



DOJ Restores Supplemental Environmental Projects in a Slate of Environmental Justice Initiatives

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On May 5, 2022, the United States Department of Justice (“DOJ”) [introduced a slate of environmental justice initiatives](#) to address pollution and climate impacts in underserved communities. Included in these initiatives is the restoration of federal prosecutors’ authority to use supplemental environmental projects (SEPs), which allow defendants to undertake such projects as part of environmental enforcement settlements. Additionally, DOJ also announced its new environmental justice strategy and launched the new DOJ Office of Environmental Justice. These initiatives fall under the Comprehensive Environmental Justice Enforcement Strategy which was created in response to President Biden’s Executive Order 14008, *Tackling the Climate Crisis at Home and Abroad*.

Supplemental Environmental Projects (SEPs)

For many years, SEPs were used in enforcement settlements to allow defendants to mitigate a portion of monetary penalties in exchange for a commitment to perform specific projects that would benefit the environment and/or specific communities affected by the environmental violations charged. A SEP was typically effectuated through a payment or loan from a defendant to a non-governmental person or entity that is not a party to the dispute. SEPs were favored by many enforcement officials and regulated communities, as well as local communities that benefitted from the projects. Some found the use of SEPs to be controversial, however, arguing that they were problematic because they amounted to direct cash payments to third parties. In 2017, the Trump Administration barred the DOJ from using SEPs in settlements. DOJ formalized that policy in March 2020, finding that SEPs violate the Miscellaneous Receipts Act by improperly diverting money from the Treasury.

Through an interim final rule, effective on May 10, 2022, [Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties](#) (Interim Rule), DOJ “revokes” the Trump-era regulations prohibiting SEPs in settlement agreements. The Interim Rule provides that SEPs “are particularly powerful tools for advancing environmental justice” and “further the aims of Federal environmental laws the Justice Department is responsible for enforcing by remedying the harms to the communities most directly impacted by violations of those laws.” The Interim Rule focuses on the revocation of the previous regulations, and additional information on how DOJ intends to approach SEPs is provided in an Attorney General Memorandum, [Guidelines and Limitations For Settlement Agreements Involving Payments To Non-Governmental Third Parties](#) (Memorandum), issued in conjunction with the Interim Rule.

Through the Interim Rule and DOJ’s Memorandum, DOJ is once again allowing the use of SEPs, with some limitations. The Memorandum provides internal DOJ guidance and does not create any rights enforceable by law or any limitations on lawful DOJ litigation prerogatives. Further, SEPs generally require approval from the relevant Deputy or Associate Attorney General, with some specific exceptions.

Pursuant to the Memorandum, SEPs must:

- define “with particularity” the nature and scope of the project(s) the defendant has agreed to fund;
- have a “strong connection” to the underlying violation (including advancing at least one of the objectives of the statute being enforced and by reducing the detrimental effects of the underlying violation); and
- be executed before an admission or finding of liability.

The Memorandum also provides that DOJ cannot propose the selection of a third party to receive payments through an SEP, although DOJ may specify the type of beneficiary entity and can also disapprove of a third-party beneficiary under certain conditions. Additionally, SEPs cannot require

payments to non-governmental third parties solely for general public educational or awareness projects, solely in the form of contributions to generalized research, or in the form of unrestricted cash donations.

Comments on the Interim Rule and Memorandum are due by July 11, 2022.

DOJ Environmental Justice Strategy

DOJ unveiled its [Comprehensive Environmental Justice Enforcement Strategy](#), which provides that both DOJ civil and criminal enforcement authorities will work with the Environmental Protection Agency (EPA) and other federal agencies to prioritize cases that will reduce environmental and public health harms to overburdened and underserved communities. Further, the strategy directs that DOJ make “strategic use of all available legal tools to address environmental justice concerns,” including “appropriate use of settlement tools like [SEPs].” DOJ’s strategy also directs meaningful engagement with impacted communities through methods such as increased outreach and listening sessions and development of case-specific community outreach plans. Finally, DOJ’s strategy provides that DOJ must promote transparency in environmental justice enforcement efforts and outcomes by developing performance standards and tracking progress.

New DOJ Office of Environmental Justice

The Biden Administration established the DOJ Office of Environmental Justice to guide the work of DOJ’s litigators, investigators, and United States Attorneys’ offices to advance environmental justice causes through the enforcement of federal laws. In the May 5 announcement, DOJ “launched” this new Office of Environmental Justice, which will be under DOJ’s Environment and Natural Resources Division. Acting Director, Cynthia Ferguson, will lead the office and will oversee the implementation of the new environmental strategy, which includes the restoration of SEPs. The new office will work with the Assistant United States Attorney’s Environmental Justice Coordinators to identify and prioritize enforcement actions that are most likely to achieve meaningful reductions in adverse public-health and environmental impacts on overburdened and underserved communities.

Implications

The restoration of SEPs, DOJ’s new environmental justice strategy, and DOJ’s new Office of Environmental Justice demonstrate that DOJ is working with the EPA and other federal agencies to address environmental justice impacts from the violation of federal environmental laws. DOJ’s approach is consistent with the Administration’s focus on environmental justice and seeks to institutionalize the consideration of environmental justice impacts into federal environmental enforcement actions.

Due to the restoration of SEPs, companies facing potential enforcement exposure would be well-advised to identify specific projects and stakeholders for inclusion in any settlement. We expect that SEPs will be used as a settlement tool in citizens suits as a method of ensuring money paid by the alleged violator goes to support the place and community impacted by the alleged violation. DOJ may look to state prosecutors, like California, as well as pre-2017 practices to inform how SEPs can be used to provide funding to minority and low-income communities.

For More Information

Van Ness Feldman closely monitors and counsels clients on environmental justice and enforcement-related issues. If you would like to evaluate whether to file comments on the Interim Rule and Memorandum, or more generally would like to discuss the potential impact of these DOJ initiatives, please contact [Mike Farber](#), [Britt Fleming](#), [Rachael Lipinski](#), [Paul Libus](#), [Tiffany Ganthier](#), [Savian Gray-Sommerville](#), or any member of the firm’s Environmental or Litigation and Investigations practices in Washington, D.C. at (202) 298-1800 or in Seattle, WA at (206) 623-9372.

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