



# DOJ Policy Invalidates Special Environmental Projects in Settlements but Private Parties May Have Other Options

## Publication:

Riker Danzig Environmental UPDATE December 2020

Recently, the Justice Department eliminated the use of supplemental environmental projects (“SEPs”) in United States Environmental Protection Agency (“USEPA”) settlements. SEPs, environmentally beneficial projects implemented by a regulated entity, are not required by law but have been used for years to allow an entity to lower its penalty for a violation of environmental law. Although the use of SEPs has been questioned in the past, the Justice Department now has determined that SEPs in settlements violate the Miscellaneous Receipts Act (“MRA”), 31 U.S.C. §3302, and can no longer be used. As a result, instead of implementing these beneficial projects, many violators simply will pay higher fines into the United States Treasury, with no guarantee that the penalty money will be used for environmental protection. However, by structuring the project to directly remedy the harm, which will be considered by the Justice Department as injunctive relief and not an SEP, there may be an avenue for violators to continue to include such projects in USEPA settlements.

The MRA requires that any federal official receiving funds on behalf of the federal government must deposit those funds directly into the Treasury. The Justice Department has determined that the use of SEPs in settlements diverts money designated for the Treasury to a third party in violation of the MRA. Also, according to the Justice Department, by trading monetary payments for projects not previously approved by Congress, SEPs allegedly allow government officials to make decisions regarding budgetary allocations, which they are not permitted to do.

SEPs not only provide environmentally beneficial projects for communities but they also generate “goodwill” for violators, making them favored by both the regulated community and environmentalists. SEPs include projects that reduce pollution impacts, preserve land, protect public health and promote renewable energy. For years, the

Justice Department and the USEPA have claimed that SEPs do not trade penalties for projects because penalties are not assessed and owed until the settlement is final. Since the SEP is established before the settlement is finalized, no trade occurs and no money is diverted from the Treasury. But the Justice Department now has changed its position pointing to the fact that an SEP can reduce penalties by, in some cases, 80%.

In the past, the USEPA attempted to avoid conflict with the MRA by changing its policy to formulate SEPs so that they directly remedy the harm caused by the violation, which would be considered injunctive relief and not a separate third party project. This older USEPA policy, however, continued to consider the relationship between the SEP and a reduction in penalties and, thus, does not adequately resolve the conflict with the MRA.

Nevertheless, the Justice Department has acknowledged that a properly designed project, one that directly remedies the harm at issue and does not simply benefit third parties, may provide an avenue for allowing the use of environmentally beneficial projects in USEPA settlements as injunctive relief and not as an SEP. Therefore, the regulated community should not abandon the use of environmentally beneficial projects when settling with USEPA, but rather, should work with their attorneys and consultants to develop projects that may properly be characterized as injunctive relief. To avoid violating the MRA, however, such projects should not be tied to any reduction in monetary payments or penalties.

In response to the Justice Department's decision, environmental activists may begin to push Congress to authorize the use of SEPs by statute. If Congress were to authorize USEPA to use projects when settling with a violator, this would circumvent the alleged issues in the MRA because Congress is permitted to direct money designated for the Treasury.

For now, USEPA is not permitted to include SEPs in settlements. Therefore, any party in the final stages of negotiations of a settlement that includes an SEP will have to renegotiate the settlement. It may be beneficial to determine whether the negotiated SEP can be modified so that it is remedying the harm caused by the violation; otherwise the SEP will be eliminated and the settling party will likely face a higher penalty.

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