

# Supplemental Environmental Projects/U.S. Department of Justice: Conservation Law Foundation Files Judicial Challenge to Termination



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The Conservation Law Foundation (“CLF”) filed a Complaint for Declaratory and Injunctive Relief (“Complaint”) in the United States District Court for the District of Massachusetts challenging the Environment and Natural Resources Division of the United States Department of Justice (“DOJ”) termination of the use of Supplemental Environmental Projects (“SEPs”) in resolving federal civil enforcement actions.

DOJ articulated this policy in a March 12 memorandum titled:

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

In terminating the use of SEPs, the *Memorandum* stated in part:

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 United States 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

Both EPA and the states (including Arkansas) have issued in the past guidance documents delineating the appropriate scope and offset ratio (in terms of penalties) related to SEPs.

CLF’s Complaint:

- Describes the traditional function of SEPs
- Argues that SEPs have provided real world benefits for the nation’s air and water and those communities that depend on those resources

- Describes EPA's refinement of SEP policies
- Outlines DOJ's Office of Legal Counsel's prior determination that settlements with SEPs do not violate the Miscellaneous Receipts Act
- States DOJ's Memorandum misreads:
  - the Miscellaneous Receipts Act
  - EPA's SEP policy
  - DOJ's prior conclusions regarding settlements such as SEPS
- States poor and low income communities will be particularly impacted
- States the action constitutes an arbitrary, unreasoned, and unlawful interpretation of the Miscellaneous Receipts Act

The DOJ policy did not affect the states' use of SEPs. For example, Arkansas has in place the statutory authority and an agency 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 the Arkansas Department of Energy and Environment – Division of Environmental Quality. As a result, SEPS have been and will presumably continue to be utilized in Arkansas for state enforcement actions.

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