertone was also that SEPs created slush funds that environmental groups critical of the administration could use to pursue their own agendas.[4]

Ultimately, the new policy itself and future SEP projects appear to be on solid legal footing. The DOJ imposes limitations on the use of SEPs, as discussed below, which preclude line lawyers from forcing defendants to write blank checks to environmental groups or creating an unrestrained enforcement tool outside the agency's statutory authority — all of which are consistent with historical policies and practice.

SEPs are often seen as a win-win for all parties involved, and many courts would be loath to upset a practice supported by decades of bipartisan support, prior to the Trump administration.

The DOJ's New Limitations on SEPs

The new policy includes the following express limitations on the department's use of SEPs:

- Settlement agreements "shall define with particularity" the nature and scope of the SEPs that a defendant has agreed to fund;
- SEPs must have a "strong connection to the underlying violation" of federal law at issue and "advance at least one of the objectives" of the law;
- The DOJ may not propose any particular third party to receive SEP benefits, but may disapprove of any defendant-proposed third party, based on objective criteria for beneficiary selection outlined in a settlement agreement;
- The DOJ may not retain post-settlement control over the execution of SEPs;

- The DOJ may not use SEPs in place of satisfying any statutory obligations of the federal government; and
- The DOJ may not use SEPs to provide funding solely for general public educational or awareness projects, generalized research, or unrestricted cash donations.

While these limitations are largely consistent with the department's prior use of SEPs, the new policy goes further to set a high bar for any SEP involving NGOs. Such an SEP must be approved by the highest levels of the DOJ — either the deputy attorney general (for criminal matters) or the associate attorney general (for civil matters).

Applicability of the New Policy

The new policy is applicable to both civil and criminal enforcement actions. And like the Trump administration's SEP policy, the new policy's express limitations on payments to third parties are not applicable to:

- Payments that provide restitution or compensation to a victim or directly remedies the harm sought to be redressed;
- Payments required to facilitate the reparation and use of funds to directly benefit those harmed by foreign official corruption;
- Payments for legal or professional services rendered in connection with the case; and
- Payments expressly authorized by statute or regulation.

It is also important to note that nothing in Garland's announcement limits the EPA's ability to use SEPs in administrative settlements — or to set its own policy as to what SEPs it, as the client agency, is willing to endorse in judicial settlements where the DOJ is representing the EPA.

Nor does the policy affect the DOJ's use of mitigation measures in environmental settlements. The latter, in particular, have become an increasing focus of settlements involving allegations of past excess pollution, and are seen as a form of injunctive relief, not as an offset to civil penalties per se.

Finally, the policy does not affect SEPs in state or local environmental settlements.

Using SEPs to Offset Penalties

The new policy only provides high-level guidance, and does not define the degree to which a SEP will reduce civil and criminal penalties and fines. But the EPA's existing civil settlement policy is instructive.[5]

Under that policy, the penalty reduction in administrative and civil settlements for a SEP is generally limited to 80% of the cost of implementing the SEP, provided that the final civil penalty awarded is greater than 10% of the economic benefit of a defendant's noncompliance, or 25% of the gravity of the environmental harm, whichever is larger.

While the EPA's policy was dormant under the Trump administration, the DOJ's recent action paves the way for the EPA to resume past practices.[6] How SEPs may be used in the criminal context is even murkier, as prior DOJ guidance was far more restrictive than the EPA's civil analogue, under which SEPs are used mostly as a form of community service or other condition of probation.

SEPs in the Context of Environmental Justice

The new policy was messaged as being part of the DOJ's launch of a new environmental justice enforcement strategy, and the Office of Environmental Justice within the Environmental and Natural Resources Division.[7]

Adding another office may complicate — rather than facilitate — SEPs if that office must review and approve projects before they are memorialized in proposed settlements involving environmental justice matters.

Next Steps: SEPs in the Biden Administration

For decades, SEPs have largely lain within the approval authority of the DOJ's Environment and Natural Resource Division and the EPA. But the new policy's express requirement for staff to obtain senior DOJ approval for payments made to NGOs may be too high of an internal ladder to climb within the bureaucracy, serving as a significant barrier to widespread adoption of certain types of SEPs.

Does this approval process gauntlet, coupled with the DOJ taking more than 18 months to reverse the Trump administration's ban, signal a substantial degree of risk aversion within the department toward SEPs? Or will this approval process be construed narrowly to only apply to cash payments to NGOs, leaving prosecutors free to negotiate projects whereby the defendant provides funds to local governments and municipalities or delivers the SEP itself? Time will tell.

Aaron L. Flyer is a managing associate, and Timothy K. Webster and Justin A. Savage are partners, at Sidley Austin LLP.

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[1] See Memorandum from Attorney General Merrick Garland, "Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties," May 5, 2022, available at <https://www.justice.gov/ag/page/file/1499241/download>.

[2] 87 Fed. Reg. 27936, Interim final rule; request for comments, "Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties," May 10, 2022, available at <https://www.govinfo.gov/content/pkg/FR-2022-05-10/pdf/2022-10036.pdf>.

[3] 31 U.S.C. § 3302.

[4] See Memorandum from Jeffrey Bosset Clark, Assistant Attorney General, "Supplement

Environmental Projects ('SEPs') in Civil Settlements with Private Defendants," March 12, 2020, available at <https://www.justice.gov/enrd/file/1257901/download>.

[5] See Memorandum from Cynthia Giles, EPA Assistant Administrator, "Issuance of the 2015 Update to the 1998 U.S. Environmental Protection Agency Supplemental Environmental Projects Policy," March 10, 2015, available at <https://www.epa.gov/sites/default/files/2015-04/documents/sepupdatedpolicy15.pdf>.

[6] See Memorandum from Lawrence Starfield, EPA Acting Assistant Administrator, "Using All appropriate Injunctive Relief Tools in Civil Enforcement Settlements," April 26, 2021, available at <https://www.epa.gov/sites/default/files/2021-04/documents/usingallappropriateinjunctiverelieftoolsincivilenforcementsettlement0426.pdf> (noting that SEPs are limited by regulation under the prior administration, but those regulations are currently under review).

[7] See Memorandum from Attorney General Merrick Garland, "Actions to Advance Environmental Justice," May 5, 2022, available at <https://www.justice.gov/ag/page/file/1499236/download>.