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# Supplemental Environmental Projects Settlement Option Terminated: March 12th U.S. Department of Justice Environmental and Natural Resources Division Memorandum

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Mr. Jeffrey Bossert Clark, Assistant Attorney General of the Environment and Natural Resources Division of the United States Department of Justice (“DOJ”) published a March 12th memorandum titled:

*Supplemental Environmental Projects (“SEPs”) in Civil Settlements with Private Defendants (“Memorandum”)*

The *Memorandum* was transmitted to the Environment and Natural Resources Division Deputy Assistant Attorney Generals and Section Chiefs.

The *Memorandum* terminates the use of Supplemental Environmental Projects (“SEPs”) in resolving federal civil enforcement actions. It states:

Moving forward, they therefore will no longer be part of the suite of relief the Environment and Natural Resources Division seeks in its cases (unless specifically authorized by Congress), both in light of their inconsistency with law and their departure from sound enforcement practices.

The Assistant Attorney General states that the Memorandum is being issued as an exercise of his authority:

1. to construe the governing sources of law as a necessary part of ensuring any and all enforcement actions I authorize and every position taken in court in cases that I supervise comport with the law; and
2. to exercise appropriate prosecutorial discretion as to both civil and criminal enforcement cases.

The Environmental Protection Agency (“EPA”) and state agencies (including Arkansas) have for many years offered SEPs as an option for partial settlement of violation of environmental laws and regulations. The SEP provides the alleged violator an opportunity to develop an environmentally beneficial project to offset part of the penalty. Assorted examples might include:

- Development of wetlands as a natural pollution control project
- Providing natural gas conversion for school buses
- Utility installation of photovoltaic cells for electricity generation

- Agreement to install pollution control equipment at facilities without a regulatory mandate to do so
- Purchase of emergency response or fire equipment for a local government

EPA has issued guidance documents in the past delineating the appropriate scope and offset ratio (in terms of penalties) related to SEPs.

The Assistant Attorney General contends that federal SEPs are inconsistent with the federal Miscellaneous Receipts Act, 31 U.S.C. § 3302. This federal statutory provision requires any federal officer receiving funds on behalf of the United States to deposit them in the Treasury.

The Memorandum further states:

. . . Attempts in consent decrees and settlement agreements to divert cash from the Treasury to third parties have long been deemed improper and inconsistent with the Miscellaneous Receipts Act, absent authorization from Congress.

Consequently, the offset of civil penalties by allowing SEPs is argued to allocate budgetary discretion to officials who are not designated to make such decisions.

The 20-page *Memorandum* addresses:

- Congress' Exclusive Power of the Purse
- The Settlement Authority of the Attorney General
- Description of SEPs
- The Attorney General's Policy Prohibiting Third-Party Payments
- The Attorney General's Policy Governing Civil Consent Decrees and Settlement Agreements with State and Local Governments
- The Executive Order of October 9, 2019

The Assistant Attorney General marshals the following arguments in support of his position:

- SEPs Contravene Long-Established Principles Prohibiting the Diversion of Funds Away from the Treasury
- Sound Public Policy Does Not Support the Use of SEPs

The Assistant Attorney General concludes that Environment and Natural Resources Division attorneys negotiating consent decrees or compromise settlements in EPA cases should not include SEPs in those settlements. Recognition is noted of the long history of the use of SEPs and the potential for disruption in the final stages of negotiation where parties have included SEPs as part of the proposed settlement.

Note that this policy does not affect the state's use of SEPs. For example, Arkansas has in place the statutory authority and an agency (Arkansas Department of Energy and Environment – Division of Environmental Quality ["DEQ"]) policy for utilization of SEPs in appropriate situations. Further, since Arkansas has been delegated almost every federal environmental program, the primary source of environmental enforcement in the State is DEQ. As a result, SEPs will presumably continue to be utilized in Arkansas for state enforcement action.

A copy of the *Memorandum* can be downloaded [here](#).