

CLIENT ALERT

DOJ Ends Use of SEPs in Resolving Violations of Environmental Law

March 17, 2020

On March 12, 2020, the Environment and Natural Resources Division (ENRD) of the Department of Justice (DOJ) formally terminated its policy of permitting companies to perform environmentally beneficial projects – so-called “supplemental environmental projects” (SEPs) – in lieu of paying civil penalties for settlement of violations of federal environmental laws, according to a [memo](#) from ENRD Assistant Attorney General Jeffrey Bossert Clark.

The prohibition on ENRD attorneys’ use of SEPs in environmental settlements is effective immediately. The new policy will not, however, affect prior settlements; in other words, settlements containing SEPs executed prior to the publication of the new policy remain valid. Notably, however, ongoing settlement negotiations may be affected: “I recognize the disruption could have on existing cases, particularly those in the final stage of negotiations where parties have long included SEPs as part of the proposed settlement.”

SEPs historically have been used to let parties agree to perform environmentally beneficial projects in exchange for lower fines. According to ENRD, however, the practice of using SEPs “has been controversial for decades,” and they “are as problematic as direct cash payments to third parties.” In his memo, Clark said that EPA’s SEP policy allowed defendants to reduce their civil penalties by up to 80% if they agreed to perform a SEP, *i.e.*, in exchange for a \$1 million SEP, civil penalties could be reduced by as much as \$800,000. According to Clark, that arrangement would violate the Miscellaneous Receipts Act, a statute that prevents cash from legal settlements from being diverted from the Treasury to third parties. Furthermore, Clark rejected the argument that defendants who agree to perform a SEP should receive a lesser fine because the project reduces the severity of the offense: “The severity of the underlying offense is a historic fact by the time any enforcement action would even kick off,” Clark wrote. “SEPs are not time machines that can return to the point of the offense and soften the blow of an impending violation to the public or the environment.” While the stated justifications for this change in policy are clearly open to debate, there is no clear legal path to reversing this decision.

One area of uncertainty is the effect of the ENRD policy on EPA settlements that do not involve ENRD, *i.e.*, settlements undertaken pursuant to EPA’s own administrative enforcement authority. EPA has used [SEPs](#) in its own administrative enforcement authority for decades, but the ENRD memo does not directly address this question. It states that it is “intended to govern the staff of the United States Department of Justice, Environment and Natural Resource Division, in their handling of enforcement actions.” Thus, by the terms of this memo, where EPA agrees to an administrative settlement containing a SEP and the settlement does not require ENRD approval, the settlement theoretically would be permissible. Whether EPA will continue to use SEPs in light of the new ENRD policy remains to be seen.

The memo also has other ambiguities complicating the ability of private parties to evaluate how it will be applied. For example, while early in the memo Clark states broadly that SEPs “will no longer be part of the suite of relief [ENRD] seeks in its cases (unless specifically authorized by Congress),” elsewhere the memo uses language (such as “should not”) indicating some potential for bending the new policy. But with no legal path to challenge this policy, private parties will either have to be in a

wait-and-see mode to fully understand the contours of its implementation or resort to Congress for a legislative reversal of the new policy.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Elliott P. Laws

Partner – Washington, D.C.

Phone: +1.202.624.2798

Email: elaws@crowell.com

Peter Gray

Senior Counsel – Washington, D.C.

Phone: +1.202.624.2513

Email: pgray@crowell.com

Elizabeth B. Dawson

Counsel – Washington, D.C.

Phone: +1.202.624.2508

Email: edawson@crowell.com