



Supplemental Environmental Project: The Forgotten Penalty Reduction Tool

October 13, 2023

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What is a Supplemental Environmental Project?

- ▶ 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.

Federal SEP vs Arkansas SEP

Federal SEP

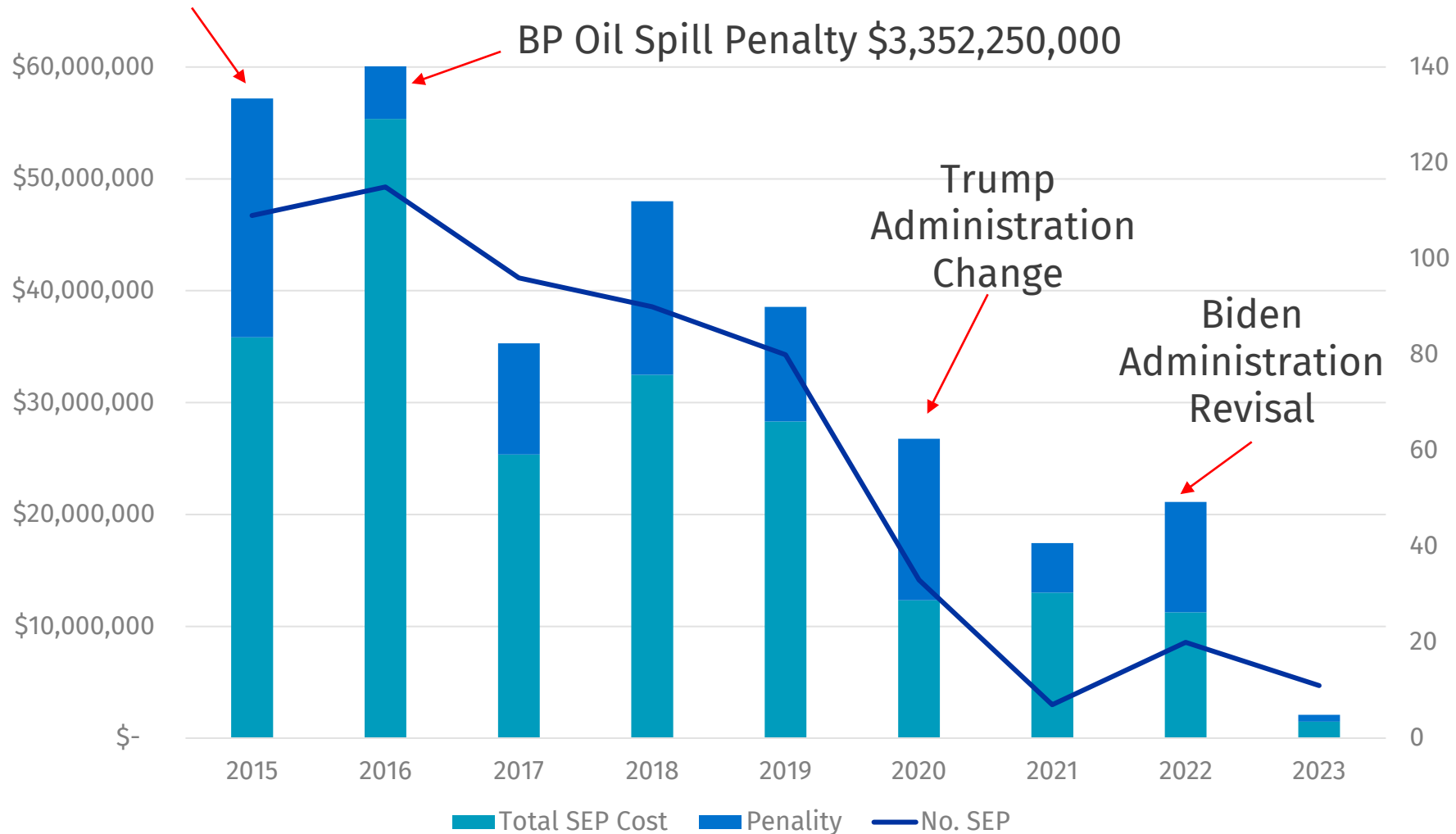
- Has been used as a tool by DOJ/EPA to achieve administration goals
- Become a political issue in recent decades with shifting allowance and policy
- Must have a must have a strong “nexus”

Arkansas SEP

- Last used by a regulated entity 10-15+ years ago*
- Originally designed to align with EPA SEP policy
- Appropriate relationship between the nature of the violation and the environmental benefits

Federal Environmental Settlements with a SEP

Obama Revised SEPs Policy



Arkansas Legal Framework

- ▶ Arkansas Code Annotated § 8-4-103 (f)(3) Arkansas Water and Air Pollution Control Act)

(A) In his or her discretion, the director may authorize in-kind services or cash contributions as partial mitigation of cash penalties for use in projects or programs designed to advance environmental interests.

(B) The violator may provide in-kind services or cash contributions as directed by the Division of Environmental Quality by utilizing the violator's own expertise, by hiring and compensating subcontractors to perform the services, by arranging and providing financing for the services, or by other financial arrangements initiated by the Division of Environmental Quality in which the violator and the Division of Environmental Quality retain no monetary benefit, however remote.

(C) The services shall not duplicate or augment services already provided by the Division of Environmental Quality through appropriations of the General Assembly.

- ▶ Very Similar language for Disposal of Solid Wastes and Other Refuse Arkansas Code Annotated 8-6-204 (e)(3) and 8-7-204 (e)(3)

SEP Penalty Reduction

- ▶ SEP justifies up to a 35% reduction in administrative penalties*
 - \$1 SEP expenditure required for a \$1 reduction in penalties.
 - Projects directly remediating contamination or reducing pollutants can be accepted at a 1:1 ratio.
 - SEPs with indirect environmental benefits may be accepted at a 3:1 ratio.
 - Director's discretion applies and percent reduction and ratios may be modified.
 - Does not apply to economic benefit/pecuniary gain penalty

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.

Criteria for Acceptable Projects

- ▶ **Acceptable Projects:** prevent pollution, reduce the amount of pollutants reaching the environment, enhance the quality of the environment, or contribute to public awareness of environmental matters.
- ▶ **Unacceptable Projects:** include those that would be required to bring the respondent into compliance with the law or are otherwise required to be completed or previously completed.



DEQ Types of Projects

- ▶ 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

▶ Chlorine Gas Replacement

- Alma facility replacing chlorine gas with sodium hypochlorite

▶ First Responder Equipment Donation

- Corpus Christi Fire Department
- Facilitation of equipment acquisition

▶ Lead Water Main Replacement

- Kalamazoo neighborhood replacing lead-containing water lines
- Addressing potential environmental justice concerns

▶ Wastewater Treatment Plant Upgrade

- City of Springfield installation of advanced treatment technologies to improve water quality and reduce pollutant.



Additional Considerations

▶ Compliance History

- DEQ reviews prior non-compliance history.
- SEP use may be refused with a non-compliance history.

▶ Performance

- Person demonstrates ability to perform SEP.
- Must provide a report on proper SEP implementation.
- Unspent SEP funds forfeited as a penalty.

▶ Oversight/Tracking

- Timely data submission by the Person.
- Any third-party oversight costs borne by the Person.

DEQ SEP Proposal Elements

▶ **Project Recipient**

- Contact info.
- Letter or resolution from the appropriate board, governing body, or executive staff expressing the organization's commitment to the project if approved.

▶ **Name of Project**

- Title that identifies the SEP

▶ **DEQ Contact**

- Contact info and division of any DEQ staff who has assisted with the development of SEP

▶ **Geographical Area to Benefit from Project**

- Identify communities, cities, counties, etc. benefiting from this environmental project.
- Preferred projects that benefit the environment in the community where the alleged violation occurred.

DEQ SEP Proposal Elements Cont.

► Types of Project

- Pollution prevention/reduction, environmental restoration/protection, environmental regulatory compliance/technical assistance, environmental education/assistance, or other environmental projects beneficial to neighboring community.

► Project Description

- Need for the project.
- Availability of other similar services or projects in the area.
- Project implementation tasks such as technology, operation, or process changes.

► Expected Environmental Benefits

- For pollution prevention or reduction projects - Identify the type of each pollutant expected to be reduced. Specify the media (air, water, land) to be benefited.
- For all other projects - Identify the sites cleaned, types of contamination contained/removed, acres restored or benefited, number of participants, programs offered, etc.

SEP Proposal Elements Cont.

▶ **Project Cost**

- Provide estimated project costs with specific line item expenditures.
- Costs must be clearly and solely attributable to the proposed SEP.

▶ **Project Schedule**

- Provide a proposed schedule addressing project implementation and submittal of status reports to DEQ.

▶ **Accounting**

- Describe how SEP contributions would be accounted for from receipt until expenditure of the full amount.

▶ **Reporting**

- Describe the information and documentation that would be included in project status reports. Project reports must provide sufficient information for DEQ to monitor the project implementation status, to verify and document proper expenditure of SEP funds, and to evaluate effectiveness and benefits of the SEP.

SEP Proposal Elements Cont.

▶ **Availability of Other Funding**

- Describe the availability of funding for this project from sources other than SEP contributors.
- Include sources of funding secured and applied for directly related to this SEP.

▶ **Additional Information**

- DEQ reserves the right to require additional information prior to approval of the proposed SEP

▶ **Community Proposals**

- Similar criteria to Person proposals. Are not guaranteed and retained for future consideration during DEQ enforcement action settlements.

Questions & Discussion

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Resources

EPA SEP: <https://www.epa.gov/enforcement/supplemental-environmental-projects-seps>

DEQ SEP and Proposal Guidelines: <https://www.adeq.state.ar.us/legal/sep.aspx>

Arkansas Code and Constitution of 1874: <https://www.arkleg.state.ar.us/ArkansasLaw>