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Supplemental Environmental Project/The Forgotten Penalty Reduction Tool: Ben Holden (Trinity Consultants) Arkansas Environmental Federation Convention Presentation

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Ben Holden undertook a presentation at the October 13th Arkansas Environmental Federation Convention titled:

Supplemental Environmental Project: The Forgotten Penalty Reduction Tool ("Presentation")

Ben is a Managing Consultant in the Little Rock, Arkansas, office of Trinity Consultants.

The United States Environmental Protection Agency ("EPA") and state agencies (including Arkansas) have for many years offered Supplemental Environmental Projects ("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. The SEPs typically require that the project provide tangible environmental or public health benefits to the affected community of environment that is related to the violation being resolved.

Arkansas has had in place the statutory authority in an agency (Arkansas Department of Energy & Environment – Division of Environmental Quality [DEQ]) a policy for utilization of SEPs in appropriate situations. Since Arkansas has been delegated almost every federal environmental program, the primary source of environmental enforcement in the State is DEQ. Nevertheless, EPA has over-filing authority under the various federal environmental laws and therefore EPA's SEP policies are also relevant in Arkansas.

Ben Holden's *Presentation* addressed five issues:

1. What is a SEP?
2. Federal vs. Arkansas SEP
3. SEP Criteria
4. Types of Projects
5. SEP Proposal Elements

Ben addressed a common definition of a SEP which includes:

A Supplemental Environmental Project (SEP) is an in-kind service or cash contribution to a project or program designed to advance environmental interests and which a “Person” agrees to perform in partial settlement of an enforcement action, but which the Person is not otherwise legally required to perform, and for which the Person retains no monetary benefit, however remote.

Further, the *Presentation* identified differences between EPA’s and Arkansas’s SEPs.

The utilization of SEPs over the course of several administrations was addressed, noting the decreased use during the Trump Administration. This coincided with the United States Department of Justice Assistant Attorney General issuing a policy decision that eliminated the use of SEPs for federal environmental settlements. However, this policy was reversed during the Biden Administration.

The Arkansas statutory authority was addressed which is found at Arkansas Code Annotated § 8-4-103(f)(3) and similar language in 8-6-204(e)(3) and 8-7-204(e)(3).

Potential penalty reduction in the case of Arkansas was noted with a SEP potentially justifying up to a 35% reduction in administrative penalties.

Ben noted situations in which SEPS may be appropriate:

- All violations are corrected through actions to ensure future compliance
- Any pollution resulting from such violations has been remediated or will be remediated by the implementation of the terms of the agreed enforcement action
- Both general and specific deterrence objectives are served
- There is an appropriate relationship between the nature of the violation and the environmental benefits to be derived from the project or there is an overriding public and environmental good to be served by implementation of the project.

Potential Arkansas Department of Energy & Environment – Division of Environmental Quality accepted projects include:

- Pollution Reduction: Decrease pollutants beyond legal requirements.
- Environmental Restoration Projects: Beyond repair that enhance the environment near violators.
- Technical Assistance: Help non DEQ regulated entities facing economic and/or technological hardships.
- Education & Engineering Aid: Assist the community or public.
- Public Works Funding: Benefit the environment beyond compliance required by law.

Federal SEP examples were also noted:

- Chlorine Gas Replacement
- First Responder Equipment Donation
- Lead Water Main Replacement
- Wastewater Treatment Plant Upgrade

Additional considerations in regard to SEPS are stated to include:

- Compliance History
- Performance
- Oversight/Tracking

DEQ SEP proposal elements are stated to include:

- Project Recipient
- Name of Project
- DEQ Contact
- Geographical Area to Benefit from Project
- Types of Projects

- Project Description
- Expected Environmental Benefits
- Project Cost
- Project Schedule
- Accounting
- Reporting
- Availability of Other Funding
- Additional Information
- Community Proposals

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