



DOJ Restricts Use Of Supplemental Environmental Projects In Municipal Settlements

August 29, 2019 | [Environmental, Enforcement](#)

The Justice Department issued a [memorandum](#) on August 21, 2019, significantly curtailing the use of supplemental environmental projects (SEPs) in environmental enforcement actions against municipalities. The Environmental Protection Agency has been allowing the use of SEPs since 1984, under several different versions of its SEP policy. The most recent revised policy was issued in [2015](#). Historically, EPA and state environmental authorities have offered SEPs as an option for partial settlement of violations of environmental regulations, which allows the regulated entity to develop an environmentally beneficial project in lieu of all or part of its penalty.

The DOJ memorandum states that “proposed consent decrees and settlements containing [SEPs] are generally precluded.” This position stems from a November 2018 DOJ memorandum announcing a [new policy governing civil consent decrees](#) and settlement agreements with state and local governments. That policy specified that consent decrees “must not be used to achieve general policy goals or to extract greater or different relief from the defendant than could be obtained through agency enforcement authority or by litigating the matter to judgment.”

Building on that announcement, the new SEP memorandum reasons that “[t]he use of SEPs in consent decrees with state and local governments contravenes the prohibition on using consent decrees to ‘extract greater or different relief from [a state or local government] than could be obtained through agency enforcement authority or by litigating the matter to judgment.’”

The new SEP memorandum also clarifies that the [2018 Clean Water Act amendments](#) do not clearly authorize municipal SEPs even though EPA’s [2012 integrated planning guidance](#) refers to the use of SEPs in incorporating integrated plans into enforcement settlement. Even if the new amendments

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were deemed to authorize municipal SEPs, DOJ states that this SEP opportunity would be available only in very limited circumstances. The new SEP memorandum does allow for DOJ to grant exceptions authorizing municipal SEPs on an interim basis “pending [the Assistant Attorney General’s] broader review of SEPs.” The memorandum cautions that such exceptions will be rare during this interim period.

Although DOJ limited the scope of the new SEP memorandum to “civil consent decrees and settlement agreements with state and local governments,” it is written in broad terms that have further potential implications. First, the new SEP memorandum could limit agency enforcement discretion beyond the scope of SEPs. Enforcement authorities routinely advance policy goals and include relief and remedies in negotiated settlements that they could not otherwise achieve through enforcement or litigation on the merits. Though the new memorandum focuses on SEPs, it could potentially limit enforcement authorities’ ability to negotiate “greater or different relief” by any other means as well. Second, the new SEP memorandum discusses the unavailability of SEPs in municipal settlements, but DOJ could easily invoke the same rationale to apply to settlements with private sector permittees as well.